

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – II, CHENNAI**

MA/1372 & 1373/2019

&

MA/69/2020

In

MA/1130/CAA/2019

In

CP/612(IB)/2017

(Filed under Section 60(5) read with Rule 11 of NCLT Rules, 2016)

In the Matter of **M/s. Senthil Papers and Boards Private Limited**

P. Eswaramoorthy

Liquidator of

M/s. Senthil Papers and Boards Pvt. Ltd.

44/1, 5th Street, Ramalinga Jothi Nagar,

Near Corporation Office,

Nanjundapuram Road,

Ramanathapuram, Coimbatore – 641045

...Applicant

Vs.

1. The Deputy Commissioner of Income Tax (Benami Prohibition)
Office of the Deputy Commissioner of Income Tax (Benami
Prohibition)

Room No. 104, 1st Floor,

Income Tax Investigation Wing Building, 46

M.G. Road, Nungambakkam,

Chennai – 600 034

2. The Deputy Commissioner of Income Tax

Central Circle-2 (2), Investigation Wing,

Room 109, 1st Floor, New No. 46,

M.G. Road, Chennai – 600 034

...Respondents

Order pronounced on 29th March 2022

CORAM:

Justice (Retd.) S.RAMATHILAGAM, MEMBER (JUDICIAL)

ANIL KUMAR B, MEMBER (TECHNICAL)

For Appellant : B. Dhanaraj, Advocate

For Respondent : R. Shankaranarayanan, ASGI

Raj Jabhakh, Advocate

COMMON ORDER

Per: Justice (Retd.) S.RAMATHILAGAM, MEMBER (JUDICIAL)

Under consideration are three Miscellaneous Applications viz.,
MA/1372/2019, MA/1373/2019 and MA/69/2020 seeking the
following reliefs:

In MA/1372/2019:

- a) Pass an Order granting Interim Stay over the Operation of the Order of Provisional Attachment dated 01.11.2019 made in file No. IO/PBPT/Senthil Paper & Boards/ 210, pending consideration of the above Application;*
- b) Set aside the Order of Provisional Attachment dated 01.11.2019 made in file No.IO/PBPT/Senthil Paper & Boards/210 and*
- c) Pass such further or other orders as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.*

In MA/1373/2019:

- a) Pass an Order granting Interim Stay over the Operation of the Order of Provisional Attachment dated 01.11.2019 made in file No. IO/PBPT/Senthil Paper & Boards/ 216, pending consideration of the above Application;*
- b) Set aside the Order of Provisional Attachment dated 01.11.2019 made in file No.IO/PBPT/Senthil Paper & Boards/216 and*
- c) Pass such further or other orders as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.*

In MA/69/2020:

- a) Pass an Order granting Interim Stay over the Operation of the Assessment Order dated 31.12.2019 and the consequential Notice of Demand dated 31.12.2019, pending consideration of the above Application.*
- b) Set aside the Assessment Order dated 31.12.2019 issued under Section 143(3) & 153A of the Income Tax Act, 1961 and the consequential Notice of Demand dated 31.12.2019 issued under Section 156 of the Income Tax Act, 1961.*
- c) Pass such further or other orders as may be deemed fit and proper in the facts and circumstances of the case and thus render justice.*



2. Brief facts of the three applications are as follows:

M/s. Senthil Papers and Boards Private Limited (Hereinafter the "Company" or "Corporate Debtor") was ordered into liquidation vide Order dated 14.02.2019 in Application bearing number MA/60/2018. Subsequently, upon commencement of the Liquidation process, the Applicant herein had prepared the list of stakeholders and the claim status as on 14.02.2019 is produced below:

Sl.No.	Particulars	No. of Claims
1.	<i>Operational Creditors</i>	84
2.	<i>Secured Financial Creditors</i>	3
3.	<i>Unsecured Financial Creditors</i>	4
4.	<i>Authorised Representative of Workmen & Employees</i>	1
	TOTAL	92

