

Directorate Of Enforcement Government ... vs Manoj Kumar Agarwal on 1 March, 2024

Author: B. P. Colabawalla

Bench: B. P. Colabawalla

2024:BHC-OS:3372-DB

WPL-9943-2023 & WP-29111-2023.d

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.9943 OF 2023

1. Mr. Shiv Charan,
having his address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad - 500 034.
2. Mr. Pushpalata Bai
having her address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad - 500 034.
3. Ms. Bharti Agarwal
having her address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad - 500 034.

....Petitioner

Versus

1. Adjudicating Authority
under the Prevention of Money Laundering
Act, 2002, Department of Revenue,
Ministry of Finance, New Delhi.
2. Deputy Director, Directorate of
Enforcement, Mumbai Zonal
Office-II, Kaiser-I Hind Building,
Ground Floor, Currimbhoy Road,
Ballard Estate, Mumbai - 400 001.

....Respondent

ALONG WITH

WRIT PETITION (L) NO.29111 OF 2023

Directorate of Enforcement
Government of India,
Ministry of Finance Department of Revenue,
301-302, 3rd Floor, Ceejay House,
Worli, Mumbai - 400 018.

....Petitioner

Versus

1. Mr. Shiv Charan,

Page 1 of 36
March 01, 2024

Aarti Palkar/Shraddha

::: Uploaded on - 01/03/2024

::: Downloaded on -
WPL-9943-2023 & WP-29111-2023.docx

having his address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad 500 034.

2. Mr. Pushpalata Bai,
having her address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad - 500 034.

3. Ms. Bharti Agarwal,
having her address at
8-2/626/2, Sri Krishna House,
Road No.10, Banjara Hills,
Hyderabad - 500 034.

....Respondents

Mr. Devang Vyas, ASG a/w. Mr. Ashish Chavan, Mr. Shelang Shah
& Mr. Zishan Quazi, Advocates for Petitioner in WPL/29111/2023
and Respondents in WPL/9943/2023.

Mr. Vikram Nankani, Senior Advocate a/w. Mr. Mayur
Khandeparkar, Ms. Akanksha Saxena, Mr. Aditya Ajgaonkar, G.
Aniruth Purusothaman & Joshua Borges, Advocates for Petitioners
in WPL/9943/2023 and Respondents in WPL/29111/2023.

CORAM :

B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

Reserved on : 9TH JANUARY , 2024

Pronounced on : 1ST MARCH, 2024

JUDGMENT:

(Per: Somasekhar Sundaresan, J.)

1. Rule. Respondents in each petition, waive service. By consent of parties, rule made returnable forthwith, and both the petitions are taken up for hearing and final disposal.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

2. The implications of Section 32A of the Insolvency and Bankruptcy Code, 2016 (for short, the "IBC, 2016") for corporate debtors and their assets, upon approval of resolutions, and indeed for enforcement agencies that have attached assets of such corporate debtors, fall for consideration in the captioned Writ Petitions. Section 32A of the IBC, 2016 provides for immunity to corporate debtors and their assets, upon approval of a resolution plan, subject to certain conditions stipulated in that provision.

Factual Matrix:

3. The case at hand involves resolution of DSK Southern Projects Private Limited ("Corporate Debtor") under the IBC, 2016. The Corporate Debtor had been subjected to a Corporate Insolvency Resolution Process ("CIRP") since 9th December, 2021 at the instance of a financial creditor. Eventually, a resolution plan propounded by Mr. Shiv Charan, Ms. Pushpalata Bai and Ms. Bharti Agarwal ("Resolution Applicants") came to be approved by the Learned National Company Law Tribunal, Mumbai ("NCLT") by an order dated 17th February, 2023 ("Approval Order") passed under Section 31 of the IBC, 2016.

