

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH, NEW DELHI****COMPANY APPEAL (AT)(INSOLVENCY) NO.575/2019**

(Arising out of Judgement dated 12.02.2019 passed by Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in Miscellaneous Application No.1280/MB/2018 in company Petition IB No.405/MB/2018)

In the matter of :

The Directorate of Enforcement,
Headquarters Investigation Unit 10-A,
Jamnagar House,
Akbar Road,
New Delhi-110011

Appellant**Vs**

1. Sh Manoj Kumar Agarwal,
Resolution Professional
B-3/7/1-2,
Sector 15, Vashi,
Navi Mumbai-400703

Also at

502, G Square Business Park
Sector 30A,
Opp Sanpada Station,
Vashi,
Navi Mumbai 400705

2. Srei Infrastructure Finance Ltd,
Vishwakarma 86 C,
Topsia Road (South)
Kolkata
West Bengal 700046

3. Sterling SEZ & Infrastructure Ltd,
C-25, Laxmi Tower,
A-601,
6th floor,
Bandra Kurla Complex,
Bandra (East),
Mumbai.

Respondents

**For Appellant: Mr. Zoheb Hossain, Special Counsel for ED.
Mr. Nitesh Rana (SPP), Mr. Ali Khan and Mr. Agni Sen,
Advocates.
Mr. Aslam Khan, Deputy Director for ED.**

**For Respondent: Mr. Abhijeet Sinha, Mr. Rajendra Beniwal,
Mr. Kumar Sumit And Mr. Chirag Gupta, Advocates for
R-1 and R-3.
Mr. Arijit Mazumdar and Mr. Shambo Nandy,
Advocates for R-2.
Mr. Manoj Kumar Agarwal, RP (Party in person)**

With

COMPANY APPEAL (AT)(INSOLVENCY) NO.576/2019

(Arising out of Judgement dated 12.02.2019 passed by Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in Miscellaneous Application No.1299/MB/2018 in company Petition IB No.402/MB/2018)

In the matter of :

The Directorate of Enforcement,
Headquarters Investigation Unit 10-A,
Jamnagar House,
Akbar Road,
New Delhi-110011

Appellant

Vs

1. Sh Vishal Ghisulal Jain,
Resolution Professional
B-3/7/1-2,
Sector 15, Vashi,
Navi Mumbai-4000703

Also at

502, G Square Business Park
Sector 30A,
Opp Sanpada Station,
Vashi,
Navi Mumbai 400705

2. **Srei Infrastructure Finance Ltd,**
Vishwakarma 86 C,
Topsia Road (South)
Kolkata
West Bengal 700046

3. Sterling International Enterprises Ltd

43 Atlanta Building,
Nariman Point,
Mumbai 400021.

Respondents

For Appellant: Mr. Zoheb Hossain, Special Counsel for ED.
Mr. Nitesh Rana (SPP), Mr. Ali Khan and Mr. Agni Sen,
Advocates.
Mr. Aslam Khan, Deputy Director for ED.

For Respondent: Ms. Udita Singh and Mr. Siddharth Chechani,
Advocates for R-1.
Mr. Arijit Mazumdar and Mr. Shambo Nandy,
Advocates for R-2.
Mr. Rajendra Beniwal, Mr. Kumar Sumit And
Mr. Chirag Gupta, Advocates for R-3.

JUDGEMENT

(09th April, 2021)

A.I.S. Cheema, J.

COMPANY APPEAL (AT) (INSOLVENCY) No.575/2019

This appeal has been filed by the Directorate of Enforcement being aggrieved by impugned order dated 12.02.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai in MA No.1280 of 2018 in the matter of **Sterling SEZ Infrastructure Ltd. (Corporate Debtor)** through Resolution Professional Vs Deputy Director, Directorate of Enforcement, Headquarters Investigation Unit, New Delhi in Company Petition IB No.405/IB/2018. The Miscellaneous Application was filed by the Resolution Professional of the Corporate Debtor and after hearing the parties the Adjudicating Authority, NCLT, Mumbai by the impugned order directed that the attachment order dated 29.05.2018 and the Corrigendum dated 14.6.2018 issued by the deputy Director, Directorate of Enforcement, under the provisions of Prevention of Money Laundering Act,

2002 (PMLA in short) which has been confirmed by the Adjudicating Authority under PMLA was nullity and nonest in law in view of Sections 14(1)(a), 63 and 238 of Insolvency and Bankruptcy Code (IBC). By the impugned order the Adjudicating Authority, NCLT, Mumbai permitted the Resolution Professional to take charge of the properties and deal with them under IBC as if there is no attachment order. The concerned sub-registrars are also directed to give effect to this order. The Adjudicating Authority clarified that the attachment only in respect of the properties of Corporate Debtor were covered by this impugned order. Thus the present appeal

Company Appeal (AT) (Insolvency) No.576/2019

2. This appeal relates to impugned order dated 12.02.2019 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai in the matter of SREI Infrastructure Finance Ltd Vs **Sterling International Enterprises Ltd (Corporate Debtor)** (represented by the Resolution Professional Mr. Vishal Ghisulal Jain) in MA No.1299/2018 in CP No. 402 of 2018. The Miscellaneous Application was filed by the Resolution Professional of Corporate Debtor-Sterling International Enterprises Ltd and the Adjudicating Authority, NCLT, Mumbai after hearing the parties directed that the attachment order dated 29.5.2018 and the Corrigendum dated 14.6.2018 issued by the Deputy Director, Directorate of Enforcement which was confirmed by the Adjudicating Authority under PMLA was nullity and nonest in law in view of Sections 14(1)(a), 63 and 238 of IBC. The Adjudicating Authority by impugned order allowed the Resolution Professional to take charge of the properties and deal with them under IBC

as if there is no attachment. The concerned sub-registrars were also given directions to give effect to this order. The Adjudicating Authority clarified that the attachment in respect of the properties of Corporate Debtor only were covered by the impugned order. Thus the present appeal.

3. The above two appeals have been filed and the impugned order in both the appeals being similar and relating to the same group companies, similar issues are being raised in both the matters. For the sake of convenience, the Company Appeal (AT)(Insolvency) No.575/2019 is treated as lead appeal and the arguments and documents will be referred from the record of this appeal (unless mentioned otherwise). The arguments have also been advanced referring to record in Company Appeal (AT)(Insolvency) no.575/2019.

The Appeal

4. The appellant claims that the impugned order dated 12.02.2019 needs to be set aside, as the properties were validly attached under the provisions of PMLA. It is stated that in another proceeding before another Bench of the same Tribunal in MA No.1243/2018 in CP(IB) No.490/MBH/2018 in the matter of Sterling Biotech Ltd Vs Andhra Bank where quashing of attachment was sought, the concerned Bench did not interfere and observed that the appeal could be filed only under the provisions of PMLA. It is claimed that there is no moratorium applicable in criminal proceedings.

