

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 957 of 2019

IN THE MATTER OF:

JSW Steel Limited

...Appellant

Versus

Mahender Kumar Khandelwal & Anr.

...Respondents

Present:

For Appellant :

**Mr. Kapil Sibal, Senior Advocate
Mr. Arun Kathpalia, Senior Advocate with
Mr. Manmeet Singh, Ms. Nishtha Chaturvedi, Mr.
Anugrah Robin Frey and Ms. Abhilasha Khanna,
Advocates**

For Respondents :

**Mr. Abhinav Vasisht, Senior Advocate with
Ms. Misha, Mr. Shantanu Chaturvedi, Mr. Anoop
Rawat, Mr. Shreyas and Ms. Charu, Advocates
for 'Resolution Professional'**

**Mr. Ramji Srinivasan, Senior Advocate with
Mr. Bishwajit Dubey, Mr. Spandan Biswal, Ms.
Srideepa Bhattacharya, Mr. Aditya marwah, Ms.
Neha Shivhare and Ms. Sylona Mohapatra,
Advocates for 'Committee of Creditors'**

**Mr. Zoheb Hossain, Advocate for Enforcement
Directorate**

**Mr. Sanjay Shorey, Director (Legal & Prosecution),
Ministry of Corporate Affairs**

O R D E R

14.10.2019

The questions arise for consideration in this appeal are:

- (i) Whether the 'Directorate of Enforcement' has jurisdiction to attach the property of the 'Corporate Debtor' or part thereof which is undergoing 'corporate insolvency resolution process'; and
- (ii) Whether the 'Directorate of Enforcement' comes within the meaning of 'Operational Creditor' in terms of Section 5 (20) and (21) of the

‘Insolvency and Bankruptcy Code, 2016’ for the purpose of money claim (civil matter), which may be generated out of the attached property/ part thereof of the ‘Corporate Debtor’.

2. Mr. Sanjay Shorey, Director (Legal and Prosecution), Ministry of Corporate Affairs, Government of India appeared on behalf of ‘Union of India’ and filed reply-affidavit. He submits that ‘Central Bureau of Investigation (CBI) also intends to file an affidavit.

3. Mr. Zoheb Hossain, Advocate appears on behalf of the ‘Directorate of Enforcement’ and submits that in the present case as the ‘proceeds of crime’ is involved, part/property of the ‘Corporate Debtor’ (Bhushan Power & Steel Limited) has been attached by the Deputy Director of the Directorate of Enforcement, New Delhi by order dated 10th October, 2019. He prays for and is allowed time till 17th October, 2019 to file reply-affidavit. Same time is also granted to the ‘Central Bureau of Investigation’ to file reply affidavit. Rejoinder, if any, may be filed by the Appellant by 23rd October, 2019.

4. Mr. Sanjay Shorey, Director (Legal and Prosecution), Ministry of Corporate Affairs, Government of India submits that the ‘Directorate of Enforcement’ has no jurisdiction to attach the property of the ‘Corporate Debtor’, which is undergoing ‘corporate insolvency resolution process’ and particularly when the appeal is pending consideration of issue of attachment of property of the ‘Corporate Debtor’.

5. Similar plea has been taken by the learned Senior Counsel for the ‘Committee of Creditors’ and the learned Senior Counsel appearing on behalf of the Appellant (JSW Steel Limited) .

6. In the reply-affidavit filed by Union of India through Ministry of Corporate Affairs in consultation with Department of Financial Services and the Banks, the following statement has been made in support of stand taken by Union of India:

“3) That pursuant to the captioned notice, the Ministry had called for meeting of the officials of Department of Financial Services and the Banks who were members of the Committee of Creditors on October 3rd, 2019 to ascertain their views and formalize the response of this Ministry, in view of rippling effects it would have in this case as well as other cases as well. In the meeting, it was unanimously recognized that the rights of Secured Financial Creditors are to be protected in the resolution of the Corporate Debtor and the incumbent resolution applicant is bona fide investor who acquires and takes over the Non-performing Assets (NPA) company as a going concern and facilitates maximization of the value of assets of the corporate debtor, revival of a failing company and realization of dues of creditors to the extent possible under an open, transparent National Company Law Tribunal (NCLT) supervised process.