4. On 20th October, 2017 i.e. nearly four years prior to the commencement of the CIRP, various First Information Reports alleging, among others, offences of cheating and criminal breach of trust had been filed against the Corporate Debtor and its erstwhile promoters. The offences alleged, being "scheduled offences" under the Prevention of Money Laundering Act, 2002 (for short the "PMLA, 2002"), an Enforcement Case Information Report being ECIR/01/MBZO-II/2018 dated 8th March, 2018 ("ECIR") came to be filed by the Directorate of Enforcement ("ED"). The ECIR estimated the "proceeds of crime" to be in the order of Rs. 8,522.27 crores. Pursuant to the ECIR, an "original complaint" being O.C.No.1104/2019 came to be filed by the ED, leading to attachment proceedings, amongst others, against the assets of the Corporate Debtor. Four bank accounts of the Corporate Debtor with an aggregate balance of Rs.3,55,298/-, and 14 flats constructed by the March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Corporate Debtor valued at Rs.32,47,55,298/- (aggregating to Rs. 32,51,10,596/-) were attached ("Attached Properties"). The attachment was levied initially, by way of a provisional attachment under Section 5 of the PMLA,

2002 on 14th February, 2019, and subsequently continued, by a confirmatory order dated 5th August, 2019 passed by the Adjudicating Authority under Section 8 of the PMLA, 2002. The attachment continued even after the commencement of the CIRP, and further continued even after approval of the resolution plan. It is the continuation such attachment that lies at the heart of these proceedings.

5. Writ Petition (L) No.9943 of 2023 ("WP 9943"), is filed by the Resolution Applicants against the Adjudicating Authority under the PMLA, 2002 as Respondent No.1 and the Deputy Director, ED, as Respondent No.2. The Resolution Applicants seek quashing of the ECIR, the orders attaching the Attached Properties and the "original complaint", based on which the attachment was effected - all, insofar as they relate to the Corporate Debtor and its assets. The Resolution Applicants seek a writ directing the Respondents to release the Attached Properties, pursuant to the Approval Order. The Approval Order [at Paragraph 17(e)], by relying upon Section 32A of the IBC, 2016, had explicitly directed the ED to release the Attached Properties.

6. Writ Petition (L) No.29111 of 2023 ("WP 29111") is filed by the ED challenging the authority and legal capacity of the NCLT to pass orders invoking Section 32A of the IBC, 2016 in a manner that (according to the ED) renders nugatory, the PMLA, 2002 and its legislative objective. The ED did not seek quashing of the Approval Order, but has sought quashing of a subsequent order dated 28th April, 2023 ("April 2023 Order"), whereby, the NCLT directed the ED (yet again) to release the Attached Properties. The April 2023 Order disposed of an interim application being IA/383/2022 ("IA 383") that had been filed on 10 th January 2022 (prior to the Approval Order) by the Resolution Professional, seeking a direction to the ED to release the Attached Properties on the premise that the March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx attachment must come to an end once a moratorium under Section 14 of the IBC, 2016 comes into effect (in this case, with effect from 9 th December, 2021). The NCLT ruled in the April 2023 Order that once the moratorium commenced, the attachment must abate, but nevertheless took note of the final approval contained in the Approval Order, and ruled that by reason of Section 32A, the Attached Properties must be released.

Contentions of the Parties:

7. Mr. Devang Vyas, the Ld. Additional Solicitor General, representing the ED (and the Adjudicating Authority under the PMLA, 2002) in both petitions, drew our attention to the prayers in the respective petitions to submit that the Resolution Applicants have other appropriate, alternate and efficacious remedies at their disposal and they ought not to have filed a writ petition. In contrast, he submitted, the ED did not have an alternate efficacious remedy since its challenge is to the April 2023 Order, on the premise of an evident and inherent lack of jurisdiction of the NCLT to opine on matters that have implications on the PMLA, 2002. Therefore, he submitted, the ED's writ petition would indeed be maintainable.

8. Mr. Vyas would also contend that the prayers of the Resolution Applicants in WP 9943 as framed, were extreme and not worthy of being granted insofar as the Resolution Applicants want the Attached Properties i.e. the assets of the Corporate Debtor to be handed over to the Resolution

Applicants. IA 383 had sought release of the Attached Properties prematurely - even before the resolution plan came to be approved - and it is that application that was allowed by the April 2023 Order. Mr. Vyas would also argue that the Resolution Applicants are treating the Writ Court as an Execution Court to execute an order of the NCLT, the statutory remedy for which, he would argue, lies elsewhere - Section 424(3) of the Companies Act, 2013 ("Companies Act") and Rule 56 and 57 of the NCLT Rules, 2016 ("NCLT Rules").