5. The appellant claims and it is argued that CBI BS&FC New Delhi registered FIR No. RCB1/2017/E/0007 on 25.10.2017 under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and Sections 120B read with section 420, 467,468 and 471 of the Indian Penal Company Appeal (AT)(Insolvency) No.575 and 576 of 2019

Code (IPC in short) against M/s Sterling Biotech Ltd and its promoters/directors for hatching a criminal conspiracy with the intention of cheating Andhra Bank and other public sector Banks. On the basis of the said FIR, the Directorate of Enforcement recorded ECIR/HQ/17/2017 dated 27.10.2017 and investigation under the PMLA was initiated. The competent authority under the PMLA issued a Provisional Attachment Order No.4/2018 dated 29.5.2018 read with Corrigendum dated 14.06.2018 under Section 5 of PMLA whereby properties worth Rs.4702 crores (approx.) were provisionally attached. In the said attachment order the properties of M/s Sterling SEZ and Infrastructure Ltd were also included.

6. It appears that application under Section 7 of IBC was admitted on 16.7.2018 against M/s Sterling SEZ and Infrastructure Ltd. Later, a prosecution Complaint dated 23.10.2018 has been filed against the Corporate Debtor amongst other persons before the Special Court, PMLA and cognisance has been taken.

7. As per the appellant, the Resolution Professional filed Miscellaneous Application No.1280 before the Adjudicating Authority to release the properties of Corporate Debtor attached vide PAO No.04/2018. The said attachment order was confirmed by the Adjudicating Authority, PMLA on 20.11.2018. However, the Adjudicating Authority, NCLT, Mumbai vide impugned order dated 12.02.2019 has directed to release all the properties in favour of the Resolution Professional. Subsequent to order dated 28.2.2019, Section 32A was introduced in IBC vide an Ordinance of 2019 and later on replaced by Insolvency & Bankruptcy (Amendment) Act of 2020.

The appellant is pointing out that the promoters of Sterling Biotech Ltd are beneficial owners of Corporate Debtor and have been declared to be “Fugitive Economic Offenders” under the Fugitive Economic Offenders Act, 2018 (FEOA in short).

8. On the background of the such facts, it is argued by the learned counsel for the appellant that the Adjudicating Authority did not have the powers to interfere with Provisional Attachment Order passed under PMLA and the same has to be dealt with only in the manner provided in law under the PMLA. The said attachment order has been confirmed by the Adjudicating Authority under the PMLA on 20.11.2018. It is argued that the Resolution Professional was required to approach Adjudicating Authority under PMLA under Section 8(2) of the said Act. As the attachment order has been confirmed, the Resolution Professional needs to approach the Learned Appellate Tribunal under PMLA. The Resolution Professional could not have taken the short cut to go to Adjudicating Authority under Section 60(5) of IBC. It is also argued that Section 32A of IBC which has been introduced by the Amendment Act is not applicable as the same bars the attachment only after the Resolution Plan has been approved subject to fulfilment of conditions as mentioned in the concerned Section.

9. The appellant has further submitted that PMLA is a special legislation which is aimed at dealing with the offence of money laundering and, therefore, has primacy over the IBC in proceedings relating to money laundering. The mere fact that the assets of the Corporate Debtor are subject to resolution proceedings under IBC, the same 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. It is also argued that IBC cannot be an amnesty route for accused under the PMLA, and entire confiscation regime under PMLA and its objects will be defeated if the Adjudicating Authority, NCLT starts interfering with the attachment orders without the authority of law. It is argued that PMLA is a complete Code and has provisions of effective remedial measures available to affected parties. If any person is aggrieved there are remedial measures available under Section 8, 26 and 42 of PMLA. It is also argued that later general rule cannot affect specifics of an earlier law. Imposing of moratorium under Section 14 of IBC does not take away the powers of the Enforcement Directorate to attach proceeds of crime in possession of the Corporate Debtor under PMLA. It is argued that a person in possession or control of assets which directly or indirectly constitute proceeds of crime has no property rights in these assets and no valid title to them.

10. It is argued that Section 238 of IBC cannot preclude action under PMLA and because of this Section 32A of IBC was required to be introduced and said amendment does not affect action pre approval of resolution plan.

11. The Learned counsel for the appellant in support of such submission has referred to judgements. We will refer relevant judgements later in this judgement.

The Defence

12. Against the above, Respondent No.1 and 3 are supporting the impugned order. Respondent No.2 is also supporting the other two
Company Appeal (AT)(Insolvency) No.575 and 576 of 2019

respondents. According to the respondents the nature of attachment qua proceedings under PMLA is not compulsorily criminal in nature in every instance. The proceedings before Adjudicating Authority are civil in nature. It is argued that only when the trial is concluded and Special Court orders confiscation title is lost. The property does not till that point of time vest with the Central Government. It is argued by the Respondent that the property of the Corporate Debtor is independent from the management of Corporate Debtor and protection has been granted under Section 32A of IBC. There is no vesting of property under Section 9 of PMLA and there is no predicament for the CIRP to continue. IBC and PMLA are both special statutes and IBC being subsequent with provisions like Section 238 IBC will prevail over provisions of PMLA. The object of attachment under Section 5 of PMLA is only to prevent the management of the corporate debtor from creating any third parties rights. Once CIRP is initiated, Resolution Professional takes control of the properties of corporate debtor and there is protection so that no third party rights are created. There is no conflict between the IBC and PMLA. Respondents are thus arguing that the impugned order should not be interfered with.

13. Respondents have also relied on judgements in support of their submissions. We will refer to the relevant judgements subsequently in this judgement.

Broad Facts

14. Before discussing the averments made with regard to the law, it would be appropriate to make brief reference to the broad facts. The Appellant has

not given the particulars and reply of Respondent No. 3- the Corporate Debtor to Resolution Professional (Diary No. 13525) in Paragraphs 29, 30, 31, 42 and 43 reads as under:

“29. The Respondent No. 3 company was incorporated in the year 2006 as Special Purpose Company for implementing the SEZ. The SEZ has been notified vide Notification dated 9th January, 2008. The Respondent No. 3 Company is setting up one of the largest multi product Special Economic Zones near Jambusar in Bharuch District, Gujarat. The attached assets were acquired in the year 2006 to 2008.

30. In the year 2008-2012, the Respondent No. 3 Company availed various financial facilities for consortium of banks in the form of Term Loan and other financial facilities and charge were created over the immovable assets in favour of the Banks against the loans obtained by it by depositing of title deeds vide the Memorandum of Deposit of Title Deeds, which was registered with the Sub-Registrar office on 19.12.2008 (Regn No. 2472). A deed of Hypothecation was also executed. The Charge was registered by the Registrar of Companies in favour of the SREI Infrastructure Finance Limited vide certificate dated 25.05.2012.

31. The Respondent No. 3 Company executed a Memorandum of Understanding (“MoU”) dated 31.01.2015. Two plots of land, admeasuring around 32 Acres, were leased by the Respondent No. 3 Company to another entity namely M/s. P.I. Industries Ltd. Respondent No.3 Company signed two MoUs dated 27.10.2016 with the M/s. P.I. Industries Ltd. to grant lease of the lands as below;

*(a)land admeasuring 21.57 acres for setting up a new manufacturing unit for its products for a period of 90 years;
(b)land admeasuring 10.43 acres for expansion of its aforesaid existing unit for a period of 90 years.*

The copies of the above-mentioned MoUs are filed along with the Appeal at Page Nos. 589 to 606 (Volume- III)

.....
.....

