IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19387 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==========

WELSPUN STEEL RESOURCES PRIVATE LIMITED
Versus
UNION OF INDIA

==========

Appearance:

MR MIHIR JOSHI, SENIOR ADVOCATE WITH MR JAY KANSARA AND MS ALISHA MEHTA, ADVOCATES FOR M/S WADIAGHANDY AND CO for the Petitioner(s) No. 1,2,3,4

MR SAURABH SOPARKAR, SENIOR ADVOCATE WITH MR MONAAL J DAVAWALA(6514) for the Respondent(s) No. 2

MR DEVANG VYAS, ASG WITH MR. PARTH H BHATT(6381) for the Respondent(s) No. 1

==========

CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 17/02/2023

CAV JUDGMENT

1. The prayers in this petition read as under:

> "a) Issue a Writ of Certiorari and/or a Writ in the nature of Certiorari and/or any other appropriate Writ/order inter alia quashing and setting aside the Provisional Attachment Order No. 8 of 2022 dated 21st September 2022 passed by Respondent No. 1 to the extent it attaches the Specified Assets that have been sold to the Petitioners;
>
> b) Issue a Writ of Mandamus and/or a Writ in the nature of Mandamus and/or any other appropriate Writ/order inter alia to declare and order that the right, title and interest of the Petitioners to the Specified Assets sold to the Petitioners will not be affected in any manner by any action taken/to be taken by Respondent No. 1 under the provisions of the Prevention of Money Laundering Act against the Corporate Debtor or the Corporate Debtor's promoters;"

2. Facts in brief are as under:

2.1 The petitioners namely (I) Welspun Steel Resources Private Limited (II) Welspun Corp Limited (III) Rank Real Estate and Infra Developers Private Limited and (IV) Mauyaan Shipyard Private Limited have approached this court challenging the provisional attachment order no.

8/22 dated 21.09.2022. ABG Shipyard Limited (the corporate debtor) was in the business of ship building in Dahej, Gujarat. An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) was filed by the ICICI Bank against the Corporate Debtor which was admitted by the National Company Law Tribunal, Ahmedabad (NCLT). The respondent no. 2, after passing of an order on admission was appointed as an Interim Resolution Professional (IRP) and was subsequently confirmed as RP (Resolution Professional) by the Corporate Debtor. The Corporate Insolvency Resolution Process of the corporate debtor went on unsuccessfully for a period of one and half years and since it could not be resolved, by an order dated 25.04.2019, the corporate debtor was ordered to be liquidated by the NCLT. Several attempts to sell the assets were made but these public auctions had failed.

2.2 On 16.08.2021, the NCLT passed an order permitting the liquidator to complete the sale of assets on

a composite basis and directed the liquidator to complete the process within a period of three weeks. On 24.08.2021, the liquidator issued a bid document for sale of specified assets of ABG Shipyard. The petitioners submitted their expression of interest on 26.08.2021. One of the bidders from the abandoned Swiss Challenge Process filed an appeal before the NCLT challenging the order of the NCLT dated 16.08.2021 permitting the liquidator to complete the sale of assets on a composite basis. The National Company Law Appellate Tribunal (NCLAT) upheld the order of NCLT.

2.3 On a challenge before the Apex Court, the Apex Court upheld the power of the liquidator to sell the assets and pursuant thereto the liquidator resumes the sale process by amending the bid document. The petitioners were successful bidders. It appears that in the interregnum, State Bank of India who was one of the lenders filed a complaint against the corporate debtor and promoters with the CBI. On 07.02.2022, an FIR was

registered pursuant to the complaint by the CBI. On 15.02.2022, an enforcement case was recorded under Section 3 of the Prevention of Money Laundering Act, 2022 (PMLA).

2.4 After the petitioners were declared as successful bidders and had paid their entire sale consideration for specified assets, on 21.09.2022, the liquidator informed the petitioners that the respondent no. 1 – Deputy Director of Directorate of Enforcement had passed an order in respect of the assets that were sold to the petitioners. On 22.09.2022, a press note was published informing on its website that it had attached the assets of the corporate debtor. A copy of the provisional attachment order dated 21.09.2022 was received by the petitioners on 22.09.2022. The gist of the allegations contained in the order was that the loans raised on the banks were transferred to group companies and other businesses instead of using them for the intended purposes and that the corporate debtor was carrying out

circular transactions with various group companies and making overseas investment. The petitioners being successful bidders of the specified assets which they had purchased pursuant to the auction proceedings conducted under the orders of the Apex Court the petitioners on 21.09.2022, paid the entire sale consideration of Rs.676 crores plus applicable taxes aggregating to Rs.789,05,00,000/- to the liquidator and who in turn issued sale certificates to the petitioners in respect of the specified assets put up for sale. For the purposes of purchase of these assets, the petitioners have availed of a loan of Rs.400 crores from the Indusind Bank and the primary security for the loans is the assets of the corporate debtor. It is these very assets which by the impugned order have been attached by the respondent no. 1.

