

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL AT
ALLAHABAD, BENCH

IA NO.150/2018
IN
CP No.(IB)70/ALD/2017

IN THE MATTER OF :

MR. ANIL GOEL,
LIQUIDATOR,
ROTOMAC GLOBAL PRIVATE LTD.

.....APPLICANT

VERSUS

MS. RAMANJIT KAUR SETHI,
DEPUTY DIRECTOR,
DIRECTORATE OF ENFORCEMENT

.....RESPONDENT

IN THE MATTER OF:

BANK OF BAORDA

.....FINANCIAL CREDITOR

VERSUS

ROTOMAC GLOBAL PRIVATE LTD.

..... CORPORATE DEBTOR

ORDER DELIVERED ON 10.01.2019

CORAM : Sh. Bikki Raveendra Babu, Hon'ble Member (Judicial)
: Ms Saroj Rajware, Hon'ble Member (Technical)

For Applicant/ Liquidator :

Sh. Shubham Agarwal, Advocate

For Directorate of Enforcement/ Respondent:

Sh. Om Prakash Misra, Advocate

PER SE : Sh. Bikki Raveendra Babu, Hon'ble Member (Judicial)

ORDER

1. Liquidator Mr. Anil Goel appointed by this Tribunal vide its order dated 23.03.2018 filed this application U/s 35(1)(n) of Insolvency & Bankruptcy Code, 2016 seeking a direction to the Deputy Director, Directorate of Enforcement to withdraw its Provisional Attachment Order no.08/2018

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dated 28.05.2018 thereby de-attach the properties of the Corporate Debtor under Prevention of Money Laundering Act (PMLA) and restore the said properties to the Liquidator for the purpose of liquidation under IBC, 2016 to declare the right of the lenders/ creditors on the attached properties of the Corporate Debtor to recover their dues prevails over the right of the respondent to attach the properties under PMLA, and pass order to extend immunity to buyer of the property from any adverse action with respect to the said properties of the Corporate Debtor under PMLA proceedings, after sale of the properties by the Liquidator to such buyer under IBC, 2016.

2. The facts in brief that require for the disposal of this application are as follows:

- i. Bank of Baroda initiated Corporate Insolvency Resolution Process (CIRP) against Rotomac Global Private Ltd./ corporate debtor in CP No.(IB)70/ALD/2017. The said application was admitted by this Authority on 20.09.2017.
- ii. This Authority after the conclusion of CIRP of 180 days basing on the resolution of the Committee of Creditors (COC) and the application moved by the Resolution Professional (RP) ordered for liquidation of the Corporate Debtor and appointed RP Mr. Anil Goel as Liquidator.

3. In contra it is stated by the respondent that the Directorate of Enforcement of Delhi Zonal Office-I has vide an ECIR No.01/DLZO-I/2018 dated 18.02.2018 started investigation for commission of offence under Section 3 of Prevention of Money Laundering Act, 2002 (herein PMLA, 2002),

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punishable U/s 4 of the said Act on the basis of information/material as evident from CBI RC No.RC-BDI/2018/E/0001, CBI/BS & FC, dated 18.02.2018 under Sections 420, 467, 471, 468 & 120-B IPC and Section 13(2) r/w 13(1)(d) of the Prevention of Corruption Act.

4. It is further stated that the investigation done under the provisions of PMLA, U/s 13(2) revealed that the accused persons have misappropriated/diverted banks funds, committed criminal breach of trust and laundered the money so diverted. It is further stated that the accused persons worked for the interest rate differential in local and foreign currency in guise of Merchant Trading without having any genuine business transactions and defaulted in meeting its payments obligation to the bank by diverting and siphoning off the funds. The investigation further revealed that the Corporate Debtor indulged in merchanting trade with limited number of buyers and sellers wherein it used to receive back the discounted LC amount from the overseas beneficiary after deduction of 1.5 to 2 % commission by them either directly into the accounts of Rotomac group companies or into the accounts of overseas companies controlled by Mr. Vikram Kothari. This discounted LC amount thereafter have been used by M/s Rotomac Global Pvt. Ltd. for other business activities such as FDR, Iron ore purchase and investment in real estate. It is also stated that the overseas companies were controlled by Mr. Vikram Kothari.