42. A bare perusal of the facts in the present case is sufficient to establish that notwithstanding the allegations levelled by the Appellant against the Respondent No. 3

with respect to purported offences of money laundering, the assets attached by way of the Provisional Order had been purchased prior to the commission of the said offences. It is the Appellant's case that the offences had been committed sometime in 2008. However, it is imperative to note that there is not even a whisper as to the exact nature and extent of the involvement of the Respondent No. 3 in the case. The Provisional Attachment Order, is conspicuously silent inasmuch as they fail to identify a timeline so as to pin-point the exact date of involvement of the Respondent No. 3 in respect of the charges levelled against the Company.

43. It is submitted that source of money for acquisition of the subject properties is not a result of any criminal activity related to a schedule offence as defined under Section 2 (u) of PMLA, the subject properties were wrongly attached. There are no evidence to even prima facie indicate that the attached assets of the Respondent No. 3 Company were purchased from the proceeds of crime and were involved in money laundering.”

(Emphasis Supplied)

15. The copy of FIR (Appeal Page 69) registered by CBI dated 25.10.2017 is against M/s. Sterling Biotech Ltd. (SBL in short) Corporate Debtor is Sterling SEZ and Infrastructure Ltd. in Appeal No. 575 of 2019 (and Sterling International Enterprise Ltd. is Corporate Debtor in Appeal No. 576 of 2019). The SBL is stated to be Flagship Company with other group Companies which include Corporate Debtors. The alleged offence is stated to have been committed “2008 onward”. According to the Appellant, the FIR was registered on 25.10.2017. Pursuant to the said FIR, Appellant recorded ECIR No. ECIR/HQ/17/2017 ON 27.10.2017(Annexure D) and investigation was started. In this ECIR (Annexure D Page 80) M/s. SBL is arrayed as suspected accused along with Directors and others. Competent Authority of PMLA issued Provisional Attachment Order (Annexure E) on 29.05.2018 and Corrigendum dated 14.06.2018 (Annexure E & F) Page 86 under Section 5

(1) of PMLA. It is stated that inter alia properties of Corporate Debtors in present matter were also attached.

16. The Application under Section 7 of IBC came to be admitted on 16.07.2018. It appears that the Resolution Professional approached the Appellant for release of the Provisional Attachment of the assets and properties of the Company and handover the charge to the Resolution Professional but this was not accepted and ultimately the Resolution Professional moved Ld. Adjudicating Authority (NCLT, Mumbai Bench, Mumbai) which after hearing the parties passed the present Impugned Orders.

Provisional Attachment confirmed after date of CIRP

17. Subsequent to the Admission of the Corporate Debtor to Corporate Insolvency Resolution Process (CIRP in short) the Provisional Attachment Order dated 29th May, 2018 passed by the Adjudicating Authority under PMLA was confirmed by the Adjudicating Authority under PMLA on 20.11.2018 (Annexure J Page 691) observing that it has come to prima facie conclusion that the “defendants” have committed the scheduled offence. The Adjudicating Authority under PMLA confirmed the Provisional Attachment Order directing that the same shall continue during pendency of the proceedings relating to any offence under Act before Court or under the Corresponding Law of any other Country, before the Competent Court of Criminal Jurisdiction outside India as the case may be and the same will become final after the Order of confiscation is passed under sub-section 5 to sub-section 7 of Section 8 or Section 58B or sub-section 2A or Section 60

of PMLA. With this background, the Adjudicating Authority heard the parties and passed the Impugned Orders.

Before Adjudicating Authority, the Resolution Professional relied on Section 18 of the Insolvency and Bankruptcy Code, 2016 (IBC in short) with regard to the control and custody of the assets of the Corporate Debtor required under IBC. Reliance was also placed on Section 14 of IBC as well as the Section 238 of IBC and Judgments in support. The Adjudicating Authority considered the arguments of the Enforcement Directorate which claimed that SBL Group had obtained more than Rs. 5,000/- Crores from Banks and Financial Institutions and the loan turned into N.P.A. Appellant claims that forensic audit Report was taken from Andhra Bank and State Bank of India and use of the loan was made for non-mandated purposes, payments made to non-existent parties and unjustified payments to directors. Appellant claimed that credit facility availed by M/s. SBL Group was declared as fraud account by the concerned banks. Referring to the investigation and attachment proceedings, Appellant claimed before Adjudicating Authority that PMLA was special Act. That, Section 71 of PMLA gives overriding effect and objects of PMLA and IBC were different and that moratorium could not be applied to criminal case initiated.

**Submissions of Amicus-Curiae before Adjudicating Authority,
and Reasons**

18. The Adjudicating Authority took assistance from amicus-curiae Mr. Mayur R.S. Khandeparkar, Advocate and referred to the arguments raised by the amicus curiae which were as under:

“5(b)

In the present MA, the Resolution Professional have sought release of attachments as well as handing over possession of assets, there is nothing on record to indicate that the possession of these assets in question have been taken over by the ED under PMLA. In absence of such material, it is obligation/duty of the Resolution Professional to take control and custody of assets of the Corporate Debtor in terms of Section 18(1)(f) of the Code. However, it is required to be noted that the provisions of PMLA permit possession to be taken by the ED under Section 8 (4) of the PMLA only after confirmation of the provisional order of attachment under sub-section 3 thereof. There is nothing on record to indicate that ED has taken any such steps after passing of the order of confirmation of attachment dated 20.11.2018.

It is pertinent to note that the order dated 20.11.2018 passed by the Adjudicating Authority (under PMLA) has been passed after the order of admission of the Petition against the Corporate Debtor and during CIRP as well as moratorium. The issue as to whether the proceedings before the Adjudicating Authority under the PMLA would be stayed by virtue of Section 14 of the IBC has already been considered by the Appellate Tribunal under the PMLA Act in two recent judgments, one in the case of “Bank of India Vs. Deputy Director, Enforcement Directorate” and another in the case of “Punjab National Bank vs. Deputy Director, Directorate of Enforcement, Raipur”. Hon’ble Justice Manmohan Singh speaking for the Appellate Tribunal in both the above cases has held as below:

- i. In view of the non-obstante clause contained in Section 238 of IBC, the Adjudicating Authority under the PMLA could not have continued with the attachment after declaration of moratorium.*
- ii. The non-obstante clause contained in IBC, which is a later statute shall prevail over the non-obstante clause contained in Section 71 of PMLA.*
- iii. The proceedings before the Adjudicating Authority under PMLA is civil in nature and hence, in view of Section 14 of IBC, the proceedings before the Adjudicating Authority of PMLA cannot continue.*
- iv. In the case of Punjab National Bank (supra), the Secured Creditor being lead Banker of Consortium of Banks had applied for raising of the attachment which was granted by the Appellate Tribunal, the facts of that case are similar to the case on hand except that the secured creditors in the present case have not*

filed any such application before the Adjudicating Authority under PMLA for raising attachment.”