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

9. In a nutshell, Mr. Vyas' core submissions can be summarized under three heads, namely:-

(i) The attachment by the ED had been provisionally made and finally confirmed well prior to the initiation of the CIRP i.e. before the protection of moratorium under the IBC, 2016 commenced. Therefore, when the CIRP started, it was public knowledge that the Attached Properties were the subject matter of the ED's attachment under the PMLA, 2002. Any person aggrieved by such attachment had a statutory right to appeal under Section 26(1) of the PMLA, 2002 and approach the designated Appellate Tribunal. Even where an attachment eventually leads to confiscation under Section 8(5) of the PMLA, 2002, any person with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offense of money laundering, is entitled to apply to the Special Court under Section 8(8) of the PMLA, 2002 seeking a direction to the Government to restore the confiscated property. Therefore, Mr. Vyas would argue, each of the avenues under Section 26(1) and Section 8(8) of the PMLA, 2002 was a distinct and specific alternate efficacious remedy available under the framework of the PMLA, 2002;

(ii) Section 32A of the IBC, 2016, cannot be read in a manner that renders nugatory the special objectives for which the PMLA, 2002 has been enacted. Towards this end, he would argue, the jurisdiction of the NCLT under Section 60(5) of the IBC, 2016 is a jurisdiction relating to interpreting the IBC, 2016 alone. In exercise of such jurisdiction, the NCLT ought not to traverse beyond the IBC, 2016 and enter upon the domain covered by the provisions of the PMLA, 2002. Mr. Vyas would argue that if the effect of a ruling on the IBC, 2016 by the NCLT could have March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx implications for other special legislations such as the PMLA, 2002, the NCLT must refrain from ruling so, since it would indirectly be an interpretation of the provisions of the PMLA, 2002 and not just the provisions of the IBC, 2016;

(iii) Even if we were to hold that Section 32A enables exercise of jurisdiction by the NCLT over IBC, 2016 matters and the effect of such exercise could intrude into the PMLA's domain, care should be taken to ensure that the power of the ED to attach assets is not sought to be trampled upon even before a resolution plan is approved. No party can be heard to argue that because a CIRP gets underway (triggering a moratorium), and because it may eventually lead to an approved resolution plan, the

ED must be directed to release its attachment to enable an effective resolution of the Corporate Debtor. The note of caution that Mr. Vyas would sound is that the effect of Section 32A of the IBC, 2016 cannot stretch to curtailing the ED's powers to keep properties attached under the PMLA, 2002, after the CIRP starts and before a resolution plan is approved.

10. On the other hand, the core submissions of Mr. Vikram Nankani, the Learned Senior Counsel appearing for the Resolution Applicants in both Writ Petitions, may be summarised thus:-

(i) Section 32A, being a non-obstante provision, would override the provisions of the PMLA, 2002, should a conflict between them arise. The jurisdiction of Section 32A is attracted only after a resolution plan is approved under Section 31 of the IBC, 2016.

Conflicts between the IBC, 2016 and the PMLA, 2002 may arise in the case of attachments by agencies such as the ED prior to the approval of the resolution plan, whether such attachment is effected before or after commencement of the CIRP. Such a conflict could be between the statutory moratorium triggered by March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Section 14 of the IBC, 2016 and the powers of attachment under the PMLA, 2002. However, that would have no relevance for the interpretation of Section 32A because the jurisdiction of Section 32A commences when the moratorium under Section 14 ends;

(ii) Section 32A is a special automatic framework where the only condition precedent is the approval of a resolution plan under Section 31 of the IBC, 2016. The resolution applicant is not required to knock on the doors of any forum to seek any positive grant of approval or endorsement so that the benefits of Section 32A may become available to the Corporate Debtor. Parliament has designed Section 32A to be a self-operating legal framework that discharges only the Corporate Debtor and its assets, taking care to enable attachments and proceedings to continue against other accused with the same charges. For the immunity under Section 32A to become available, the Corporate Debtor must meet the condition that there is a change in management and control of the Corporate Debtor in favour of persons unconnected with those in management and control of the Corporate Debtor when the alleged offense took place;

(iii) Any attachment under the PMLA, 2002 can only be in the nature of an interim measure that would aid the final measure of confiscation under Section 8(5). Since by reason of Section 32A of the IBC, 2016, the ultimate end of confiscation is protected against, it is only natural that the interim measure of attachment must come to an end upon approval of a resolution plan; and

(iv) The ED has not challenged the Approval Order, which approved the resolution plan under Section 31 of the IBC, 2016, and already directed the ED to release the Attached Properties. Although the ED had originally not been a party to the CIRP, considering that IA 383 had made the ED a party, the ED clearly March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx was a person aggrieved by the Approval Order, but chose not to challenge the Approval Order. Besides, even in WP 29111, the ED has not challenged the Approval Order but has only challenged the April 2023 Order. The controversy raised in IA 383 (whether the ED can

continue its attachment upon the moratorium coming into effect) can be said to have become infructuous once the resolution plan got approved, and the Approval Order itself directed the ED to release the Attached Properties. Mr. Nankani would argue that even if the April 2023 Order were to be set aside, the ED would need to abide by the Approval Order.