3. Mr. Mihir Joshi, learned Senior Advocate assisted by Mr. Jay Kansara and Ms. Alisha Mehta, learned advocates for the petitioners would submit that Section 32(A) of the

IBC creates a bar and the respondent no. 1 therefore was wholly divested of all jurisdiction to take any action against the specified assets which have been sold to the petitioners. He would submit that the Apex Court has upheld the constitutional validity of Section 32A after specifically considering the provisions of the PMLA. In support of his submissions, Mr. Joshi would rely on the decision in the cases of **(I) Manish Kumar vs. Union of India and Another [2021(5) SCC 1, paras 320-326] (II) Rajiv Chakrborty Resolution Professional of EIEL vs. Directorate of Enforcement of the Delhi High Court [2022 SCC OnLine DEL 3703, paras 114 & 115].**

3.1 Mr. Joshi, learned Senior Counsel would take the court to the provisions of Section 5 of the PMLA and submit that the impugned order does not determine that there is a 'reason to believe'. He would submit that the foremost requirement under the provisions of the Act particularly section 5 of the Act is to form a reason to

believe that the properties standing the in the name of the corporate debtor and forming part of the assets sold to the petitioners are ‘proceeds of crime’. Reading the definition of the term ‘proceeds of crime’ as defined in section 2(u) of the Act he would submit that if any property is derived or obtained directly or indirectly by any person as a result of criminal activity, the property so derived would be ‘proceeds of crime’. The petitioners have obtained the specified assets after a private sale conducted in accordance with the directions of the Apex Court and for which they have paid substantial amounts. Such properties therefore cannot be treated as property derived or obtained as a result of any criminal activity so as to be attached under Section 5 of the Act. Taking the court through the impugned order, he would submit that the case of the authority was that the ABG Shipyard had availed credit facility from consortium of banks and had diverted the funds so availed and used the funds for purchase of properties. The petitioners were in no manner concerned with the money trail as demonstrated

in the impugned order and therefore the properties purchased through auction cannot be said to be properties derived from proceeds of crime. In coming to a conclusion that the assets acquired by the petitioners are proceeds of crime, the authorities have to come to 'reason to believe' that the possession that the petitioners have of the assets are from the proceeds of crime. In absence of any material, the authority has no 'reason to believe' that these assets are acquired from the proceeds of crime.

3.2 Mr. Joshi would submit that the expression 'reason to believe' does not mean purely subjective satisfaction. The reasons for the belief must have a rational connection or a relevant bearing to the formation of belief. It must be that one honest and a reasonable person based upon a reasonable ground. The reason to believe cannot arise from mere suspicion, gossip or rumour. The order suffers from non-application of mind as there are no objective reasons to believe recorded in the order. For a property

to be a ‘proceed of crime’ must be derived and obtained directly or indirectly as a result of any criminal activity. Reason to believe is not bonafide and is not based on jurisdictional facts.

3.3 The petitioners, in Mr. Joshi’s submission cannot invoke any other remedy than that of filing the present petition as ‘reason to believe’ is a jurisdictional fact which must be determined prior to assuming jurisdiction. In support of his submission, Mr. Joshi would rely on the following decisions:

(a) Vijay Madanlal Choudhary vs. Union of India [2022 SCC OnLine SC 929];

(b) Madhya Pradesh Industries Ltd. vs. Income Tax Officer, Nagpur [(1970) 2 SCC 32];

(c) S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta vs. Income Tax Officer and Ors. [(1981) 3 SCC 143];

(d) Sheo Nath Singh vs. Appellate Assistant

Commissioner of Income Tax, Calcutta [(1972) 3 SCC 234);

(e) Radha Krishan Industries vs. State of Himachal Pradesh and Ors. [(2021) 6 SCC 771];

(f) Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Anr. [AIR 1961 SC 372];

(g) The Income Tax Officer, I Ward, District VI, Calcutta and Others vs. Lakmani Mewal Das [(1976) 3 SCC 757].

3.4 Mr. Joshi would submit that the reasons to believe must be communicated in a crisp manner and reasons must be recorded which must be apparent from the order itself which is absent in the impugned order and is not recorded. He would rely on the following decisions:

(h) Shreya Singhal vs. Union of India [(2015) 5 SCC 1]

(i) CIT, West Bengal – III amd Ors. vs. Oriental Rubber Works [(1984) 1 SCC 700]

3.5 Assailing the order of attachment, it was Mr. Joshi's submission that even the formation of an opinion must be based on tangible material. The subjective satisfaction as to the need for provisional attachment must be based on credible information and not on imaginary grounds and wishful thinking however laudable that may be. He relied on the following decisions

(j) Radha Krishan Industries vs. State of Himachal Pradesh and Ors. [(2021) 6 SCC 771]

3.6 It is the submission of Mr. Joshi that what is pertinent to notice is that these assets were not procured pursuant to any criminal activity. The orders cannot be challenged except by filing the present petition as there is no efficacious alternative remedy challenging the order. Reading the provisions of Section 8 of the PMLA, Mr.