Impugned Order in Paragraphs 6 and 8 to 10 records as under:

“6. It is to be noted that the Appellate Tribunal for PMLA in the case of Bank of India v. The Deputy Directorate of Enforcement of Mumbai MANU/ML/0040/2018 held in Para 43 and 44 as below:

“43. The proceedings under PML Act before the Adjudicating Authority are civil in nature and not criminal. The provisions of Section 11 and Section 42 of the PML Act specifically confirms the said position and therefore the reliance placed by ED on the judgment passed by NCLT, Ahmedabad to contend non-applicability of moratorium on the proceedings before Adjudicating Authority is wholly misplaced. Rather the said judgment reinforces the correct position.

44. In view of aforesaid facts and circumstances and for reasons referred above, we set aside the Impugned Order dated 20.12.2017 and the Provisional Attachment Order dated 29.06.2017. The mortgaged properties attached under the PAO 05/2017, so far as, properties concern in this appeal are released from attachment forth with.”

.....
8. This Bench has given serious consideration to the submissions made by the applicant, respondent and amicus curiae and gone through the pleadings and the judgments and is of the considered view that:-

a. The purpose and object of IBC is for resolution of the Corporate Debtor by maximizing the value that can be received by the Creditors and stake holders. The IBC provides for timelines within which the resolution has to be arrived at. The PMLA’s object is also to recover the property from wrong doers and compensate the affected parties by confiscation and sale of the assets of the wrong doer apart from imposing punishment. Here the beneficiaries are the creditors of the Corporate Debtor. The criminal proceedings before PMLA will take a longer time and by the time there will be an erosion in the value of Section 238 of IBC which is the later legislation, when compared to the earlier legislation of PMLA, the provisions of IBC will prevail and hence considering the economic interest of the beneficiaries, the IBC will provide solution at the earliest to

the Corporate Debtor as well as to the Creditors. The case laws cited above also favours a resolution by IBC instead of waiting for a long period to get the benefit under the PMLA. Further, the quantum of amount locked in the assets of the Corporate Debtor can be released at the earliest when resolution is found through IBC instead of taking a long route under PMLA. This is the economic aspect of the case.

b. As per the provisions of Section 14(1) (a) of IBC, where moratorium on any kind of proceedings is imposed by the Adjudicating Authority, particularly this attachment is a legal proceedings which squarely falls under the ambit of the said Sections of IBC. Since, the attachment order passed by the PMLA court is hit by the provisions of Section 14 of the Code and considering the overriding effect of IBC under Section 238 of the Code, this Tribunal is of the considered view that the attachment order under PMLA Act is a nullity and non-est in law and hence it will not have any binding force.

c. Section 63 of the IBC provides that, no Civil Court or Authority shall have jurisdiction to entertain any suit or proceeding in respect of any matter on which NCLT or NCLAT has jurisdiction under this Code. In view of the ruling by the Appellate Authority under PMLA in “Bank of India Vs. Deputy Directorate Enforcement, Mumbai” supra, that the proceedings before Adjudicating Authority under PMLA in respect of attached properties is a civil proceedings, the Adjudicating Authority under PMLA does not have jurisdiction to attach the properties of the Corporate Debtor undergoing Corporate Insolvency Resolution Process.

d. The suggestion made by the amicus curiae that the resolution professional or other creditors can approach the adjudicating authority under PMLA for raising the attachment though seems plausible but will definitely further delay the CIRP which will be against the spirit of the Code. If that route is followed it may take a considerable time and the assets wer to be locked in the proceedings. Considering the economic factors associated with the case and the object of both legislations, it is advisable to take a route where assets can be utilized in a speedy manner rather waiting and lose the value of assets over a period of time.

9. In view of the above discussion the attachment order dated 29.05.2018 and the Corrigendum dated 14.06.2018 issued by Respondent and as confirmed Adjudicating Authority under PMLA Court is a nullity and nonest in law

in view of Sections 14 (1) (a) 63 and 238 of IBC and the Resolution Professional can proceed to take charge of the properties and deal with them under IBC as if there is no attachment order. The concerned sub-registrars are directed to give effect to this order and remove their notings of attachment, if any, in their file in respect of properties belonging to the Corporate Debtor. It is needless to mention that the attachments in respect of the properties of the Corporate Debtor only are covered in this order.

10. Consequently, the sub-registrar at Jambusar is directed to register and hand over the two Original lease deeds entered into between Sterling SEZ and Infrastructure Ltd. and P.I. Industries Ltd. on 28.08.2018, as prayed for in this application.”

Thus for the above reasons, the Adjudicating Authority passed the Impugned Orders which are challenged before us. Clearly it is with regard to assets of Corporate Debtor only and not others.

Power of Adjudicating Authority under Section 60(5) of IBC

19. The Learned Counsel for the Appellant has argued that the Adjudicating Authority did not have jurisdiction to interfere in the Provisional Attachment which had been made by the Appellant and if the Resolution Professional had any grievance, it was for the Resolution Professional to move the Adjudicating Authority under PMLA or to file Appeals to the Appellate Tribunal under PMLA. The Learned Counsel relied on Judgment in the matter of “*Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Ors.*” (2019) SCC Online SC 1542. Relying on the Judgment it is claimed that where Corporate Debtor has to exercise rights in judicial, quasi-judicial proceedings the Resolution Professional cannot short-circuit by bringing the claim before National Company Law Tribunal (NCLT in short) under Section 60 (5). It is argued that Hon’ble Supreme Court has further held that where Corporate Debtor has to exercise right which falls

outside the purview of IBC especially in the range of public law they cannot through Resolution Professional take a bypass and go before the NCLT for enforcing such a right. Thus, the argument is that the Resolution Professional could not have moved the Adjudicating Authority under IBC for seeking relief of releasing the attachment and should have gone to the Authorities under the PMLA.

20. We have gone through the Judgment relied on by the Learned Counsel for the Appellant. The facts in the matter of “*Embassy Property Developments*” (supra) can be seen in Paragraph 4 of the Judgment. In that matter, the Corporate Debtor was M/s. Tiffin Barytes Asbestos and Paints Ltd. CIRP started in that matter on 12th March, 2018 before NCLT, Chennai. The Corporate Debtor held a mining lease which was to expire on 25th May, 2018. Government of Karnataka had given pre-mature termination of lease notice on 09.08.2017. The IRP made effort by writing to the Director of mines and Geology seeking benefit of deemed extension of the lease up to 31st March, 2020 in terms of Mines and Minerals (Development and Regulation) Act, 1957. As there was no response, IRP filed a Writ Petition WP No. 23075 of 2018 before the High Court of Karnataka seeking relief. Government of Karnataka rejected the proposal of deemed extension on 26.09.2018. In view of such order, the IRP withdrew Writ Petition No. 23075 of 2018 with liberty to file fresh Writ Petition but instead filed Miscellaneous Application before the NCLT, Chennai which passed ex-parte orders on 11th December, 2018 setting aside order of Government of Karnataka treating it in violation of moratorium under Section 14 of IBC. Adjudicating Authority directed

Government of Karnataka to execute Supplement Lease Deeds. The Government filed Writ Petition No. 5002 OF 2019 before the High Court of Karnataka. Considering factor of ex-parte Order, the Hon'ble High Court remanded back the matter to NCLT, Chennai. The matter in M.A. No. 632 of 2018 was again heard by NCLT which passed order dated 3rd May, 2019 allowing the M.A. and rejected the defence of the Government of Karnataka. The Government was directed to execute Supplement Lease Deeds. The Government challenged this in the High Court again in Writ Petition No. 41029 of 2019. As the Resolution Professional moved for action of contempt, the Hon'ble High Court granted stay to the directions contained in the order of NCLT. The matter was then carried to the Hon'ble Supreme Court by RP and others.