Core Issue:

11. The core issue that falls for our consideration is whether the NCLT had the jurisdiction to direct the ED to release the Attached Properties, invoking Section 32A of the IBC, 2016, since Section 32A provides that all attachments over properties of a corporate debtor would cease once a resolution plan in respect of the said corporate debtor is approved.

12. It is true that IA 383 had originally raised a larger issue - whether any attachment of assets is at all permitted to be continued once a moratorium commences owing to initiation of a CIRP. Indeed, the moratorium under Section 14 of the IBC, 2016 is itself an interim measure and may come to an end when the corporate debtor heads to liquidation or is resolved with a resolution plan. However, in the facts of the instant case, we need not get into this facet of the law at all since the issue has been rendered moot by the actual final approval of a resolution plan, leading to the jurisdiction of Section 32A having been attracted.

13. Therefore, we do not intend to pronounce upon a question of law in a vacuum, when the need to interpret Section 14 of the IBC, 2016 has been overtaken by the approval of the resolution plan, triggering the commencement of the jurisdiction of Section 32A.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

14. Besides, the ED has continued its attachment over the Attached Properties despite Section 32A of the IBC, 2016 being attracted. While the April 2023 Order has also ruled upon the effect of Section 14 on continued attachment, it is Section 32A that the NCLT has in fact invoked to direct the release of the Attached Properties. Therefore, the real question before us now is the legality of continuing the attachment levied on the properties of the Corporate Debtor under the provisions of the PMLA, 2002, in the teeth of the provisions of Section 32A of the IBC, 2016. We have restricted ourselves to answering that core question, which, in our opinion, is the only question involved in the matter before us. As a necessary corollary to decide whether the NCLT had exceeded its jurisdiction, we would also need to examine the scope and jurisdiction of Section 60(5) of the IBC, 2016, under which the NCLT rules on questions of fact and law in relation to resolution proceedings.

Section 32A of the IBC, 2016:

15. For convenience, we first deal with Section 32A of the IBC, 2016, and the same is extracted below:-

"32A. Liability for prior offences, etc.-- (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not -

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx
PROVIDED that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

PROVIDED FURTHER that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in-charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not--

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation : For the purposes of this sub-section, it is hereby clarified that,-

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

[Emphasis Supplied]

16. A plain reading of the forgoing would show that Section 32A is a non-obstante provision. Its jurisdiction is attracted only when a resolution plan gets approved under Section 31. Besides, the immunity conferred by Section 32A is available if and only if the approved resolution plan results in a complete change in the character of ownership and control of the corporate debtor. Explicitly, Section 32A(1) stipulates that the liability of the corporate debtor for an offense committed prior to commencement of the CIRP shall cease. The corporate debtor is explicitly protected from being prosecuted any further for such an offense, with effect from the approval of the resolution plan. Section 32A disentitles the corporate debtor from such immunity if the promoters or those in the management or control of the corporate debtor prior to the CIRP, or any related party of such persons, continues in management or control of the corporate debtor under the approved resolution plan. Likewise, the corporate debtor would be disentitled from immunity even if third parties, who were not promoters or persons in management or control of the corporate debtor come into management or control of the corporate debtor under the resolution plan but are persons who the Investigating Authority has reason to believe (based on material) had abetted or conspired for the commission of the offense in question.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

17. Should the ingredients of Section 32A(1) be met, it enables an automatic discharge from prosecution, for the corporate debtor alone. The provision takes care to ensure that the immunity is available only to the corporate debtor and not to any other person who was in management or control or was in any manner, in charge of, or responsible to, the corporate debtor for conduct of its business, or was associated with the corporate debtor in any manner, and directly or indirectly involved in the commission of the offense being prosecuted. Such others who are charged for the offense would continue to remain liable to prosecution. Effectively, all other accused remain on the hook and it is the corporate debtor who alone gets the statutorily-stipulated immunity, and that too only when a resolution plan is approved under Section 31, and such resolution plan entails a clean break from those who conducted the affairs in the past at the time when the offense was committed. A complete dissociation of the individuals involved in the management and control at the time of commission of the alleged offense is a fundamental requisite for the immunity to become available.