5. The Directorate of Enforcement basing on the material and evidences on record and exercising the powers conferred by Sub-Section (1) of Section 5 of the Prevention of Money Laundering Act, 2002, a Provisional Attachment Order No.08/2018 dated 28.05.2018 attaching the properties provisionally lying in name of Corporate Debtor and its Directors wherein

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it was further ordered that the same shall not be transferred, disposed, parted with or otherwise dealt with in any manner, whatsoever, until or unless specifically to do so by the Directorate.

6. It is further stated that the properties in question and mentioned in PAO that were attached fall within the definition of 'Proceeds of Crime' in terms of Section 2(1)(u) of the PMLA and the same were provisionally attached vide PAO No.08.2018 dated 28.05.2018. It is further stated that the property provisionally attached constitutes the value of such proceeds of crime.
7. Respondent relied upon the decision of Hon'ble Appellate Tribunal, New Delhi under Prevention of Money Laundering Act in the case of *Chief Manager, Syndicate Bank v/s Dy. Director, PMLA* held as under :-

"It has also been held by the Supreme Court in a number of judgments that the conflict of non-obstante clause arising in respect of two enactments has to be resolved on consideration of policy underlying the enactments and the language used in them [Sarvan Singh, v Kasturilal (AIR 1977 SC 265); Kamayu Motors Association v. State Uttar Pradesh (AIR 1966 SC 785)]. The Prevention of Money Laundering Act has been enacted to provide for forfeiture of proceeds of crime involved in money laundering which was considered necessary to deprive persons engaged in serious illegal activities and have thereby been increasing their resources for operating in clandestine manner. The Act was created to forfeit illegal properties and to prevent the money laundering activities which are threat to financial system of the country and its integrity and sovereignty. Further the question of prevalence of a subsequent legislation will only come into picture when there is a conflict between the two statutes. The securitisation Act has been enacted for the purpose of establishing an expeditious system for recovery of debts due to Banks and for matters connected therewith or incidental thereto. It only lays down a procedure for recovery of debts due to Banks. The Prevention of Money Laundering Act vests the statutory authorities with a power to forfeit proceeds of crime involved in money laundering to the state. There is thus no apparent conflict between the two statutes. The two

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statutes operate in their exclusive fields. The question is only who will have his first claim on any property where the claim of the State concurs with the claim of any other person. Halsbury explaining the crown's rights, in relation to property states that where the crown's right and that of a subject under it meet at one end and at the same time, that of the crown in general is preferred."

8. It is contended by the respondent that in view of Section 9 of PMLA, in case an order of confiscation has been made under sub-section (6) of Section 8 of the PMLA in respect of any property of a persons, all the rights and little in such property shall vest absolutely in the Central Government free from all encumbrances.
9. It is contended that the mortgage or creating a charge over the properties of the Corporate Debtor in favour of the banks and other lenders is only encumbrance of the properties. It is contended that in view of Section 9, if confiscation has been made under sub-section (6) of Section 8, such property shall vest in the Central Government free from all encumbrances.
10. It is also contended that State will have first right to confiscate the proceeds of crime over the right of person to recover their debts from an accused. It is stated that the Applicant/Liquidator has got alternative remedies available U/s 8, 26 and 42 of the PMLA Act, 2002. It is for the Applicant/ Liquidator to project his case before the appropriate Authority U/s 8, 26, and 42 of the PMLA Act, 2002, in case, if the rights of the secured creditors or other creditors is affected.
11. It is also stated that in view of Section 8(8) of PMLA, special court may, if it thinks fit, consider the claim of the claimant for the purpose of restoration of such property during the trial of the case in such manner as may be prescribed.

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12. It is contended that the moratorium order passed by the Adjudicating Authority under the provision of I & B Code is not applicable to the criminal proceedings, if any, initiated under the provisions of Prevention of Money Laundering Act, 2002 and the proceedings before the Enforcement Directorate and to the criminal cases initiated by the Central Bureau of Investigation. On this aspect respondent relied upon the decision of NCLT, Ahmedabad Bench in the matter of *PNB v/s Sidhi Vinayak in CP(LB) No.89/7/NCLT/AHM/2017 dated 12.09.2017*.
13. It is also contended that Section 71 of the PMLA, 2002 gives overriding effect to the provisions of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force.
14. On the other hand, it is contended by the learned counsel for the Liquidator that the Provisional Attachment Order issued by the respondent under PMLA, 2002 is in violation of Section 33(5) read with section 238 of IBC, 2016. It is contended that no suit or other legal proceeding shall be instituted by or against the Corporate Debtor after liquidation order has been passed in view of Section 33(5) of IBC. It is stated that respondent instituted legal proceedings under PMLA for attachment of properties after the liquidation order was passed. It is further stated that there exists a direct inconsistency between the provisions for liquidation of the Corporate Debtor provided in Chapter III of the IBC and the provisions for attachment/ freezing/ seizure of properties contained in the PMLA.
15. It is stated that the property which is part of liquidation estate is provisionally attached by the respondent and therefore, it is not available for being included within the liquidation estate. It is contended that in view of the inconsistency between PMLA Act, 2002 and the I & B Code,