3. It is averred in the Application that, the ex-director/shareholder of the Company being aggrieved by the Order of Liquidation, had preferred an Appeal vide Company Appeal (AT) (Insolvency) No. 482 of 2019 before the Hon'ble National Company Law Appellate Tribunal (NCLAT), New Delhi. Thereafter, the Hon'ble NCLAT vide Order dated 03.05.2019 disposed of the Appeal with the following observations and directions:

"In view of the observations aforesaid, we hold that the Liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under section 230 of the Companies Act. If the members or the "Corporate Debtor" or the "Creditors" or a class of creditors like :Financial Creditor"

or "Operational Creditor" approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the Adjudicating Authority i.e., National Company Law Tribunal, Chennai Bench in terms of the observations as made in above..."

4. It is further averred that, pursuant to the Hon'ble NCLAT Order, a Scheme was placed by the one Mr. Arumugasamy who is an ex-director/shareholder. Subsequent to the 4th stakeholders meeting the committee had called for improvising the Scheme and upon receipt of the revised Scheme, the same was filed by the Applicant under MA/1130/CCA/2019 in CP/612/(IB)/CB/2017 seeking the convention of meeting of Creditors; this Application was allowed by this Tribunal vide Order dated 08.11.2019.

5. It is averred that the Applicant received a show cause notice dated 01.11.2019 from the Respondent herein under Section 24(1) of the Prohibition of Benami Property Transactions Act, 1988 to show as to why:

- a) The property being assets of the Corporate Debtor along with its paper mill running business and 15MW Cogeneration Power Plant and 7,74,538 sq.ft. construction on land where the factory of the Corporate Debtor is situated should not be treated as benami property; and
- b) The property being the proportionate share of land owned by the Corporate Debtor out of total extent of 889.82 acres where the factory of the Corporate Debtor is located should not be treated as benami property.

It is further averred that, in addition to the notice, the Respondent had also issued a Provisional Attachment Order dated 01.11.2019 under Section 24(3) of the Prohibition of Benami Property Transactions Act, 1988.

6. It is given in the written submissions of the Respondent that the following factual circumstances led to the issuance of the notice and provisional attachment Order:

- a) that upon a search action initiated under Section 132 of the Income Tax Act, 1961 in the year 2017 in the case of V.K. Sasikala & Ors and based on the materials emanated during such search, information regarding certain incriminating transactions was sent to the Respondent vide letter dated 17.05.2019. The information showed that, during the period of demonetization, Rs.400 Crores in Old High Denomination Notes (OHDs) were given to Senthil Group, Coimbatore for the purchase of a Paper Mill in Coimbatore District belonging to Senthil Group, by Smt. Sasikala through her intermediaries.
- b) Subsequently, on 18.11.2017, a Service Apartment at Room 302, Shylee Nivas Service Apartments, Nutech Lushington, Old No. 41, New No. 76, Block- II, 1st Main Road, CIT Nagar, Nandanam, Chennai -35 was searched and many memorandums of understanding, land documents, share certificates , etc were found and seized.

7. The Liquidator has also received an Assessment Order under Section 143(3) and 153A and a Demand Notice under Section 156 of the Income Tax Act, 1961 dated 31.12.2019 from the DCIT, Central Circle-2(2), the 2nd Respondent calling the Corporate

Debtor to pay a sum of Rs. 1,85,50,88,875/- within a period of 30 days from the date of receipt of the said notice.

8. The Applicant avers that answer from the Shri. O. Arumugasamy, Erstwhile Director of the company records that:

"The abovementioned amount of Rs. 400 Crores was received as advance towards share Transfer of M/s. Senthil Papers and Boards Private Limited out of the total consideration of Rs. 600 Crores. For the receipt of the Share Transfer Advance, an MoU was signed by the 5 shareholders of the Corporate Debtor and handed over to Sh. Senthil, Advocate... Also at the time of receipt of Rs. 400 Crores, we have given all our shareholders' Share Certificates to Sh. Senthil. Advocate, Namakkal."