18. Section 32A(2) goes a step further and also protects the property of the corporate debtor from any attachment and restraint in proceedings connected to the offense committed prior to the commencement of the CIRP. Once a resolution plan is approved under Section 31 and a change in control and management is effected under the resolution plan (the same ingredients as set out in Section 32A(1) are stipulated here too), the property of the corporate debtor would get immunity from further prosecution of proceedings. Clause (i) in the Explanation to Section 32A(2) removes all doubt about what the assets are given immunity from. The provision explicitly stipulates that an "action against the property" of the corporate debtor, from which immunity would be available, "shall include the attachment, seizure, retention or confiscation of such property under such law" as applicable. The reference being to any action against the property under any law would evidently bring within its compass, attachments made under the PMLA, 2002.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

19. Section 32A(2) also affords similar immunity without a successful resolution having been approved - where a successful sale of assets of the corporate debtor is effected to an unconnected purchaser in liquidation proceedings. In short, action against the property is prohibited so that the purchaser of the property in liquidation proceedings of the corporate debtor can enjoy it freely, and therefore pay the best value when bidding for it. Since that facet of the matter is not relevant to the facts at hand, we are not analysing it further.

20. Therefore, as a matter of law, once the resolution plan is approved with the attendant conditions set out in Section 32A being met, further prosecution against the corporate debtor and its properties, would cease. Section 32A(3) enjoins the corporate debtor to continue to cooperate with the enforcement agencies in the continued prosecution against the individuals in question.

21. Now, applying this position in law to the facts of the case, it is common ground that under the Approval Order, a resolution plan in respect of the Corporate Debtor was approved under Section 31 of the IBC, 2016. It is also common ground that none of the Resolution Applicants is a person in charge of or responsible for the commission of the alleged scheduled offense being prosecuted by the ED. It is not the ED's case that the Resolution Applicants are third parties who have aided and

abetted the commission of the alleged offences. In short, it is common ground that all the ingredients of Section 32A of the IBC, 2016 are met. However, what the ED disputes is the power of the NCLT to rule upon the interpretation of Section 32A when the effect of such interpretation would lead to release of attachment of property that had been levied under the provisions of the PMLA, 2002.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Section 31 of the IBC, 2016:

22. To deal with this argument, one must necessarily look to the provisions of Section 31 of IBC, 2016 under which the Approval Order is passed, as well as Section 60(5) of the IBC, 2016 which is the provision under which the NCLT has passed its April 2023 order in IA 383.

23. Section 31 of the IBC, 2016 reads as under:-

"31. Approval of Resolution Plan -- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation. (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan. (3) After the order of approval under sub-section (1),--

(a) the moratorium order passed by the Adjudicating Authority under Section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan ap-

proved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law,

whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

[Emphasis Supplied]

24. As can be seen from the proviso to Section 31(1), the Adjudicating Authority (the NCLT) is enjoined with a duty to ensure that before passing any order for approval of the resolution plan, it should be satisfied that the resolution plan has provisions for its effective implementation. In other words, whilst passing any order under Section 31, the NCLT not only must follow the provisions of the IBC, 2016 but also make sure that the resolution plan approved by it can be effectively implemented. It is keeping this provision in mind that in the facts of the present case, the NCLT has directed the ED to raise its attachment on the properties of the Corporate Debtor as mandated by Section 32A of the IBC, 2016.

25. Therefore, we do not think that Mr. Vyas is correct in his submission that the NCLT does not have the power to direct the ED to raise its attachment that had been levied under the provisions of the PMLA, 2002. Equally, we find that driving a successful resolution applicant to file an appeal under Section 26(1) of the PMLA, 2002 in order to raise the attachment levied on the properties of the corporate debtor or to Section 8(5) of the PMLA, 2002 (to reverse confiscation, which itself is rendered impossible by Section 32A of the IBC, 2016) is wholly unnecessary. This is for the simple reason that Section 32A itself mandates that once a resolution plan is approved, no action can be taken against the properties of the corporate debtor in relation to an offence committed prior to the commencement of the CIRP of the corporate debtor, where such property is covered under a resolution plan approved by it under Section 31 of the IBC, 2016. It is it is wholly untenable to contend that the NCLT, and which is the Adjudicating Authority constituted under the IBC, 2016, is incompetent and/or powerless to either interpret or to give effect to the provisions of the very Act under which it was constituted.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

26. We are of the clear view that looking at the purpose and object of not only Section 31, but also Section 32A of the IBC, 2016, the NCLT had all powers to direct the ED to raise its attachment in relation to the attached properties of the corporate debtor once a resolution plan that qualifies for immunity under Section 32A was approved, and those very properties were the subject matter of the resolution plan. This is the clear mandate of the legislature as enshrined in Section 32A of the IBC, 2016.