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2016 the provisions of IBC which are latter in the point of time ought to prevail over the former. On this aspect applicant counsel relied upon the decision in the matter of *Solidare India Limited v/s Fair Growth Financial Services Private Limited & Ors.* (2001) 3 SCC 71, wherein it has been conclusively held that where two statutes contain non-obstante clause, later statute would prevail.

16. It is also contended that the attachment adversely affects the interest of the creditors. On this aspect the applicant relied upon the decision of Hon'ble Bombay High Court in the matter of *In Re: Aryarup Tourism Club Resorts Private Limited and Ors.*, [2017] 203 CompaCas220(Bom), wherein it is held as under:

"119. In my view, the Official Liquidator acts as trustee and custodian of all such properties and assets of companies in liquidation and is empowered to deal with such properties of the companies in liquidation for the purpose of distribution of the proceeds of those properties amongst the creditors in accordance with the provisions of the Companies Act, 1956 and under supervision of this court. There is no merit in the submission of the learned A.G.P. that in view of section 6(1) of the MPID Act, no other court than the designated court shall have jurisdiction in respect of the properties of the financial establishment though such financial establishment are already wound up under the provisions of the Companies Act, 1956 or that the Official Liquidator cannot seek any direction in respect of the properties attached by the competent authority as prayed in the report filed by the Official Liquidator.

120. In my view since there is no conflict between the Companies Act, 1956 and the MPID Act and both operates in different field, the Judgment of Supreme Court in case of *Central bank of India Vs. State of Kerala and others* (supra) relied upon by the learned A.G.P. would not assist his case."

"128. In my view for the purpose of considering the claims of the secured and unsecured creditors,

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the preferential creditors and also the claims of the investors/depositors etc., the properties which are admittedly standing in the name of the companies in liquidation attached by the competent authority under the provisions of the MPID Act are required to be handed over to the Official Liquidator for the purpose of sale and physical control thereof. The competent authority is thus required to be issued an order and direction to handover the physical possession, custody and control of all such properties standing in the name of the aforesaid companies in liquidation which are attached by the competent authority under the provisions of the MPID Act to the Official Liquidator expeditiously."

17. It is further stated that the interest of the creditors of the Corporate Debtor to recover their dues under special legislations has also been recognized in the Finance Act, 2018 Section 208(c)(ii) has introduced amendment in Section 8(8) of PMLA to consider the claim of the claimant for the purpose of restoration even during trial in such manner as may be prescribed. The provision after the proposed amendment shall read as under :-

"(8) Where a property confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed." (Amendment proposed vide section 208(c)(ii) of Finance Act, 2018).

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18. It is stated that the applicant being Liquidator appointed by this Tribunal is acting in good faith on behalf of claimants and will suffer quantifiable loss if the properties are not de-attached that form of part of the liquidation estate are subject to attachment under the provision of PMLA, 2002.
19. It is stated that Section 2(b) of the Prevention of Money Laundering (Restoration of Confiscated Property) Rules, 2016, the claimant is a person who has acted in good faith and has suffered a quantifiable loss as a result of the offence of money laundering despite having taken all reasonable precautions, and is not involved in the offence of Money Laundering.
20. It is further contended by the applicant that the Appellate Tribunal of PMLA has also recognized the right of secured creditors in the matter of FPA-PMLA-1026/KOL/2015 & another 10 appeals titled *State Bank of India V/s The Joint Director, Directorate of Enforcement, Kolkata*. The operative part of the judgment is as under :-

"65. From the entire gamut of the matter we are of the view that there is no nexus whatsoever between the alleged crime and the two bank who are mortgagee of all the properties which were purchased before sanctioning the loan. Thus no case of money-laundering is made out against banks who have sanctioned the amount which is untainted and pure money. They have priority to the secured creditors to recover the loan amount/debts by sale of assets over which security interest is created, which remains unpaid. The Ld. Adjudicating Authority has not appreciated the facts and law involved in these matters and the primary objective of Section 8 of PMLA is that the Adjudicating Authority to take a prima facie view on available material and facts produced. All the contentions raised by Mr. Matta has no substance. The provisional attachment in the present matter is bad and against the law.