It is in the context of such facts that the Hon'ble Supreme Court considered jurisdiction and power of the Hon'ble High Courts under Article 226. The Hon'ble Supreme Court considered the matter on the principle whether the case of State of Karnataka fell under the category of (1) lack of jurisdiction on the part of the NCLT to issue a direction in relation to a matter covered by MMDR Act, 1957 and statutory rules issues thereunder, or (2) if it was mere wrongful exercise of a recognised jurisdiction. The Hon'ble Supreme Court in this context considered jurisdiction and powers of NCLT under the Companies Act read with provisions of IBC. In Paragraph 37 to 42 It was observed and held as under:

“37. From a combined reading of Subsection (4) and Subsection (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by

the government under the provisions of MMDR Act, 1957 and the Rules issued thereunder. 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 Subsection (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 Subsection (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. (It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression “operational debt” under Section 5(21), making the Government an “operational creditor” in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the Adjudicating Authority, namely the NCLT.)

*38. It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty bound under Section 20(1) to preserve the value of the property of the Corporate Debtor and that the word “**property**” is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to **property** and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the Corporate Debtor.*

39. *But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact Section 20(1) cannot be read in isolation, but has to be read in conjunction with Section 18(f)(vi) of the IBC, 2016 together with the Explanation thereunder. Section 18 (f) (vi) reads as follows:*

“18. Duties of interim resolution professional. The interim resolution professional shall perform the following duties, namely:

(a) ...

(b)...

(c) ...

(d)...

(e)...

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i)...

(ii)...

(iii)...

(iv) ...

(v)...

(vi) assets subject to the determination of ownership by a court or authority;

(g) ...

Explanation. For the purposes of this section, the term ‘assets’ shall not include the following namely:

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”

40. *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 Sections 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. Section 25(1) and 25(2)(b) reads as follows:

*“25. **Duties of resolution professional** – (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*

(2) For the purposes of subsection (1), the resolution professional shall undertake the following actions:

(a).....

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings.”

41. This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot shortcircuit the same and bring a claim before NCLT taking advantage of Section 60(5).

42. 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.”

Having gone through the above Judgment and submissions made by the Learned Counsel for the Appellant to rely on Paragraphs 41 and 42 of the Judgment. Material would be to see if right concerned falls outside the purview of IBC, or within. We find that it would be a matter of applying facts

to the law. The facts in the matter of “*Embassy Property Developments*” were clearly different. It is clear from the above Judgment that Hon’ble Supreme Court has observed that clause ‘c’ of sub-section 5 of Section 60 is very broad in its sweep. Under Section 14 of IBC once Insolvency commences inter alia moratorium applies to actions “against the Corporate Debtor”. Under Section 25 of IBC, the Resolution Professional is inter alia duty bound to represent and act on behalf of the Corporate Debtor with third parties, to exercise rights for the “benefit” of the Corporate Debtor in judicial, quasi-judicial and arbitration proceedings. The Judgment of Hon’ble Supreme Court has observed that for such actions the Resolution Professional cannot move the NCLT/Adjudicating Authority under Section 60 (5). There cannot be any shortcut on such counts. Under Section 18(1) (f) the IRP when it takes control and custody of any asset over which Corporate Debtor has ownership rights as recorded in the balance-sheet of the Corporate Debtor, it can include asset regarding which there may be a dispute pending regarding ownership in a court of law. Such issue of Ownership only a Civil Court can decide. Under Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons, Regulations 2016) (CIRP Regulations in short) Regulation 36(h) requires that information memorandum required to be issued by Resolution Professional shall contain “details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;”.

21. The Government has amended Section 11 of IBC by adding additional explanation as per Insolvency and Bankruptcy Code Amendment Act, 2020

published on 13.03.2020. Section 11 of IBC relates to persons who are not entitled to make application. Explanation 2 was added to clarify that nothing in the Section shall prevent a Corporate Debtor referred to in clause (a) to (d) of the Section from initiating Corporate Insolvency Resolution Process against another Corporate Debtor. The constitutional validity of Section 11 was challenged in the matter of “*Manish Kumar vs. Union of India*” (2021) SCC Online SC 30 and in Paragraphs 265 of the Judgment Hon’ble Supreme Court observed as under:

“265.....The intention of the Legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code. It could never had been the intention of the Legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in Section 11, from maximizing its assets by trying to recover the liabilities due to it from others. Not only does it go against the basic common sense view but it would frustrate the very object of the Code, if a corporate debtor is prevented from invoking the provisions of the Code either by itself or through his resolution professional, who at later stage, may, don the mantle of its liquidator. The provisions of the impugned Explanation, thus, clearly amount to a clarificatory amendment.....”

Thus, while Section 14 protects Corporate Debtor from actions, the Resolution Professional can pursue claims for the benefit of the Corporate Debtor.

22. The observations of the Hon’ble Supreme Court in the matter of “Embassy Properties” do not appear to be helpful to the Appellant with regard to the facts involved and the law which is to be applied which we propose to discuss further. The Learned Counsel for Appellant is not reading the said Judgment correctly. On facts and law it does not help Appellant.

Section 32A of IBC

23(A). After the Impugned Order dated 12th February, 2019 was passed, the Amendment Act, 2020, recorded above came to be passed. In the matter of “*Manish Kumar*” (Supra) the other Section, constitutional validity of which was challenged is Section 32A of IBC. Section 32A reads as under:

“Section 32A inserted through the impugned amendment reads as follows: “32A. (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

(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 7 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, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge 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 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 9 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.”

23 (B). When the constitutional validity was challenged, Union of India defended these provisions (Please see Para 271 of the Judgment in Manish Kumar) by submitting that:

“The stand of the Union, on the other hand, is as follows: Section 32A provides immunity to the corporate debtor and its property when there is approval of the resolution plan resulting in the change of management of control of corporate debtor. This is subject to the successful resolution applicant being not involved in the commission of the offence. Statutory basis has now given under Section 32A to the law laid down by this Court in the decision of Committee of Creditors of Essar Steel(supra). This Court took the view therein that successful resolution applicant cannot be faced with undecided claim after its resolution plan has been accepted. The object is to ensure that a successful resolution applicant starts of on a fresh slate. The relevant extracts of the Statement of Objects and Reasons relied upon by the Union of India are as follows:

“STATEMENT OF OBJECTS AND REASONS

xxx

2. A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency 69 framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016.