Joshi would submit that after conclusion of the process under Section 5(5) of the Act, the matter is handed over to the adjudicating authorities under Section 8 and the onus would be on the petitioners to show-cause as to why the specified assets are not proceeds of crime. In support of the same, he has relied on the following decisions:

(k) Radha Krishan Industries vs. State of Himachal Pradesh and Ors. [(2021) 6 SCC 771];

(l) Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Anr. [AIR 1961 SC 372];

3.7 Mr. Joshi would submit that the consequences of provisional attachment are drastic and extraordinary and in absence of any cogent and credible material which constitute malice in law.

3.8 Making a fine distinction between a jurisdictional fact and an adjudicatory fact, Mr. Joshi would submit that

a jurisdictional fact is a fact which must exist before a court or an authority assumes jurisdiction over a particular matter. If a jurisdictional fact does not exist, the court, authority or officer cannot act. Such an order therefore can be questioned by a writ of certiorari. The principle is that by erroneously assuming existence of a jurisdictional fact no authority can confer upon itself jurisdiction which it otherwise does not possess. Absence of jurisdiction is an exception and an alternative remedy cannot oust the jurisdiction of this court to exercise discretion in favour of the petitioners.

3.9 Mr. Joshi further pointed out that the original complainant, the State Bank of India was already a part of the SCC during the liquidation process and no objection was raised by the bank with respect to sale of assets by the petitioner and therefore when the complainant itself is agreeable to sell the very assets there is no question of attaching the very property.

4. Mr. Saurabh Soparkar, learned Senior Advocate assisted by Mr. Monaal Dawawala, learned advocate appearing for respondent no. 2 liquidator has supported the submissions made by the petitioners. He would submit that the orders are in violation of the provisions of Section 33(5) of IBC. No findings have been recorded that the properties are 'proceeds of crime'. Relying on the decision in the case of **CB Gautam vs. Union of India reported in 1993 (1) SCC 78,** he would submit that the Apex Court has categorically held that recording of reasons which leads to passing of the order is a deterrent against arbitrary action. There is no nexus between the attached properties and diversion of funds. The impugned order is also in violation of provisions of Section 32(A) of IBC. The properties were purchased by the petitioners in a sale process conducted in accordance with law and in compliance of the Apex Court orders.

5. Mr. Devang Vyas, learned ASG appearing with Mr. Parth Bhatt, learned Standing Counsel for the respondent

Union of India would take the court through the scheme of PMLA, especially reading sections 5, 8 and 42 thereof, and submit that the petition is not maintainable as not only the attachment is provisional and therefore the petitioner is at liberty to appear before the adjudicating authority under section 8 of the PMLA and satisfy the authority of the fact that the assets are not proceeds of crime. He would submit that in view of the investigation carried out under the provisions of PMLA what has been found is that the proceeds of the crime are to the tune of Rs.27,47,69,57,435/-.

5.1 Mr. Vyas would submit that the IBC would not prevail over PMLA since the objective is distinct from the purposes of other enactments. By virtue of Section 71 of the PMLA, it is apparent that the Act has an overriding effect.

5.2 Mr. Vyas would extensively read the contents of the order of attachment and submit that the same is in strict

compliance of the Act and such reasons are recorded in writing as per the provisions. He would submit that on a complaint being lodged before the enforcement authorities, investigation was carried out, forensic audit was done and it was found that there was diversion of funds. The attachment was therefore necessary. In support of the contentions, Mr. Vyas would rely on the following decisions:

(i) Farida Begum Biswas vs. Union of India reported in 2015 SCC online Del 11834;

(ii) The State of Maharashtra and Others vs. Greatship (India) Limited [Civil Appeal No. 4956 of 2022];

(iii) Nitin Hasmukhlal Shah vs. Union of India [Special Civil Application No. 9946 of 2020];

(iv) G. Gopalkrishnan vs. Deputy Director, Directorate of Enforcement and other [WP (MD) No. 11454 of 2018];

(v) Kiran Shah vs. Enforcement Directorate,

Kolkata reported in 2022 SCC Online NCLAT 2];

(vi) Apex Laboratories Private Ltd. vs. Deputy Commissioner of Income Tax reported in (2022) 7 SCC 98;

(vii) Varsana Ispat Limited vs. Deputy Director, Directorate of Enforcement NCLAT [Company Appeal (AT) (Insolvency) No. 493 of 2018]

6. Having considered the submissions made by the learned advocates for the respective parties, the legality of the order under challenge has to be addressed from the point of view whether the assets acquired by the petitioners can at all be said to be 'proceeds of crime'. This is not only in light of the manner and the method in which the specified assets have been acquired by the petitioners but also in light of the provisions of the IBC. From the chain of events narrated in the earlier part of this judgement what is evident is that ABG Shipyard Limited went into liquidation. Assets of the company 'corporate debtor' were offered for sale pursuant to an

auction held under the directions of the Apex Court. The petitioners were successful bidders and had after depositing the entire sale consideration received sale certificates. Certainly can it not be said that the assets which are 'specified assets' which the petitioners have acquired are those assets which are acquired as a result of criminal activity and therefore can be said to be 'proceeds of crime'. In the decision in the case of **Manish Kumar** (supra), the Apex Court while considering the constitutionality of Section 32(A) of IBC held as under:

> "320. Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the Resolution Plan. The further requirement is that a Resolution Plan must be approved by the Adjudicating Authority and, finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in sub-Section (1). In other words, the requirements

for invoking the bar against proceeding against the property of the corporate debtor in relation to an offence committed before the commencement of the CIRP, are as follows:

320.1 There must be Resolution Plan, which is approved by the Adjudication Authority under Section 31 of the Code;

320.2 The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence;

321. The Explanation to sub-Section (2) has clarified that the words “an action against the property of the corporate debtor in relation to an offence”, would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word “include” is used under sub-clause (i) of the Explanation, the word “action” against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the Code. The other part of the

clarification, under the Explanation, is found in the second sub-clause of the Explanation

322. Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person.

323. Thus, reading sub-Section (1) and sub-Section(2) together, two results emerge:

323.1 Subject to the requirements embedded in sub- Section (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease.

323.2 The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated.

323.3 The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in sub- Section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

324. The last segment of Section 32A makes it obligatory on the part of the corporate debtor or any person, to whom immunity is provided under Section 32A, to provide all assistance to the Investigating Officer qua any offence committed prior to the commencement of the CIRP.

325. 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.

326. 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."

6.1 If the authorities were given a free hand to pass orders of attachment of properties which were acquired by a successful bidder in a liquidation process, on a presumption that such acquisition was as a result of a criminal activity, could be contrary to the interest of value maximization of the corporate debtor's assets by substantially reducing the chances of finding a willing resolution applicant or a bidder in liquidation.

6.2 In the case of **Rajiv Chakraborty** (supra), while considering the provisions of IBC together with PMLA, the court in paras 102 to 109 held as under:

> "102. The Court had while noticing the submissions addressed on behalf of the petitioner taken note of the contention that Section 238 of the IBC would confer primacy upon the said statute and thus it would override the provisions of the PMLA bearing in mind that

it was a special statute and had come to be promulgated later in point of time.

103. While there can be no doubt that where two special statutes incorporate non obstante clauses it is the later enactment which would ordinarily or normally prevail, the same cannot possibly be recognised as constituting the solitary principle of interpretation which would apply or an inviolable rule. It must be fundamentally borne in mind that a non obstante clause in any statute is looked at principally in case of an asserted irreconcilable conflict between statutes. However, that does not preclude courts from identifying or discerning the core objectives of the competing statutes. This would be manifest from the following pertinent observations that were made by the Supreme Court in Maruti Udyog Vs. Ram Lal

> "41. The said Act contains a non obstante clause. It is well settled that when both statutes containing non obstante clauses are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the later shall prevail.
>
> 42. In Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. [(2001) 3 SCC 71] it is stated: (SCC pp. 73-74, paras 9-10)
>
> > "9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must

prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] ; Sarwan Singh v. Kasturi Lal [(1977) 1 SCC 750] ; Allahabad Bank v. Canara Bank [(2000) 4 SCC 406] and Ram Narain v. Simla Banking & Industrial Co. Ltd. [1956 SCR 603 : AIR 1956 SC 614]

10. We may notice that the Special Court had in another case dealt with a similar contention. In Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. [(1997) 89 Comp Cas 547 (Special Court)] it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:

"Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the legislature was aware of the earlier legislation and its non obstante clause. If the legislature

> still confers the later enactment with a non obstante clause it means that the legislature wanted that enactment to prevail. If the legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply."

104. More importantly and while dealing with the question which arises for determination in this case, the Court would have to bear in Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 mind the undisputed fact that while the PMLA was originally promulgated on 01 July 2005, the IBC came to be enforced with effect from 28 May 2016 and on subsequent dates when its various provisions were separately enforced. Section 238 of the IBC came to be energised in terms of the notification dated 30 November 2016 and was ordained to come into effect from 01 December 2016. Section 32A of the IBC on the other was introduced by Amending Act No.1 of 2020 with retrospective effect from 28 December 2019.

105. The introduction of Section 32A constitutes an event of vital import since it embodies a provision which effectively shut out criminal proceedings including those under the PMLA upon the CIRP reaching the defining moment specified therein. However, when the Legislature introduced the said provision, it was

conscious and aware of the fact that the provisions of the PMLA could be enforced against the properties of a corporate debtor notwithstanding the pendency of the CIRP. This the Court notes in light of the extent to which Section 14 could be recognised to legally operate under the statutory scheme and as has been explained hereinabove. Notwithstanding the above, the Legislature chose to structure that provision in a manner that the authorities under the PMLA would cease to have the power to attach or confiscate only when a Resolution Plan had been approved or where a measure towards liquidation had been adopted. The statutory injunct against the invocation or utilisation of the powers available under the PMLA was thus ordained to come into effect only once the trigger events envisaged under Section 32A came into effect. The Legislature thus in its wisdom chose to place an embargo upon the Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 continuance of criminal proceedings including action of attachment under the PMLA only once a Resolution Plan were approved or a measure in aid of liquidation had been adopted.