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In the circumstances available in the present case, the allegation of money laundering prima facie found to be unsustainable for the purpose of attachment under the PMLA, 2002.

66. In view of aforesaid facts and circumstances in the present case and for reasons referred above, we set aside the Impugned Order dated 02.07.2015 and the provisional attachment order dated 04.02.2015. All the eight properties are released from attachment forthwith."

21. Ld. Counsel for the applicant further relied upon the judgment of NCLT, Kolkata Bench in the case of *Mr. Anil Goel, Liquidator (Applicant) v/s Deputy Director, Directorate of Enforcement (Respondent) in the matter of Surendra Kumar Joshi (Operational Creditor) v/s REI Agro Limited (Corporate Debtor) in CA (IB) No.453/KB/2018 in CP (IB) No.73/KB/2017*, wherein the NCLT, Kolkata Bench relying upon the decision of Hon'ble Supreme Court in case of *Solidare India Private Ltd. v/s Fair Growth Financial Services Private Ltd & Ors.* held that the Adjudicating Authority has every power and jurisdiction to consider the aspect of distribution of assets of the company under the liquidation and the Court established under PMLA Act being a criminal Court can only decide whether the properties attached during investigation from possession of the Corporate Debtor could be said to be the properties acquired by them using proceeds of crime.
22. It is further held by the NCLT, Kolkata Bench that it is for the Tribunal to decide as to how the properties and assets of the Corporate Debtor under liquidation can be appropriated. The NCLT, Kolkata Bench held that the liquidator must get possession of the properties attached by the Enforcement Director, New Delhi.

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23. In the rejoinder, it is stated that if the appropriate relief to the applicant is not granted, it would increase the liquidation cost, since the Liquidator has to engage legal counsel to contest the case before Special Court PMLA. It is also stated the speed is the essence for working of the Bankruptcy Code and there will be value destruction if the liquidation is delayed.
24. In the rejoinder, applicant also referred to Section 8(8), wherein the Special Court can consider the claims, if the claimant acted in good faith and had suffered the loss in spite of taking all reasonable precautions and is not involved in the offence of money laundering.
25. It is contended by the learned counsel appearing for the Liquidator that the Liquidator acted in good faith and the lenders also acted in good faith and therefore the properties mortgaged to the lenders wherein security interest is created, has to be de-attached from the order of attachment.
26. It is contended that the proceedings under the Prevention of Money Laundering Act may not get frustrated even if this Authority de-attached the properties provisionally attached by the Enforcement Directorate. It is said that if the properties of the Corporate Debtor are not de-attached and hand over to the Liquidator, the rights of the creditors would be deprived.
27. It is contended that in Section 6(15) of the PMLA, it is stated that the procedure laid down by the CPC is not applicable and therefore it can be said that the proceedings under PMLA are civil in nature but not criminal. It is argued that if the proceedings are criminal in nature, it would have been mentioned in Section 6(15) that the Authority under PMLA is not bound by the procedure laid down by the Cr.P.C.

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28. This Authority vide its order dated 14.09.2018 directed the Liquidator to provide the details of the attached assets on which the Bank has relinquished security interest reserving the question of validity of the provisional attachment order under PMLA.
29. Pursuant to the said order, Liquidator filed additional affidavit, wherein assets attached by the Enforcement Directorate on which the secured creditors have charged and stating whether they have relinquished their security interest or not. The table is here under :-