3.The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, inter alia, provides for the following, namely:—

xxx

(vii) to insert a new section 32A so as to provide that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease under certain circumstances”.

23(C). The Union of India also placed reliance on the Report of Insolvency Law Committee which is referred by the Hon’ble Supreme Court in Para 272.

Para 17.3 to 17.5 of the Report of the Committee are referred as under:

“272..... (17.3) It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any

offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the Adjudicating Authority. Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalize the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

17.5. The Committee noted that the proceedings under the Code, which are designed to ensure maximization of value, generally require transfer of the corporate debtor to bona fide persons. In fact, Section 29A casts a wide net that disallows any undesirable person, related party or defaulting entity from acquiring a corporate debtor. Further, the Code provides for an open process, in which transfers either require approval of the Adjudicating Authority, or can be challenged before it. Thus, the CIRP typically culminates in a change of control to resolution applicants who are unrelated to the old management of the corporate debtor and step in to resolve the insolvency of the corporate debtor following the approval of a resolution plan by the Adjudicating Authority”.

With regard to the actions against the property of the Corporate Debtor, Report of Insolvency Law Committee Para 17.9 to 17.11 read as under:

“17.9. The Committee also noted that in furtherance of a criminal investigation and prosecution, the property of a company, which continues to exist after the resolution or liquidation of a corporate debtor, may have been liable to be attached, seized or confiscated. For instance, the property of a corporate debtor may have been at risk of attachment, seizure or confiscation where there was any suspicion that such property was derived out of proceeds of crime in an offence of money laundering. It was felt that taking actions against such property, after it is acquired by a resolution applicant, or a bidder in liquidation, could be contrary to the interest of value maximisation of the corporate debtor’s assets, by substantially reducing the chances of finding a willing resolution applicant or bidder in liquidation, or lowering the price of bids, as discussed above.

17.10. Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bona fide bidder in liquidation under the Code, should be protected from such enforcement action, and the new Section discussed in paragraph 17.7 should provide for the same. Here too, the Committee agreed that the protection given to the corporate debtor’s assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, that may have been involved in the commission of such criminal offence.

17.11. By way of abundant caution, the Committee also recognised and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor’s assets would have to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence, and was not involved in the commission of such criminal offence along with the corporate debtor”.

24. This Section also puts responsibility on the Corporate Debtor and bona fide purchaser to co-operate in investigation. In Paragraphs 279 to 280 of the Judgment in the matter of “*Manish Kumar*” Hon’ble Supreme Court observed in the above context as under:

“279. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, the PMLA) are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a Resolution Plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stake holders.

280. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court’s jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of

the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.”

Thus constitutional validity of Section 32A has been upheld.

25. Coming back to the facts of the present matter, the argument of the Learned Counsel for the Appellant is that Section 32 A of the Code is not helpful in the present case as the matter has not reached the stage of acceptance of Resolution Plan or the stage of liquidation. Secondly it is argued that PMLA is a special legislation with the aim of dealing with money laundering and that Section 71 of PMLA gives the provisions of the Act effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Reliance is placed on Judgment in the matter of “*Deputy Director, Directorate of Enforcement Delhi vs. Axis Bank and Ors.*” (2019) SCC Online Del 7854 to submit that Hon’ble High Court has held that IBC and PMLA operate in different fields and that the former cannot take primacy over the later. Reliance is also placed on Judgment of this Tribunal in the matter of “*Varrsana Ispat Ltd. Vs. Deputy Director, Directorate of Enforcement*”, Company Appeal (AT) (Ins.) No. 493 of 2018 vide Judgment dated 2nd May, 2019 which was not interfered with when matter went to Hon’ble Supreme Court in orders dated 22.07.2019 in Civil Appeal No. 5546 of 2019. It is stated that in the matter of “*Varrsana Ispat Ltd.*” this Tribunal had held that Prevention of Money Laundering Act, 2002 relates to proceeds of crime and offence relates to money laundering resulting into confiscation and thus the Act relates to proceeds of crime and so Section 14 of IBC is not

applicable. The Learned Counsel referred to other Judgments to refer to the aims and objects of PMLA.

26. We have already noticed the amendment made to Section 32A and Judgment in the matter of “*Manish Kumar*” (Supra) and which shows the change of law. The reasons for bringing about such amendment are a matter of record. The aim of IBC is to find resolution to ailing corporate debtors and it was getting affected due to apprehension amongst potential resolution applicants.

Aims and Objects to be achieved in IBC

27. It is clear that Section 32A gives protection to the property of the Corporate Debtor in relation to an offence committed prior to commencement of CIRP where such property is covered under a resolution plan, on compliance with conditions stated. But then the question which has arisen before us is that if during CIRP the properties remain under attachment or seizure etc. can the apprehensions of prospective resolution applicants be allayed if the properties continue to be under attachment, seizure etc. and are inaccessible to the IRP/RP. There are many steps required to be taken during CIRP and which are all time bound so as to ensure maximisation of the value of the property to achieve the target of a successful resolution (which is in interest of Economy) and failure of which leads to liquidation.

28. Some of the provisions may be referred.

29. (A). The aim and object of PMLA under Section 5 for attaching the property alleged to be involved in money laundering is to avoid concealment,

transfer or dealing in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under chapter III of PMLA. Thus, Provisional Attachment Order is issued for a period not exceeding 180 days from the date of Order. Now if Section 14 (1)(b) of IBC relating to moratorium is seen, on the insolvency commencement date, the Adjudicating Authority is required to pass order declaring moratorium, 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” thus the moment CIRP is initiated, the property of the Corporate Debtor is protected by such moratorium. Thus both provisions seek to protect the property of Corporate Debtor from transfer etc. till further actions take place.

(B). Under Section 17 of IBC from the date of appointment of the IRP, he has to manage the affairs of the Corporate Debtor which shall vest in IRP and the powers of directors or partners of the Corporate Debtor as the case may be, stand suspended and are to be exercised by the IRP.

(C). Under Section 18 (1) (f), the IRP is required under the laws of IBC to take control and custody of any assets corporate debtor has ownership rights as recorded in balance sheet of the Corporate Debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets. The further sub-clauses give particulars of properties to be taken over. The explanation provides as to which assets shall not be included.

(D). Then under Section 20 of IBC, there is responsibility of IRP to make every endeavour to protect and preserve the value of the property of the Corporate Debtor and manage the operations of the Corporate Debtor as a going concern. When IRP is appointed as RP or is replaced by RP, even the RP has similar responsibility and powers as can be seen in Section 23 and 25.

30. Even on the stage of liquidation, under Section 34(2) of IBC all Powers of Directors etc. vest in the Liquidator. Under Section 35(1)(b), it is the duty of the liquidator to take into custody all the assets and properties of Corporate Debtor and also to carry on business of the Corporate Debtor for its beneficial liquidation as may be considered necessary by the Liquidator.