The counsel for the Applicant avers that the above suggests that the Asset subjected to the Deal was only the Shares of the Company and not the Property like Power, Plant, Building, Machineries of the Company. Therefore, the Applicant submits that if the shareholders agree to transfer the shares of the company for a consideration and the said transaction falls under the provisions of the Prohibition of Benami Property Transactions Act, 1988, then the shares may be subject to the attachment as per the Act and not the properties of the company should be subjected to the attachment.

9. The Applicant further avers that the Company had borrowed a Term Loan for Rs. 199 Crore and cash credit for Rs. 30 Crore through Consortium Arrangements. The Security given for the above loans were all moveable and immovable

assets of the Company and that mortgages were created on 02.11.2009, 18.11.2009 and 25.03.2013 i.e., before the alleged transfer of Rs. 400 Crore to the Promoters and that this indicates that the amounts received by the erstwhile director towards advance money against Sale of the shares of Senthil Papers and Boards Private Limited subject to settlement of Bank Loan of Rs. 200 Crore by the intending purchaser.

10. The Applicant states that during demonetization, there were no cash inflows into the Company either in the form of cash or cheque from the Promoters of the Company or others. This is clearly evidenced from the disclosure on Specified Bank Notes given by the Statutory Auditor in his report for FY 2016-17 filed with the Ministry of Corporate Affairs. The Applicant as the Liquidator has conducted independent Forensic Audit for the FY 2015-16 and 2016-17 wherein no cash inflows are seen. Further, the Applicant states that there is nothing to show that the Promoters brought in the money into the Corporate Debtor out of the said Rs. 400 Crore during the demonetization.

11. The Counsel for the 1st Respondent in their memo dated 22nd January 2020 has stated the following:



- i. the 1st Respondent has provisionally attached the property viz., proportionate share of land owned by M/s. Senthil Papers and Boards Pvt. Ltd, out of the total extent of 89.82 Acres vide the attachment order dated 01.11.2019 bearing F.No.10/PBPT/Senthil Papers/216 under Section 24(3) of the Prohibition of Benami Property Transactions Act, 1988. Along with the said Order, a show cause notice was also issued under Section 24(1) by the Respondent to the Corporate Debtor.
- ii. It is averred by the Counsel for the Respondent that the order was well founded based on the premise that the transaction is in the nature of benami transaction within the meaning of section 2(9)(A) of the Prohibition of The Benami Transactions Act, 1988. Further, it is averred that, pursuant to the search action conducted under section 132 of the Income Tax Act, various incriminating documents and loose sheets were found and seized, which inter alia shows that during the period of demonetization Rs. 400 Crore in Old High Denomination Notes were given to Senthil Group, Coimbatore by Smt. Sasikala through her intermediaries and that this transaction is evidenced by a Memorandum of Understanding dated 22.11.2016.
- iii. It is further averred by the counsel Respondent that on 18.11.2017 a Service Apartment at Room No. 302, Shylee Nivas Service Apartments, Nutech Lushington, Old No. 41, New No. 76, 1st Main Road, CIT Nagar, Nandanam, Chennai - 35 was searched during which many original MoUs, land documents, share certificates, etc, were found and seized. Among the seized materials were the share certificates of M/s. Saradha Papers and Boards Pvt. Ltd. (former name of M/s. Senthil Papers and Boards Pvt. Ltd.) in the names of Shri T.N. Vetrivel, Shri. A. senthilKumar, Shri. O. Arumugasamy, Shri. T.N. Mariya Gowder and Shri. M. Palanisamy. An MoU containing details of the sale of the assets of M/s. Senthil Papers and Boards Pvt. Ltd. along

with its paper mill (830 Tonnes per day) running business and 15 MW cogeneration power plant, including the extent of 89.82 Acres where M/s. Senthil Papers and Boards Pvt. Ltd. is located along with the details of transfer of entire equity shares of the Company was seized from the same premises. To corroborate the above evidences, the Senthil Group was searched under Section 132 of the Income Tax Act, 1961, whereby Shri. A Senthil Kumar, MD of the Company admitted on oath that they had received cash in Old High Denominations to the tune of Rs. 400 Crore through Shri. Senthil, the Advocate towards the sale of the Company. Further, Shri. O. Arumugasamy, the Director of the Company also admitted on oath that they had received Rs. 400 Crore from Shri S Senthil, towards the sale of the company, by way of transfer of shares. Moreover, Shri. M. palanisamy he Director of the Company had also admitted on oath that he had received the amount of Rs. 400 Crore from Smt. V.K. Sasikala through Shri. S Senthil, Advocate.