Sl. No.	Description of property being attached	Charge on the property	Status of Relinquishment
1.	Office No. 901 on 9 th Floor, "Raheja Complex", Nariman Point, Mumbai	United Bank of India	Relinquished
2.	Office No. 401 and 402, Fourth Floor, Wing – C, Lotus Corporate Park, Western Express Highway, Goregaon (E), Mumbai	United Bank of India	Relinquished
3.	Office No. 511, 513 & 515 at Fifth Floor, Pinnacle Corporate Tower, (Near – Royal Office), Prahalad Nagar, Satellite, Vijalpur, Ahmedabad	Bank of Baroda (28.03.2014)	Relinquished
4.	Open Plot No. 77, Survey No. 62/P at Mauji Rakhail, Distt. Ahmedabad	Bank of Baroda (28.03.2014)	Relinquished
5.	Unit No. 201 at Second Floor, Part of Premises No. 63/2, The Mall Kanpur	Allahabad Bank	Relinquished
6.	Office No. 201, 202, 223 and 223A at Second Floor, Part of Premises No. 63/2, The Mall City Centre, Kanpur Nagar	Freehold	Relinquished
7.	Open Land bearing Premises No. 24/6, Tulsa Kothi, Mall Road, Kanpur Nagar	Allahabad Bank	Relinquished
8.	Flat No. 803, at 8 th Floor, "Shyam Vrund Apartment", Ring Road Satellite, Ahmedabad	Allahabad Bank	Relinquished
9.	Open Land Situated at Survey No. 756/1 and 756/2, Moje-Kolat, Taluka Sanand Distt – Ahmedabad	Bank of India (16.11.2013)	Relinquished
10.	Plot No. A – 101 to 106, A – 128 to 130, A – 134 to A – 157 at	Bank of India (16.11.2013)	Relinquished

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	Karma-Bhumi – 2, Mauje – Vansajda Dhedia, Takalol, Distt. Gandhi Nagar		
11.	Premises No. CF – II, Industrial Area Panki, Site No. 3, Kanpur Nagar	Working Capital Consortium of 7 Banks	Relinquished
12.	Premises No. D-2, Industrial area Panki, Site No. 3, Kanpur Nagar	Working Capital Consortium of 7 Banks Date 6/10/2015	Relinquished
13.	Premises No. D-3, Industrial area Panki, Site No. 3, Kanpur Nagar	Working Capital Consortium of 7 Banks Date 6/10/2015	Relinquished
14.	Premises No. D-4 & D-5, Industrial area Panki, Site No. 3, Kanpur Nagar	Working Capital Consortium of 7 Banks Date 6/10/2015	Relinquished
15.	Premises No. D-6, Industrial area Panki, Site No. 3, Kanpur Nagar	Working Capital Consortium of 7 Banks Date 6/10/2015	Relinquished
16.	Premises on Plot No. 788/P, Paiki National Highway No. 81, Gram-Moje Rojoda Bavla, Ahmedabad	Working Capital Consortium of 7 Banks	Relinquished
17.	Premises on Plot No. 415, Paiki Village – Moraiya, Taluka – Sanand, Ahmedabad	Working Capital Consortium of 7 Banks	Relinquished
18.	Plant and Machinery including mould electrical at Ahmedabad	Bank of India (06.09.2007)	Relinquished
19.	Plant and Machinery including mould electricals at Kanpur	Bank of India (06.09.2007)	Relinquished
20.	Other fixed assets such as office equipments, Furniture & Fixture, A.C., Vehicles (except Landrover) etc.	Working Capital Consortium of 7 Banks	Relinquished
21.	Landrover bearing Registration No.JH 05 AY 0777	Punjab National Bank (Exclusive)	Not Relinquished realized u/s 52(1)(b)

30. First of all, we would like to discuss on the aspect the relevancy of relinquishment of security interest by the secured creditors. Section 53 of the Code deals with the distribution of proceeds of sale of the liquidation assets. Section 53(1)(b)(ii) says, debts owed to a secured creditor in the event such secured creditor has relinquished security interest in the

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manner set out in Section 52, then the secured creditor is entitled for distribution of the proceeds of the sale of the liquidation assets on par with the workmen's dues for the period of 24 months preceding the liquidation commencement date.