Regulations to be complied

Apart from these Acts, the CIRP Regulations when considered, Regulation 27 requires the RP that he shall within 7 days of the appointment but not later than 47th day from Insolvency Commencement day appoint two registered valuers to determine the fair value and the liquidation value of the Corporate Debtor in accordance with the regulation 35. Earlier, under Regulation 36 of CIRP Regulations relating to information memorandum, the RP is required to submit information memorandum within two weeks of his appointment but not later than 44th day from insolvency commencement date, whichever is earlier. The information memorandum shall contain “Details” of the Corporate Debtor “assets and Liabilities” with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values. The description has to include details

such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value and other relevant details.

31. Under Insolvency and Bankruptcy Board of India (Liquidation Process) Rules, 2016 Regulation 9 requires a liquidator to apply to the Adjudicating Authority for a direction that a person who has possession of any of the properties of the Corporate Debtor shall co-operate with him in collection of information necessary for the conduct of the liquidation. Under Regulation 32A, the Liquidator may sell the assets of the Corporate Debtor in the various manners mentioned in the regulation including sale of the corporate Debtor as a going concern. Under Regulation 34, Liquidator is required to prepare assets memorandum which shall provide details in respect of assets which are entitled to be realised by way of sale giving “value of the asset, valued in accordance with regulation 35. Under Regulation 35, the Liquidator can adopt valuation under Section 35 of CIRP, Regulation but if Liquidation is of opinion that fresh valuation is required under the circumstance, he shall within 7 days of the liquidation commencement date, appoint two registered valuers to determine the realisable value of the assets or businesses under clauses (a) to (f) of regulation 32 of the Corporate Debtor.

32. Regulation 40A of CIRP, Regulations and Regulation 47 of Liquidation Regulations give model timelines.

33. Once CIRP starts, there may be a contingency of the admission order getting set aside in Appeal. There may be another contingency where under Section 12A of IBC withdrawal of the Application admitted under Section 7,

9 or 10 takes place. Apart from these two contingencies, the CIRP is bound to end into either in Resolution Plan getting accepted or the Corporate Debtor going into liquidation. These two contingencies are taken care of by Section 32 A which has been recently added in IBC. If the first two contingencies happen, the normal laws would naturally get attracted as there would be a reversal to management going back to earlier hands. However, when CIRP is pending and progressing with target of Resolution, whether the attachment or seizure can be made or continued of the properties of Corporate Debtor is required to be considered.

Active Attachments, seizure etc. abstract acts as above

34. It appears to us that if the aims and objects of IBC are to be achieved, and maximisation of value is material so as to reach a resolution, above acts in time bound manner are to be performed and there cannot be obstructions of attachments and seizures existing. If the property is under attachment or seizure, or possession is taken over, keeping the corporate debtor a going concern would be serious issues. Without the properties in possession of IRP/RP getting valuation done during CIRP or even liquidation stage, would be issues. Attachment remaining in force would affect value of the property and prospective applicants may not respond in the manner in which they would, if the property is not under active attachment or seizure.

Section 14 of IBC applies

35. Coming to the question of moratorium, the Appellant is relying on the Judgment in the matter of “*Varrsana Ispat Ltd.*” (Supra) which was passed by this Tribunal on 2nd May, 2019. Now Respondent Nos. 1 and 3 have Company Appeal (AT)(Insolvency) No.575 and 576 of 2019

referred to Judgment in the matter of “*Pareena Swarup Vs. Union of India*”; 2008 14 SCC 107 (Diary No. 25059) this was a matter where Ms. Pareena Swarup member of Bar had filed Writ Petition under Article 32 of the Constitution of India by way of Public Interest Litigation to declare various sections of PMLA such as Section 6 which deals with Adjudicating Authorities, composition, powers, etc. and other sections of PMLA as ultra vires of Articles 14, 19(1)(g), 21, 50, 323-B of Constitution of India. In paragraph 8 of the Judgment the petitioner highlighted defects in the Adjudicating Authority Rules, 2007 and the Appellate Tribunal Rules, 2007.

Defect No. 7 read as under:

“7. The qualifications for legal member of the Adjudicating Authority should exclude “those who are qualified to be a District Judge” and only serving or retired District Judges should be appointed. The Chairperson of the Adjudicating Authority should be the legal member.”

The Judgment shows that Hon’ble Supreme Court had requested Mr. K.K. Venugopal, Sr. Counsel, (Now, Attorney General of India), Mr. Gopal Subramaniam, Ld. Additional Solicitor General and Ms. Pareena Swarup to suggest amendments in the line of the Constitutional Provisions as interpreted by the Supreme Court in various decisions. Relevant portions of Paragraph 11 and 12 read as under:

“11 Mr. Gopal Subramaniam has informed this Court that the suggested actions have been completed by amending the Rules. Even other wise, according to him, the proposed suggestions formulated by Mr. K.K. Venugopal would be incorporated on disposal of the above writ petition. For convenience, let us refer the doubts raised by the petitioner and amended/proposed provisions as well as the remarks of the department in complying with the same:

.....

Sl. No.	Issues	Amended/Proposed provision	Remarks
7.	<p>The qualifications for legal member of the Adjudicating Authority should exclude “those who are qualified to be a District Judge” and only serving or retired District Judges should be appointed. The Chairperson of the Adjudicating Authority should be the legal member.</p>	<p>1. Persons “qualified to be a District Judge” are treated on a par with District Judges for the purposes of qualification for appointment as member in ATFE under FEMA; as President of District Forum under Consumer Protection Act, 1986, etc. The eligibility criterion, for appointment as a District Judge, provided in the Constitution of India under Article 233(2), is that the person should have been an advocate “for not less than seven years”</p> <p>2. PMLA is a specialised and new Act and District Judges may not be available with experience in related issues whereas advocates or officers of Indian Legal Service, who are eligible to be District Judges, may often have greater knowledge of its provisions and working.</p> <p><u>3. The Adjudicating Authority is a body of experts from different fields to adjudicate on the issue of confirmation of provisional attachment of property involved in money laundering. The functions of Adjudicating Authority are civil in nature to the extent that it does not decide on the criminality of the offence nor does it have power to levy penalties or impose punishment.</u></p> <p>4. Adjudication is a function which is performed by Executives under many statutes. The Competent Authority under NDPS/SAFEMA have been conducting Adjudication proceedings routinely since 1978 and in the last four years i.e. 2004-2008, competent authority has taken 1374 new cases, issued 275 SCNs, forfeited 162 properties and disposed of 30 properties without any judicial objections/ Similar adjudications are done by the Customs Authorities under Customs Act or by authorities under FEMA/FERA.</p> <p>5. The Adjudicating Authority, being a body of experts from different fields, with a role as described in para 3 above, appointment of its Chairperson should be left to the recommendation of the Selection Committee.</p>	<p>There is no requirement to amend either the statute or the Rules.</p>

12. Inasmuch as the amended/proposed provisions, as mentioned in para 9, are in tune with the scheme of the Constitution as well as the principles laid down by this

Court, we approve the same and direct the Respondent-Union of India to implement the above provisions, if not so far amended as suggested, as expeditiously as possible but not later than six months from the date of receipt of copy of this judgment. The writ petition is disposed of accordingly. No costs. This Court records its appreciation for the valuable assistance rendered by Mr. K.K. Venugopal, learned senior counsel and Mr. Gopal Subramaniam, learned Addl. Solicitor General.”