- iv. It is averred by the Counsel for the Respondents that the Application by the Liquidator seeking setting aside of the notice and provisional attachment along with the Assessment Order and Demand Notice is not maintainable as this Adjudicating Authority is not the appropriate forum to approach in an Application under Section 60(5) of the IBC, 2016. That the Prohibition of Benami Property Transaction Act, 1988 has specifically stipulated a process with respect to the attachment of property by constitution an adjudicating authority under Section 7 and laid down procedures under Section 26. It is further submitted by the Respondent Counsel that the proceedings before the appropriate authority is pending adjudication. Likewise, the Counsel for the Respondent states that the appropriate authority to set aside the Order passed under Section 264A of the Income Tax Act, 1961 is only the Commissioner (Appeals) of Income Tax.

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In this regard, the Counsel for the Respondent has relied upon the Hon'ble Supreme Court's judgement in Embassy Property Developments Pvt. Ltd. V. State of Karnataka & Ors. [2019 SCC OnLine SC 1542]:

"If Section 60(5) 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.

Wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the RP cannot short - circuit the same and bring a claim before NCLT taking advantage of Section 60(5)."

- v. The Counsel for the Respondent further draws distinction between Section 32A of the IBC, 2016 and the Prohibition of Benami Property Transaction Act; that, Section 32A of the IBC was incorporated to provide immunity to bonafide and successful Resolution Applicants or purchasers of assets sold at the time of liquidation. It is the Respondent's case that this provision would only apply where the CIRP/sale of liquidation asset culminates in a change in control to a completely unconnected resolution applicant/ buyer, respectively. To elucidate this, the Counsel for the Respondent has placed reliance on the decision of Hon'ble NCLT, Hyderabad in **Raj Kumar Ralhan, Resolution Professional for Leo Meridian Infrastructure Projects & Hotels Limited and Ors. Vs. Deputy Director, Enforcement Directorate and Ors. [MANU/NC/6640/2020]** wherein, it was held that:

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"39. The applicant, cannot take shelter under Section 32A(2) of the I&B Code, because when Provisional Attachment Order was passed there was no resolution plan approved by the CoC, which was confirmed by the Adjudicating Authority under Section 31 of the I&B Code. In the present case, no Resolution Plan is approved by the CoC as on the date of the Provisional Attachment Order. Therefore, Section 32A(2) of the I&B Code will not apply to the Provisional Attachment Order passed by the respondent No.1. Thus, the present application filed by the Resolution Professional on behalf of the Corporate Debtor is liable to be dismissed."

- vi. It is further averred by the Counsel for the Respondent that, the assessment conducted cannot be construed as a suit or legal proceeding for availing the protections under the provisions of IBC, 2016 as the Respondents has only conducted an assessment to determine the tax liability of the assessee and the order was passed to raise demand.

12. The Applicant has, in a written statement filed on 29.12.2021 relied on the judgement of the Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 575 of 2019 in the matter of the Directorate of Enforcement Vs. Sh. Manoj Kumar Agarwal & Ors. regarding the jurisdiction of this Adjudicating Authority, wherein, it was held that if any hindrance is being created by attachments 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 NCLT under Section 60(5)(c) of the I&B Code, 2016.