106. Section 32A which came to be introduced in 2020 in the IBC also represents the "later" enactment for the purposes of evaluating the non obstante clause argument as canvassed on behalf of the petitioner. It would be pertinent to observe that subsequent amendments in an existing statute have also been recognised to be

viewed as later acts for the purposes of answering the import of a non obstante clause. In Bank of India Vs. Ketan Parekh42, one of the questions which arose was whether the provisions of the Special Courts (Trial of Offenses Relating to Transactions in Securities) Act, 1992 would have effect notwithstanding the enforcement of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which was the later statute. Since both statutes contained non obstante clauses, ordinarily the 1985 Act would have had to yield being the statute promulgated prior in point of time. However, the answer to the issue raised in Ketan Parekh came to be impacted by the insertion of Section 9-A in the 1985 Act by virtue of an amending act introduced 1994. Dealing with the impact of that later amendment the Supreme Court observed thus:-

> "28. In the present case, both the two Acts i.e. the Act of 1992 and the Act of 1993 start with the non obstante clause. Section 34 of the Act of 1993 starts with non obstante clause, likewise Section 9-A (sic 13) of the Act of 1992. But incidentally, in this case Section 9-A came subsequently i.e. it came on 25-1-1994. Therefore, it is a subsequent legislation which will have the overriding effect over the Act of 1993. But cases might arise where both the enactments have the non obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case

> the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons. However, so far as the present case is concerned, it is more than clear that Section 9-A of the Act of 1992 was amended on 25-1-1994 whereas the Act of 1993 came in 1993. Therefore, the Act of 1992 as amended to include Section 9-A in 1994 being subsequent legislation will prevail and not the provisions of the Act of 1993."

Their Lordships in Ketan Parekh thus came to hold that notwithstanding the original statute having been promulgated in 1985, the provisions of Section 9A would not stand overridden by the 1993 statute since the former had come to be enforced later in point of time.

107. While the decision of the Supreme Court in Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India43 was also cited for the consideration of the Court, it would be pertinent to note that notwithstanding the two statutes in question there carrying non obstante clauses, the issue was ultimately answered based upon Section 88 of RERA which provided that its provisions would be in addition to and not in derogation of other statutes. This would be evident from the following observations as they appear in paragraphs 23 and 25 of the report:-

"23. A perusal of the aforesaid provisions would show that, on and from the coming into force of RERA, all real estate projects (as defined) would first have to be registered with the Real Estate Regulatory Authority, which, before registering such projects, would look into all relevant details, including delay in completion of other projects by the developer. Importantly, the promoter is now to make a declaration supported by an affidavit, that he undertakes to complete the project within a certain time period, and that 70% of the amounts realised for the project from allottees, from time to time, shall be deposited in a separate account, which would be spent only to defray the cost of construction and land cost for that particular project. Registration is granted by the authority only when it is satisfied that the promoter is a bona fide promoter who is likely to perform his part of the bargain satisfactorily. Registration of the project enures only for a certain period and can only be extended due to force majeure events for a maximum period of one year by the authority, on being satisfied that such events have, in fact, taken place. Registration once granted, may be revoked if it is found that the promoter defaults in complying with the various statutory requirements or indulges in unfair practices or irregularities. Importantly, upon revocation of registration, the authority is to facilitate

the remaining development work, which can then be carried out either by the "competent authority" as defined by RERA or by the association of allottees or otherwise. The promoter at the time of booking and issue of allotment letters has to make available to the allottees information, inter alia, as to the stage-wise time schedule of completion of the project. Deposits or advances beyond 10% of the estimated cost as advance payment cannot be taken without first entering into an agreement for sale. Importantly, the agreement for sale will now no longer be a one- sided contract of adhesion, but in such form as may be prescribed, which balances the rights and obligations of both the promoter and the allottees. Importantly, under Section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment, etc. with such interest as may be prescribed and must, in addition, compensate the allottee in case of any loss caused to him. Under Section 19, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale. In addition, all allottees are to be responsible for making

necessary payments in instalments within the time specified in the agreement for sale and shall be liable to pay interest at such rate as may be prescribed for any delay in such payment. Under Section 31, any aggrieved person may file a complaint with the authority or the adjudicating officers set up by such authority against any promoter, allottee or real estate agent, as the case may be, for violation or contravention of RERA, and Rules and Regulations made thereunder. Also, if after adjudication a promoter, allottee or real estate agent fails to pay interest, penalty or compensation imposed on him by the authorities under RERA, the same shall be recoverable as arrears of land revenue. Appeals may be filed to the Real Estate Appellate Tribunal against decisions or orders of the authority or the adjudicating officer. From orders of the Appellate Tribunal, appeals may thereafter be filed to the High Court. Stiff penalties are to be awarded for breach and/or contravention of the provisions of RERA. Importantly, under Section 72, the adjudicating officer must first determine that the complainant has established "default" on the part of the respondent, after which consequential orders may then follow. Under Section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force and under Section 89, RERA is to have effect notwithstanding anything inconsistent

contained in any other law for the time being in force.

25. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject- matter is concerned. Also, the non obstante clause of RERA came into force on 1-5-2016, as opposed to the non obstante clause of the Code which came into force on 1-12-2016. Further, the amendment with which we are concerned has come into force only on 6-6- 2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of the learned Senior Counsel for the petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the Explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Codeis to be interpreted. The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to

> remember that as the authorities under RERA were to be set up within one year from 1-5-2016, remedies before those authorities would come into effect only on and from 1-5-2017 making it clear that the provisions of the Code, which came into force on 1-12-2016, would apply in addition to RERA."

108. On a consideration of the aforesaid, the Court comes to the conclusion that Section 32A would constitute the pivot by virtue of being the later act and thus govern the extent to which the non obstante clause enshrined in the IBC would operate and exclude the operation of the PMLA. As has been observed hereinabove, while both IBC and the PMLA are special statutes in the generic sense, they both seek to subserve independent and separate legislative objectives. The subject matter and focus of the two legislations is clearly distinct. When faced with a situation where both the special legislations incorporate non obstante clauses, it becomes the duty of the Court to discern the true intent and scope of the two legislations. Even though the IBC and Section 238 thereof constitute the later enactment when viewed against the PMLA which came to be enforced in 2005, the Court is of the considered opinion that the extent to which the latter was intended to capitulate to the IBC is an issue which must be answered on the basis of Section 32A. The introduction of that provision in 2020 represents the last expression of intent of the Legislature and thus the embodiment of the extent to which the provisions of the PMLA are

to give way to proceedings initiated under the IBC.

109. The Court has independently come to the conclusion that the power to attach under the PMLA would not fall within the ken of Section 14(1)(a) of the IBC. Through Section 32A, the Legislature has authoritatively spoken of the terminal point whereafter the powers under the PMLA would not be exercisable. The events which trigger its application when reached would lead to the erection of an impregnable wall which cannot be breached by invocation of the provisions of the PMLA. The non obstante clause finding place in the IBC thus can neither be interpreted nor countenanced to have an impact far greater than that envisaged in Section 32A. The aforesaid issue stands answered accordingly."

6.3 **Vijay Mohanlal Chaudhary** (supra) was a case where the Apex Court was considering a batch of appeals concerning the validity and interpretation of certain provisions of the PMLA. Relevant paras read as under:

"250. The other relevant definition is "proceeds of crime" in Section 2(1)(u) of the 2002 Act. This definition is common to all actions under the Act, namely, attachment, adjudication and confiscation being civil in nature as well as prosecution or criminal action. The original provision prior to amendment vide Finance Act,

2015 and Finance (No.2) Act, 2019, took within its sweep any property (mentioned in Section 2(1)(v) of the Act) derived or obtained, directly or indirectly, by any person "as a result of" criminal activity "relating to" a scheduled offence (mentioned in Section 2(1)(y) read with Schedule to the Act) or the value of any such property. Vide Finance Act, 2015, it further included such property (being proceeds of crime) which is taken or held outside the country, then the property equivalent in value held within the country and by further amendment vide Act 13 of 2018, it also added property which is abroad. By further amendment vide Finance (No.2) Act, 2019, Explanation has been added which is obviously a clarificatory amendment. That is evident from the plain language of the inserted Explanation itself. The fact that it also includes any property which may, directly or indirectly, be derived as a result of any criminal activity relatable to scheduled offence does not transcend beyond the original provision. In that, the word "relating to" (associated with/has to do with) used in the main provision is a present participle of word "relate" and the word "relatable" is only an adjective. The thrust of the original provision itself is to indicate that any property is derived or obtained, directly or indirectly, as a result of criminal activity concerning the scheduled offence, the same be regarded as proceeds of crime. In other words, property in whatever form mentioned in Section 2(1)(v), is or can be linked to criminal activity relating to or relatable to scheduled offence,

must be regarded as proceeds of crime for the purpose of the 2002 Act. It must follow that the Explanation inserted in 2019 is merely clarificatory and restatement of the position emerging from the principal provision [i.e., Section 2(1)(u)].

251. The "proceeds of crime" being the core of the ingredients constituting the offence of money-laundering, that expression needs to be construed strictly. In that, all properties recovered or attached by the investigating agency in connection with the criminal activity relating to a scheduled offence under the general law cannot be regarded as proceeds of crime. There may be cases where the property involved in the commission of scheduled offence attached by the investigating agency dealing with that offence, cannot be wholly or partly regarded as proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act — so long as the whole or some portion of the property has been derived or obtained by any person "as a result of" criminal activity relating to the stated scheduled offence. To be proceeds of crime, therefore, the property must be derived or obtained, directly or indirectly, "as a result of" criminal activity relating to a scheduled offence. To put it differently, the vehicle used in commission of scheduled offence may be attached as property in the concerned case (crime), it may still not be proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act. Similarly, possession of unaccounted property acquired by legal means may be actionable for tax

violation and yet, will not be regarded as proceeds of crime unless the concerned tax legislation prescribes such violation as an offence and such offence is included in the Schedule of the 2002 Act. For being regarded as proceeds of crime, the property associated with the scheduled offence must have been derived or obtained by a person "as a result of" criminal activity relating to the concerned scheduled offence. This distinction must be borne in mind while reckoning any property referred to in the scheduled offence as proceeds of crime for the purpose of the 2002 Act. Dealing with proceeds of crime by way of any process or activity constitutes offence of money-laundering under Section 3 of the Act.