36. The Learned Counsel for the Respondents are submitting that the Judgment shows that Government accepted that under PMLA, functions of Adjudicating Authority are civil in nature and not Criminal.

37. The Learned Counsel for the Appellant submitted that these were proposed provisions and thus the Judgment is not helpful. Having reproduced the relevant portions from the Judgment, what appears to us is that the Government did save Issue No. 7 dealing with attachment and confirmation of the same by the Adjudicating Authority by claiming that the acts were civil in nature. Provisions on this count were not proposed provisions as argued. This being so, it does appear to have been accepted that the proceedings before the Adjudicating Authority under PMLA are civil in nature.

Apart from above Section 11 and Section 41 of PMLA also give insight.

They read as under:

“11. Power regarding summons, production of documents and evidence, etc.—

(1) The Adjudicating Authority shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) All the persons so summoned shall be bound to attend in person or through authorised agents, as the Adjudicating Authority may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

(3) Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

41. Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

Section 41 does not refer to Special Courts which on the face of the provisions are Criminal Courts. Section 41 was required to protect actions of Director and adjudication before Adjudicating Authority and Appeal to Appellant Tribunal under PMLA, which are Civil in nature from being challenged in regular Civil Courts.

38. In PMLA offence of money laundering is defined and punishment prescribed in Chapter 2. Chapter 7 deals with special courts for trial of offence punishable under Section 4 which is found in Chapter 2. The offences are triable by Special Courts under Section 44 and the offence are cognizable

and non-bailable as per Section 45. Section 46 applies Code of Criminal Procedure before Special Court. There is provision of Appeal and Revision to the High Courts under Section 47 of PMLA. Thus, there is demarcation with regard to the attachment of property done under Section 5 of PMLA which is to be adjudicated under Section 8 before the Adjudicating Authority who has to deal with confirmation of attachment under Section 8 (3) of PMLA. On confirmation, the attachment continues during investigation for a period not exceeding 365 days or pendency of the proceedings relating to the offence under PMLA before a Court or under the corresponding law of any other country or before the Competent Court of any jurisdiction outside India as the case may be. The attachment confirmed by Adjudicating Authority becomes final after an order of confiscation passed under sub-section 5 or sub-section 7 of Section 8 or Section 58B or sub-section (2-A) of Section 60 by the special Court. It appears that because of such demarcations, the Government stated before the Hon'ble Supreme Court of India that the functions as regards the Adjudicating Authority are civil in nature to the extent that it does not decide on the criminality of the offence nor does it has power to impose penalty or impose punishment.

39. Taking aid from this, it appears to us that after the attachment when matter goes before the Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature. That being so, Section 14 of IBC would be attracted and applies. In present matter, the Provisional Attachment took place on 29th May, 2018 and corrigendum was issued on 14th June, 2018. The CIRP started on 16th July, 2018. Once

moratorium was ordered, even if the Appellant moved the Adjudicating Authority under PMLA, further action before Adjudicating Authority under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done on 20th November, 2018, the same will have to be ignored. Section 14 of IBC will hit institution and continuation of proceedings before Adjudicating Authority under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur.

40. In Judgment in the matter of “P. Mohanraj & Ors. Vs. Shah Brothers Ispat Pvt. Ltd.” (2021) SCC Online SC 152, Hon’ble Supreme Court of India considered the provisions of Section 138 of the Negotiable Instrument Act and Liabilities of the Corporate Debtor and Directors in the light of Section 14 of IBC and observed in Paragraph 63 as under:

“63. A conspectus of these judgments would show that the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and the interest and costs thereupon. Given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a “proceeding” within the meaning of Section 14(1)(a), the moratorium therefore attaching to such proceeding.”

Thus to quasi-criminal proceeding as regards Corporate Debtor, Section 14 applies has been found. Considering this as well as the nature of proceedings that takes place before the Adjudicating Authority under PMLA, it appears to us that even if the Authority issues order of provisional attachment, the institution and continuation of proceedings before the Adjudicating Authority for confirmation would be hit by Section 14 of IBC.

41. Alternatively, even if for any reason it was to be held that Section 14 of IBC would not help, it appears to us that Section 238 of IBC would still apply. Although it is argued that PMLA is a special statute and has an overriding effect still Section 238 of IBC is also a special statute and which is subsequent statute. IBC has specific object, which is to consolidate and amend laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interest of all stakeholders including alteration in the order of priority of payment of Government dues.

Section 238 of IBC reads as under:

“238. 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.”

If this Section is perused, the provisions of this Code would have effect notwithstanding anything inconsistent therewith contained “in any other law” for the time being in force. Section 238 of IBC does not give over riding effect merely to Section 14. The other provisions also are material, and will

have effect if there is anything inconsistent therewith contained in any other law for the time being in force. Thus if the Authorities under PMLA on the basis of the attachment or seizure done or possession taken under the said Act resist handing over the properties of the Corporate Debtor to the IRP/RP/Liquidator the consequence of which will be hindrance for them to keep the Corporate Debtor a going concern till resolution takes place or liquidation proceedings are completed, the obstructions will have to be removed. We have already referred to the various Acts required to be performed by IRP/RP/Liquidator to achieve the aims and objects of IBC in time bound manner. If properties of Corporate Debtor would not be available to keep it a going concern, or to get the properties valued without which Resolution/Sale would not be possible, the obstruction will have to be removed. To take over properties of Corporate Debtor, and manage the same, and keep Corporate Debtor a going concern are acts which fall within purview of IBC. IRP/RP/Liquidator under IBC have duty and right to take over and manage assets of Corporate Debtor as long as the assets are property of the Corporate Debtor, so that the other duties conferred on them by the statute are performed. These are issues relating to resolution/liquidation. If hindrance is being created by the attachment or by taking over the possession, it would be a question of priority arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor and such question can be decided by the Adjudicating Authority under Section 60 (5) (c) of IBC which reads as under:

“60.....

(5)....

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

42. In our view, there is no conflict between PMLA and IBC 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 IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.

43. For the above reasons, we find no substance in these Appeals. We do not find any reason to interfere with the Impugned Order in both the Appeals.

A. Company Appeal (AT) (Ins.) No. 575 of 2019 is dismissed. No order as to costs.

B. Company Appeal (AT) (Ins.) No. 576 of 2019 is dismissed. No order as to costs.

**[Justice A.I.S. Cheema]
Member (Judicial)**

**[Dr. Alok Srivastava]
Member (Technical)**

**New Delhi
BM/Basant B.**