Section 60(5) of the IBC, 2016:

This apart, even Section 60(5) of the IBC, 2016 empowers the NCLT to decide any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of a corporate debtor. The relevant portion of Section 60(5) is extracted below:-

"Section 60. Adjudicating Authority for corporate persons.

(1) to (4) ***** (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of--

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

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

[Emphasis Supplied]

27. A plain reading of the provision would show that Section 60(5) too is a non-obstante provision that confers on the NCLT, jurisdiction and powers to dispose of any question of law that arises in relation to the March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx resolution proceedings. Parliament has explicitly conferred jurisdiction on the NCLT to entertain or dispose of any question of law or fact arising in relation to insolvency resolution proceedings of any corporate debtor under the IBC, 2016. Such questions of law and fact, needless to add, would include answering questions emerging from giving effect to Section 32A in relation to any corporate debtor that has successfully undergone a CIRP with an approved resolution plan that meets the ingredients to qualify for the immunity.

28. In the instant case, the NCLT was aware of the attachment effected by the ED over the Attached Properties well before the CIRP commenced. The NCLT applied Section 32A to the facts of the case before it, and rightly took cognizance of the attachment when approving the resolution plan. The NCLT has accurately answered the question of law arising under Section 32A, that the approval of the resolution plan brings the prosecution of the Corporate Debtor to an end under Section 32A(1) and the attachment of the Attached Properties to an end under Section 32A(2) read with the Clause (i) in the Explanation to Section 32A(2). Such an exercise of jurisdiction was wholly within the scope of power and jurisdiction explicitly conferred on the NCLT by Parliament under Section 60(5). No fault can be found with either the substance of the NCLT's exercise of such jurisdiction, or with the manner of its exercise. Whether the jurisdictional facts necessary to attract the immunity under Section 32A exist, is a mixed question of fact and law that the NCLT was entitled to entertain and

dispose of. Once the jurisdictional facts are found to exist, whether the immunity becomes available is a question of law which is clearly within the domain of the NCLT's jurisdiction.

29. It should not be forgotten that both Section 32A and Section 60(5) are non-obstante provisions that operate notwithstanding anything contained in any other law, including the PMLA, 2002. Therefore, there is no basis whatsoever to treat the provisions of attachment under the PMLA, 2002 as being uniquely carved out as an exception, when the legislature March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx indeed chose to cover prosecution by, and attachment of assets, under the PMLA, 2002 as coming to an end by virtue of Section 32A of the IBC, 2016.

30. What is also evident is that the NCLT has not even interpreted or answered any question of law under the PMLA, 2002 in order to direct the release of the Attached Properties. The NCLT has answered questions of fact and found that the ingredients of Section 32A of the IBC, 2016 are met, and therefore, disposed of the question of immunity contained in Section 32A as being available to the Corporate Debtor. The necessary corollary of such a declaration of law is that the ED must obey it to ensure that the rule of law is maintained. If a State agency does not discharge its duty as laid down in law, a writ would surely lie to direct such agency to adhere to the declaration of the law. Therefore, the argument that WP 9943 would not be maintainable is misconceived. Likewise, the argument that the April 2023 Order deserves to be quashed is also misconceived.

31. The facts at hand present a situation where a tribunal with explicit jurisdiction has duly and accurately exercised its powers, and an agency that is also duty-bound to follow the law as declared, has not discharged its duty, choosing to question the evident jurisdiction of the tribunal. Such a situation clearly lends itself to the parties affected by it, to invoke their constitutional remedy under Article 226 of the Constitution of India, seeking a direction that the agency must indeed comply with the law enshrined in Section 32A of the IBC, 2016.