252. Be it noted that the definition clause includes any property derived or obtained "indirectly" as well. This would include property derived or obtained from the sale proceeds or in a given case in lieu of or in exchange of the "property" which had been directly derived or obtained as a result of criminal activity relating to a scheduled offence. In the context of Explanation added in 2019 to the definition of expression "proceeds of crime", it would inevitably include other property which may not have been derived or obtained as a result of any criminal activity relatable to the scheduled offence. As noticed from the definition, it essentially refers to "any property" including abroad derived or obtained directly or indirectly. The Explanation added in 2019 in no way travels beyond that intent of tracking and reaching upto the property

derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence. Therefore, the Explanation is in the nature of clarification and not to increase the width of the main definition "proceeds of crime". The definition of "property" also contains Explanation which is for the removal of doubts and to clarify that the term property includes property of any kind used in the commission of an offence under the 2002 Act or any of the scheduled offences. In the earlier part of this judgment, we have already noted that every crime property need not be termed as proceeds of crime but the converse may be true. Additionally, some other property is purchased or derived from the proceeds of crime even such subsequently acquired property must be regarded as tainted property and actionable under the Act. For, it would become property for the purpose of taking action under the 2002 Act which is being used in the commission of offence of money-laundering. Such purposive interpretation would be necessary to uphold the purposes and objects for enactment of 2002 Act.

253. Tersely put, it is only such property which is derived or obtained, directly or indirectly, as a result of criminal activity relating to a scheduled offence can be regarded as proceeds of crime. The authorities under the 2002 Act cannot resort to action against any person for money-laundering on an assumption that the property recovered by them must be proceeds of crime and that a scheduled offence has been

committed, unless the same is registered with the jurisdictional police or pending inquiry by way of complaint before the competent forum. For, the expression "derived or obtained" is indicative of criminal activity relating to a scheduled offence already accomplished. Similarly, in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. This interpretation alone can be countenanced on the basis of the provisions of the 2002 Act, in particular Section 2(1)(u) read with Section 3. Taking any other view would be rewriting of these provisions and disregarding the express language of definition clause "proceeds of crime", as it obtains as of now.

282. Be it noted that the authority of the Authorised Officer under the 2002 Act to prosecute any person for offence of money-laundering gets triggered only if there exists proceeds of crime within the meaning of Section 2(1)(u) of the 2002 Act and further it is involved in any process or activity. Not even in a case of existence of undisclosed income and irrespective of its volume, the definition of "proceeds of crime" under Section 2(1)(u) will get attracted, unless the property has been

derived or obtained as a result of criminal activity relating to a scheduled offence. It is possible that in a given case after the discovery of huge volume of undisclosed property, the authorised officer may be advised to send information to the jurisdictional police (under Section 66(2) of the 2002 Act) for registration of a scheduled offence contemporaneously, including for further investigation in a pending case, if any. On receipt of such information, the jurisdictional police would be obliged to register the case by way of FIR if it is a cognizable offence or as a non-cognizable offence (NC case), as the case may be. If the offence so reported is a scheduled offence, only in that eventuality, the property recovered by the authorised officer would partake the colour of proceeds of crime under Section 2(1)(u) of the 2002 Act, enabling him to take further action under the Act in that regard.

283. Even though, the 2002 Act is a complete Code in itself, it is only in respect of matters connected with offence of money- laundering, and for that, existence of proceeds of crime within the meaning of Section 2(1)(u) of the Act is quintessential. Absent existence of proceeds of crime, as aforesaid, the authorities under the 2002 Act cannot step in or initiate any prosecution.

284. In other words, the Authority under the 2002 Act, is to prosecute a person for offence of money-laundering only if it has reason to

believe, which is required to be recorded in writing that the person is in possession of "proceeds of crime". Only if that belief is further supported by tangible and credible evidence indicative of involvement of the person concerned in any process or activity connected with the proceeds of crime, action under the Act can be taken forward for attachment and confiscation of proceeds of crime and until vesting thereof in the Central Government, such process initiated would be a standalone process.

SECTION 5 OF THE 2002 ACT

285. Section 5 forms part of Chapter III dealing with attachment, adjudication and confiscation. This provision empowers the Director or officer not below the rank of Deputy Director authorised by the Director for the purposes of attachment of property involved in money-laundering. Such authorised officer is expected to act only if he has reason to believe that any person is in possession of proceeds of crime. This belief has to be formed on the basis of material in his possession and the reasons therefor are required to be recorded in writing. In addition, he must be convinced that such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which is likely to result in frustrating any proceedings concerning confiscation thereof under the 2002 Act. The Section 5 as amended reads thus:

"CHAPTER III ATTACHMENT, ADJUDICATION AND CONFISCATION

5. Attachment of property involved in money-laundering.— (1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be:

Provided further that, notwithstanding anything contained in clause (b), any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money- laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act."