31. Section 52(1) of the I & B Code gives an option to the secured creditor to relinquish its security interest to the liquidation asset and receive proceeds from the sale of assets by the liquidator in the manner specified in Section 53 or to realise its security interest in the manner specified in Section 52(2).
32. Sections 52(7) says, by enforcing the security interest if the secured creditor yield more amounts that exceed the debts due to him, the secured creditor shall account the surplus to the Liquidator and tender the surplus amount to the Liquidator and such amount has to be transferred to the Liquidator and it forms part of liquidation estate. Therefore, even if the secured creditors relinquished their security interest or they did not relinquish their security interest, has no relevancy for the simple reason that in case secured creditor realise more amount than that his debt amount has to be treated as a part of liquidation estate. In case secured creditor did not realise the amount by sale of security interest equal to his debt then the Liquidator has to pay the unpaid debt to the secured creditor in the manner provided in clause (e) of sub-section (1) of Section 53.
33. Therefore, we are of the considered view that relinquishment of the security interest of the secured creditor is not going to decide, whether attachment order passed by the Enforcement Directorate has to be upheld or not.

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34. The following points emerge for determination in this case :-
- i. The overriding effect provided in Section 71 of the PMLA, 2002 or the overriding effect provided in Section 238 of the I & B Code would prevail over the other.
35. It is contended by the learned counsel appearing for the Liquidator relying upon the judgment of the Hon'ble Supreme Court in *Solidare India Limited v/s Fair Growth Financial Services Private Limited & Ors. (2001) 3 SCC 71*, in that decision it is held that where two statutes contain non-obstante clause, later statute would prevail. No doubt, I & B Code is later in point of time.
36. Section 238 of the I & B Code contain non-obstante clause giving overriding effect over other laws in existence if there is a conflict between the provisions of I & B Code and the other laws.
37. It is contended by the learned counsel for the Enforcement Directorate relying upon the judgment of Hon'ble Appellate Tribunal, New Delhi under Prevention of Money Laundering Act in the case of *Chief Manager, Syndicate Bank v/s Dy. Director, PMLA* referring the judgment of Hon'ble Supreme Court of India in the matter of [*Sarvan Singh, v Kasturilal (AIR 1977 SC 265)*; *Kamayu Motors Association v. State Uttar Pradesh (AIR 1966 SC 785)*], that the question of prevalence of a subsequent legislation will only come into picture when there is a conflict between the two statutes.
38. In that view of the matter, now it has to be seen, the object of passing the PMLA and the object of bringing I & B Code. The object of enacting PMLA is to provide for forfeiture of proceeds of crime involved in money

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laundering which was considered and necessary to deprive persons engaged in serious illegal activities and have thereby been increasing their resources for operating in clandestine manner. The PMLA was created to forfeit illegal properties and to prevent the money laundering activities which are threat to financial system of the country and its integrity and sovereignty.

39. The object of bringing I & B Code is to maximize the assets of the Corporate Debtor balancing the interest of all the stakeholders. This is one way to find out the resolution to revive a company, which is debt ridden and in case not able to revive the company, to liquidate the company and distribute the liquidation assets to the creditors. Now in one way the object of the I & B Code also may help to increase the economy of the country but mainly it relates to a body corporate and its creditors.
40. The object of bringing PMLA is to prevent money laundering and to provide for confiscation of property derived from or involved in money laundering. Both the enactments i.e. PMLA, 2002 and the I & B Code are the legislations made by the Parliament. The object of PMLA is broader in perspective than the object of the I & B Code. The provisions of the I & B Code deals with only the company and its creditors and the assets of the corporate company and the debts due to the creditors. A mechanism is provided in the I & B Code to revive the company, to pay the debts, to maximise the assets. Whereas mechanism is provided under the PMLA to prevent money laundering by persons who are involved in crimes and earning money to their personal advantage and to the disadvantage of the nation. Therefore, we are of the considered view that the object of PMLA is wider in scope when compared to the object of the I & B Code.

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41. The Hon'ble Supreme Court in the judgment of *Solidare India Limited v/s Fair Growth Financial Services Private Limited & Ors.* (2001) 3 SCC 71 dealt with Section 32 of SICA Act and Section 13 of the Special Court (Trial of Offences Relating of Transactions and Securities) Act, 1992. In that case Securitization Act is of the year 1995, whereas the Special Court (Trial of Offences Relating of Transactions and Securities) Act is of the year 1992. The Hon'ble Supreme Court held that there is a conflict between the provisions of these two Acts and therefore held that the provisions of Special Court (Trial of Offences Relating of Transactions and Securities) Act, 1992 would prevail over the other Act being a later enactment on the ground that the legislature knowingly included non-obstante clause in the Special Court (Trial of Offences Relating of Transactions and Securities) Act, 1992 about the existence of Section 31 of the SIC Companies Act. The Hon'ble Kolkata Bench in CA (IB) No.453/KB/2018 in CP (IB) No.73/KB/2017 has not considered whether there is any inconsistency between the provisions of PMLA and provisions of I & B Code. Moreover, the decision of learned Single Member is only having persuasive value but not binding precedent.
42. Therefore, it is settled position of law that where two statutes contain non-obstante clause, the later statute must prevail, provided if there is inconsistency between the two enactments. The PMLA vests the statutory authorities with a power to forfeit proceeds of crime involved in money laundering to state. The I & B Code vests the statutory authorities with a power to approve the resolution plan and to supervise the liquidation process, with an object to maximise the assets of the Corporate Debtor and to revive the company. Moreover, jurisdiction is given to the Authorities in