- 4) *It is submitted that under the process envisaged under the Insolvency & Bankruptcy Code, 2016 (“IBC”), once a Resolution Plan is approved by the Ld. Adjudicating Authority, it is binding on all stakeholders. **Before approving the Resolution Plan, objections are heard by the Ld. Adjudicating Authority and once hearing on the Resolution Plan and objections is completed before the Ld. Adjudicating Authority and the Resolution Plan is approved, such approved Resolution Plan is binding on all stakeholders, including all government agencies. The provision of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 by which Section 31(1) was amended, makes it amply clear that a resolution plan is binding on Central Government and all statutory authorities.***
- 5) *It is submitted that if any Corporate Debtor is undergoing investigation by the Central Bureau of Investigation (“CBI”), Serious Fraud Investigation Office (“SFIO”) and/ or*

*the Directorate of Enforcement (“ED”), such investigations are separate and independent of the Corporate Insolvency Resolution Process (“CIR Process”) under the IBC and both can run simultaneously and independent of each other. **It is further submitted that the erstwhile management of a company would be held responsible for the crimes, if any, committed under their regime and the new management taking over the company after going through the IBC process cannot be held responsible for the acts of omission and commission of the previous management. In other words, no criminal liability can be fixed on the successful Resolution Applicant or its officials.***

- 6) *In so far as the corporate debtor or its assets are concerned, after the completion of the CIR Process, i.e. a statutory process under the IBC, there cannot be any attachment or confiscation of the assets of the Corporate Debtor by any enforcement*

agencies after approval of the Resolution Plan. *The CIR Process is an open and transparent statutory process wherein under Resolution Plans are invited from bona fide Prospective applicants who are not hit or disqualified under Section 29A of the IBC.*

- 7) *Resolution Plan submitted by the interested Resolution Applicants are duly examined and validated by the Resolution Professional and the Committee of Creditors (“CoC”). Once the Resolution Plan is voted upon and approved by the CoC, it is submitted to the Ld. Adjudicating Authority for its approval. The Ld. Adjudicating Authority after hearing the objections, if any, and being satisfied that the Resolution Plan is in compliance with the provisions of the law, approves the Plan. The CIR Process is desired to ensure that undesirable persons do not take control of the Corporate Debtor by virtue of Section 29A of the IBC.*
- The purpose and scheme of the CIR process is to hand over the company of the corporate debtor to a bona fide new**

resolution applicant. Any threat of attachment of the assets of the corporate debtor or subjecting the corporate debtor to proceedings by investigating agencies for wrong doing of the previous management will defeat the very purpose and scheme of CIR process, which inter-alia includes resolution of insolvency and revival of the company, and the efforts of the bank to realise dues from their NPAs would get derailed. Otherwise too, the money realised by way of resolution plan is invariably recovered by the banks and public financial institutions and other creditors who have lent money to the erstwhile promoters to recover their dues which they have lent to the erstwhile management for creation of moveable or immovable assets of the corporate debtor in question and therefore, to attach such an asset in the hands of new promoters or resolution applicant would only negate the very purpose of IBC and eventually destroy the value of assets.

8) *In light of the above, it is respectfully submitted that the ED while conducting investigation under PMLA is free to deal with or attach the personal assets of the erstwhile promoters and other accused persons, acquired through crime proceeds and not the assets of the Corporate Debtor which have been financed by creditors and acquired by a bona fide third party Resolution Applicant through the statutory process supervised and approved by the Adjudicating Authority under the IBC. In so far as a Resolution Applicant is concerned, they would not be in wrongful enjoyment of any proceeds of crime after acquisition of the Corporate Debtor and its assets, as a Resolution Applicant would be a bona fide assets acquired through a legal process. Therefore, upon an acquisition under a CIR Process by a Resolution Applicant, the Corporate Debtor and its assets are not derived or obtained through proceeds of crime under the Prevention*

***of Money Laundering Act, 2002 (“PMLA)
and need not be subject to attachment
by the ED after approval of Resolution
Plan by the Adjudicating Authorities.”***

7. Taking into consideration the fact that the stand taken by the ‘Directorate of Enforcement’, is contrary to the stand taken by the Government of India, the order of attachment dated 10th October, 2019 passed by the Deputy Director, ‘Directorate of Enforcement’ with regard to part property of the ‘Corporate Debtor’ (Bhushan Power & Steel Limited) is stayed. The Director, Deputy Director and other officers of ‘Directorate of Enforcement’ are prohibited from attachment of any property of the ‘Corporate Debtor’ (Bhushan Power and Steel Limited) without prior approval of this Appellate Tribunal. The property already attached by them be released in favour of the ‘Resolution Professional’ immediately. Further, to ensure that the ‘resolution plan’ is not given effect before deciding the issue, we stay the impugned order dated 5th September, 2019, so far it relates to the payment of the creditors.

Post the case ‘for orders’ on **25th October, 2019** on the top of the list.

[Justice S.J. Mukhopadhaya]
Chairperson

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

[Kanthi Narahari]
Member (Technical)