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.]

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section

or on the date of an order made under 493[sub-section (3)] of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority."

286. From the plain language of this provision, it is evident that several inbuilt safeguards have been provided by the Parliament while enacting the 2002 Act. This provision has been amended vide Act 21 of 2009, Act 2 of 2013, Finance Act, 2015 and Act 13 of 2018, to strengthen the mechanism keeping in mind the scheme of the 2002 Act and the need to prevent and regulate the activity of money- laundering. As regards the amendments made vide Act 21 of 2009 and Act 2 of 2013, the same are not matters in issue in these cases. The challenge is essentially to the amendment effected in the second proviso in sub-section (1), vide Finance Act, 2015.

> 287. Be that as it may, as aforesaid, sub-section (1) delineates sufficient safeguards to be adhered to by the authorised officer before issuing provisional attachment order in respect of proceeds of crime. It is only upon recording satisfaction regarding the twin requirements referred to in sub-section (1), the authorised officer can proceed to issue order of provisional attachment of such proceeds of crime. Before issuing a formal order, the authorised officer has to form his opinion and delineate the reasons for such belief to be recorded in writing, which indeed is not on the basis of assumption, but on the basis of material in his possession. The order of provisional attachment is, thus, the outcome of such satisfaction already recorded by the authorised officer. Notably, the provisional order of attachment operates for a fixed duration not exceeding one hundred and eighty days from the date of the order. This is yet another safeguard provisioned in the 2002 Act itself."

6.4 Therefore, what is clear is that it is only such property which is derived or obtained directly or indirectly as a result of a criminal activity can be regarded as proceeds of crime. In the facts of the case, obviously apparent it is that the only allegation and the gist that had been discussed is that the corporate debtor

used the credit raised from the bank for purposes other than intended purposes to carry out circular transactions with various group companies and making overseas investments. There is no explanation as to how the properties standing in the name of corporate debtor and which form part of the assets sold to the petitioners are proceeds of crime especially since these assets are neither overseas assets or that of the group companies.

7. *Sine qua non* to arrive at a determination that the assets are proceeds of crime, the foremost requirement is that the author has to have 'reason to believe' on the basis of material in his possession. 'Reason to believe' cannot arise from mere suspicion, gossip or rumour. Merely because the impugned order records alleged fraudulent transactions and diversion of funds, it cannot automatically lead to a conclusion that the properties acquired by the petitioners are proceeds of crime. In order to arrive at a conclusion that 'reason to believe' exists, there must be some material to suggest such

formation of opinion. The decisions in the cases of **Madhya Pradesh Industries Ltd.**(supra), **S. Ganga Saran and Sons (Pvt.) Ltd.** (supra), **Sheo Nath Singh** (supra), **Radha Krishan Industries** (supra), **Calcutta Discount Co. Ltd.** (supra) and **Lakhmani Mewal Das** (supra) have set out principles where the courts have held that reason to believe must be founded on sufficient material. It cannot be founded on mere suspicion but based on evidence. It must be held in good faith, cannot be merely a pretense. It is always open for the court to examine whether the reason to believe has a rational connection or a relevant bearing to the formation of the belief and the reasons are not extraneous or irrelevant to the purpose. Reading the contents of the order indicates that such observations are based on only on suspicion and are such which one that cannot be arrived at by an honest and a reasonable person but are based on mere suspicion, gossip or rumour.

8. As far as the aspect of alternative remedy is

concerned, which is vehemently pressed into service by the learned ASG Mr. Vyas, as discussed hereinabove, when the assumption of jurisdiction by the authorities itself is non-existent and the respondent proceeds on facts which have no nexus to the objects sought to be achieved, and the opinion is not based on any tangible material, 'reason to believe' is a jurisdictional fact and in absence of such 'reason to believe' arrived at by the authorities, the bar of alternative remedy cannot oust the jurisdiction of this court.

9. As far as section 8 of the PMLA is concerned, what is evident on reading the provision is that the onus shifts on the petitioners once the adjudicating authority decides to take action and therefore section 8 cannot be a ground on which the petitioner can be ousted from securing a relief in exercise of powers under Article 226 of the Constitution of India.

10. For the aforesaid reasons therefore, the petition is allowed. The order dated 21.09.2022 insofar as it

attaches the specified assets of the petitioners as shown in para 12 of the impugned order in the schedule of properties at Sr. Nos. 13, 14, 15, 17, 18, 19 and 20 shall be treated as assets not falling within the purview of and having acquired from 'proceeds of crime'. The order holding so is without jurisdiction and the assets are directed to be released from such attachment. Order accordingly. Rule is made absolute. No costs.

(BIREN VAISHNAV, J)

FURTHER ORDER

After the above judgement was pronounced, Mr. Devang Vyas, learned ASG requests that since the order of attachment viz-a-viz the properties of petitioners has been quashed and set aside, the petitioners be directed to maintain status-quo which was prevailing for a further period of four weeks. Request is rejected.

(BIREN VAISHNAV, J)

DIVYA