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the PMLA to decide whether the properties attached are the proceeds of crime or not. Therefore, this Authority is of the view that there is no inconsistency between the PMLA and I & B Code and they operate on two different aspects. The inconsistency that is sought to be projected is, that if the property or a part of property comprised in liquidation estate is attached, it is not available to the creditors of the secured and unsecured creditors. If the property of the Corporate Debtor is a proceed of crime and ultimately it is confiscated under the provision of PMLA it must go to the Central Government, unless and until the claimant establish that he has purchased that property or he has taken that property as a security interest for the loan advanced by him in good faith and for a consideration. Therefore, in case the proceeds of crime is allowed to go to the creditors of offenders that involved in money laundering, the object of PMLA would be defeated.

43. The following are the remedies provided under the PMLA.

- (i) The order passed by the respondent in this case is U/s 5(1) of the PMLA. The said order has to be confirmed by the Adjudicating Authority U/s 8 of the PMLA. The Adjudicating Authority U/s 8(2) of the PMLA shall consider the objection of the aggrieved persons and then only pass an order confirming the attachment. Therefore, the Liquidator has got an opportunity to approach the Adjudicating Authority under the PMLA, seeking order for raising attachment.
- (ii) Section 9 of the PMLA says, in case an order of confiscation has been made under sub-section (5) or sub-section (7) of Section 8 or Section 58(b) or sub-section 2(A) of Section 60 of PMLA, in respect of any property of a person, all rights and title in such property shall

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vest absolutely in Central Government free from all encumbrances. Here the right of the secured creditor is nothing but encumbrance. Therefore, in case an order of confiscation is passed, the property vest in Central Government.

- (iii) Proviso to Section 9 gives power to the Special Court to declare that the particular encumbrance has been created with a view to defeat the provisions of PMLA. It may declare such encumbrances, after giving opportunity of hearing to the persons interested in the property. It creates an opportunity for the secured creditors through Liquidator to represent that the encumbrance has not been created with a view to defeat the provisions of the PMLA.
- (iv) Section 8 of the PMLA deals with adjudication. Section 8(8) comes into picture after the property stands confiscated to the state under sub-section (5) of Section 8. Even after the properties confiscated to the Central Government, the Special Court may direct the Central Government to restore the confiscated property or part thereof to a claimant with a legitimate interest in the property, who had suffered a quantifiable loss as a result of the offence of money laundering. However, the claimant has to establish that he has acted in good faith and has suffered loss despite having taken all reasonable precautions. In view of the amendment to Section 8(8) of the Code brought in by Section 208(c)(ii) of the Finance Act, the following provisions is added w.e.f 28.03.2018.

“Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.”

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44. Therefore, the claimant of a property has got opportunity during the trial of the case before Special Court and even after confiscation order is passed by the Special Court. Provided, if the claimant is able to establish that he acted in good faith and suffered loss. This remedy also can be availed by the Liquidator to safeguard the interest of the secured creditors.
45. Now, the question is, whether the proceedings under PMLA are criminal in nature or civil in nature? It is contended by the Liquidator, that Section 11 of the PMLA says that the Adjudicating Authority is vested with the powers that are vested in Civil Court under the Code of Civil Procedure and therefore the proceedings are civil in nature. What is laid down in Section 11 of the PMLA is regarding summoning, production of documents and taking of evidence. The aspects in respect of which the Adjudicating Authority under PMLA is having powers is only enumerated U/s 11(1) of the Act. Therefore, Section 11 of the PMLA cannot be said as a guiding factor to say that the proceedings before the Adjudicating Authority or the Special Court are civil in nature.
46. It is further contended that Section 6(15) of PMLA says that the Adjudicating Authority shall not be bound by the procedure laid down by the CPC and it has to follow the principle of nature justice and that would go to show that the proceedings under PMLA are civil in nature. It is contended that, if the proceedings are criminal in nature, it would have been stated that the procedure laid down in the Cr.P.C need not be followed.
47. Section 11 of the PMLA lays down that in respect of certain aspects only CPC has to be followed by the Adjudicating Authority. Section 7(15) of the PMLA lays down that the Adjudicating Authority is not bound by the