13. It is further averred by the Applicant while relying upon the decision of the Hon'ble Supreme Court in the matter of Manish Kumar Vs. Union of India (SCC Online SC 30) wherein the object and reasoning of Section 32A of I&B Code was reiterated stating that, the section 32A is brought to prevent potential abuse and to provide immunity against prosecution of the Corporate Debtor and any actions against the property of the Corporate Debtor in order to fill the critical gaps in the corporate insolvency framework. Therefore, the Applicant/Liquidator may approach the Hon'ble Adjudicating Authority for appropriate directions to prevent any abuse or to provide any immunity against prosecution of the Corporate Debtor or against the property of Corporate Debtor.

14. Furthermore, the Applicant relied upon the Hon'ble Supreme Court case in Solidaire India Ltd. Vs. Fairgrowth Financial Services P. Ltd. (2001 (1) SCR 932) regarding the overriding effect of the I&B Code over the Benami Act wherein, it was observed that, if two special statutes contain non-obstante clause the latest statute will prevail. More importantly, the Applicant states that, the properties attached are charged in RoC and mortgaged to financial creditors prior to the alleged offence. In order to substantiate this, the Applicant has relied upon the decision of the Hon'ble Appellate



Tribunal for Benami Act in the case relating to Bank of India wherein it was observed that the properties mortgaged to the banks much before the alleged offence has to be released and accordingly in that case, the provisional attachment was also quashed. It is further averred by the Applicant that the Respondent has admitted that there were no cash flows in the books of accounts of the Corporate Debtor and hence will not be covered under the purview of the Benami Act.

15. The Applicant avers that the judgements relied upon by the Respondents are sustainable in the facts and circumstances of the present case and has relied upon the case Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta and in Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain wherein the termination of an Agreement during the CIRP period was dealt with and the jurisdiction of this Adjudicating Authority was upheld.

16. Heard the Counsels for both the Parties, and perused the documents on record including the judgements, memos and written statements. The Corporate Debtor was ordered for Liquidation vide Order dated 14.02.2019 by this Adjudicating Authority. It is seen from the Orders of the Respondents that the Provisional attachments were made on 01.11.2019. At this juncture it is pertinent to note that the period of moratorium

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starts with the initiation of the CIRP and ends in two circumstances: *either on the commencement of Liquidation or upon the approval of a resolution plan*. In the present case, the Liquidation period has commenced before the date of in which the provisional attachment was made which indicates that the Respondents herein had not acted in violation of the moratorium. Further, the question of violation of Section 32A does not arise at all as there is no sale of property of the Corporate Debtor consequent to any Resolution Plan.

17. Moreover, the provisional attachment made by the Respondents comes under the statute of *Prohibition of Benami Property Transaction Act, 1988* which in itself has stipulated the due process with respect to attachment of property under Section 7 of the same. The contention of the Applicant that both being special act *The Insolvency and Bankruptcy Code, 2016* should prevail over *The Prohibition of Benami Property Transaction Act, 1988* as per the general principle for construction does not hold in the instant case.

18. However, in the present circumstances, as there is nothing to stop the Applicant/Liquidator herein to proceed under the relevant provision to revive the provisional attachment. And that, this Adjudicating Authority having not found any conflict between the two statutes as there is no bar in selling the property of the Corporate Debtor solely on the

ground that the Corporate Debtor is under Liquidation. And that the Liquidator is also not barred by the code to add the said property into the liquidation estate. The applicant/Liquidator herein is open to approach the appropriate forum to raise the attachment or any other relief as per the provisions of the said act.

19. Further, the reliance placed by the Applicant/Liquidator in the matter of *Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta* and in *Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain* to substantiate that the Insolvency Bankruptcy Code, 2016 would prevail in the event of inconsistency cannot be relied IN the instant case as stated supra, this Adjudicating Authority is of the view that there is no inconsistency to be drawn. Accordingly, these applications in **MA/1372/2019**, **MA/1373/2019** and **MA/69/2019** stand **Dismissed**.

-Sd-
B. ANIL KUMAR
MEMBER (TECHNICAL)

-Sd-
Justice (Retd.) S. RAMATHILAGAM
MEMBER (JUDICIAL)

Haripriya