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procedures laid down by the CPC. That means, Adjudicating Authority has got powers on certain aspects as laid down in Section 11 of the Code. Further, a reading of the object of the PMLA and the punishment provided for the offences go to show that the proceedings are criminal in nature but not civil in nature.

48. The argument that moratorium comes into operation even in respect of the proceedings filed or pending before the Authorities under PMLA can be raised before the Authority under PMLA Act.
49. From the above discussion the conclusion is, that the properties attached in this case under the provisions of the PMLA, no doubt form part of the liquidation estate, irrespective of the fact, whether the secured creditor relinquished their security interest or not. Procedure is provided for distribution of the liquidation assets in I & B Code. The manner in which the proceeds of crime has to be dealt with is provided in the provision of PMLA. In other words, the procedure laid down under PMLA deals with proceeds of crime in case of money laundering, whereas the procedure laid down under I & B Code deals with distribution of liquidation assets. It is for the Authorities under the PMLA to finally decide that the money laundering has been committed or not and whether the property is acquired by way of proceeds of crime or not. The said function cannot be taken over by Adjudicating Authority under the I & B Code. 'Proceeds of crime' is defined in Section 2(1)(u) of PMLA, "Proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. It is pertinent to note that the value of any property acquired is also included in the proceeds of crime.

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50. It is contended by the learned counsel for the Liquidator relying upon the decision in the case of *State Bank of India V/s The Joint Director, Directorate of Enforcement, Kolkata*, wherein it is held that no case of money laundering is made out against the banks who have sanctioned the amount, which is untainted and pure money. It is also held in that decision that they have priority to the secured creditors to recover the loan amount/debts by sale of assets over which security interest is created, which remains unpaid. In that case, it is held that the allegation of money laundering prima facie found to be unsustainable and thereby set aside the provisional attachment order. Even the above said discussion clearly state that it is for the Authority under the PMLA to decide whether the properties attached are proceeds of crime or not.
51. In the case on hand, whether an offence of money laundering has been prima facie made out or not and the properties that are mortgaged to the bank and other lenders, thereby creating security interest are "proceeds of crime", or not has to be decided only by the Adjudicating Authority or the Appellate Authority or the Special Court under the provision of PMLA but not by this Adjudicating Authority exercising jurisdiction under the I & B Code.
52. Two different enactments i.e. PMLA, 2002 and I & B Code provide two different hierarchies of functionaries to decide the controversies that arise under the respective enactments. When such is the case one authority cannot interfere with the functions of the other Authority under a different enactment. It is already said there is no repugnancy in procedure that is being followed for liquidation of the asset of the corporate debtor and the procedure to be followed in case of proceeds of crime, where an offence of

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money laundering has been committed. It is already said even if an offence of money laundering is committed, the claimant who are having security interest over the properties of the Corporate Debtor, can still ask for release of the properties, if they are able to establish they acted in good faith and they parted with valuable consideration in the form of sale consideration or debt and/ or that the properties attached are not proceeds of crime.

53. Therefore, the Liquidator is at liberty to approach the Authorities under PMLA and seek order to release the properties from the attachment on the ground that the properties attached are not proceeds of crime and the lenders are bonafide lenders and it is for the authorities under PMLA Act to decide such issues based on the record of investigation and other material placed on record before then, uninfluenced by any of the findings or observations or opinion expressed in this order.
54. In view of the above discussion the reliefs prayed in the petition cannot be granted without liquidator taking recourse to remedies provided under PMLA Act.
55. Application (IA No.150/2018) is disposed of accordingly.

Dated: 10.01.2019

— Sd —
(SAROJ RAJWARE)
MEMBER (TECHNICAL)

— Sd —
(BIKKI RAVEENDRA BABU)
MEMBER (JUDICIAL)

Typed by:
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