IA 383 and its implications:

32. Whether IA 383, filed in 2022, was premature when the resolution plan was approved in February 2023 (by the Approval Order), is a question that is now moot. However, Mr. Vyas is right in apprehending that an endorsement of such an approach to the NCLT in anticipation of an approval of a resolution plan poses a question of whether Section 14 of the IBC, 2016 would override Section 8 of the PMLA, 2002. However, that March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx debate is now wholly irrelevant to dispose of the case at hand. The NCLT indeed disposed of IA 383 only in April 2023, i.e. after the Approval Order sanctioned the resolution plan under Section 31 in February 2023. In our opinion, IA 383 had worked itself out and had been overtaken by the Approval Order passed by the NCLT. IA 383 was filed by the Resolution Professional raising the issue of the effect of Section 14 of the IBC, 2016 but the parties are no longer in a situation where Section 14 has any relevance. Mr. Nankani is quite right in pointing out that the jurisdiction of Section 32A commences when the jurisdiction of Section 14 ends. In fact, the Approval Order too explicitly brings to an end the moratorium under Section 14. Be that as it may, for good order's sake, it must be pointed out that unless and until a resolution plan

is approved under Section 31 of the IBC, 2016, the jurisdiction of Section 32A would not even be attracted. It would not be possible for any person to invoke Section 32A on the premise of the likelihood of an approval of a resolution plan under Section 31 that may emerge in future. It is only when a resolution plan is approved under Section 31 that the rights contained in Section 32A would start to flow. We are informed that the conflict between the Section 14 of the IBC, 2016 and the power of the ED to effect new attachments or continue old attachments under the PMLA, 2002 is the subject matter of litigation before various other courts. For the proceedings before us, it is wholly unnecessary to answer this issue.

Manish Kumar and its import:

33. The Hon'ble Supreme Court has had occasion to deal with the legislative intent and purpose underlying Section 32A of the IBC, 2016, albeit when considering a challenge to the constitutional validity of Section 32A. In doing so, the Hon'ble Supreme Court had the benefit of the Union of India's clear explanation and support for the view that corporate debtors must get to begin with a clean slate under Section 32A, making a clean break from their past. In *Manish Kumar Vs Union of India - (2021) 5 SCC 1 (Manish Kumar)*, the Hon'ble Supreme Court ruled that the immunity under Section 32A is a conscious and valid legislative conferment by March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Parliament. The Union of India had emphasized the vital need for introducing Section 32A and defended having piloted the provision through Parliament, giving insight into the legislative intent behind the provision, and that too when presented with how the provision would give immunity from an attachment under the PMLA, 2002.

34. Some extracts from *Manish Kumar* would bear iteration in the context of the case at hand, and hence are set out below:

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 con-

tended 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 stakeholders.

326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. 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 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 appli-

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx cable 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.

327. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor.

328. The corporate debtor and its property in the context of the scheme of the code constitute a distinct subject matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximization of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial veto on the ground of violation of Article 14.

329. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgement and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some it cannot unless it strikingly ill squares with some constitutional mandate suffer invalidation.

[Emphasis Supplied] March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

35. We hasten to add that we are not even suggesting that there is any estoppel against a State agency from defending an action on facts without disturbing the declared law. What is clear to us is that the legislative intent and objective underlying Section 32A has been made clear in Manish Kumar not only by the Hon'ble Supreme Court but also by the Union of India. Such an exposition has made it rather easy for us to appreciate the provision in its letter and spirit, and to apply it to the facts at hand.

36. In our opinion, when a resolution plan with the ingredients that qualify for immunity under Section 32A comes to be approved, quasi-judicial authorities including the Adjudicating Authority under the PMLA, 2002 (Respondent No. 1 in WP 9943) must take judicial notice of the development and release their attachment on their own. This is the only means of ensuring that the rule of law as stipulated in Section 32A of the IBC, 2016 runs its course. The Adjudicating Authority under Section 8 of the PMLA, 2002 is a quasi-judicial officer with a judicial role. The judicial role of an Adjudicating Authority is different from the role of a prosecuting executive. In discharging such role, the Adjudicating Authority, clothed with the character of a judicial officer, must act judiciously and discharge the mandate of Article 141 of the Constitution of India, which makes it clear that the law declared by the Hon'ble Supreme Court would bind all courts in the territory of India. The process of adjudication by the Adjudicating Authority under Section 8 of the PMLA, 2002 is inherently a quasi-judicial activity, akin to the quasi-judicial process of adjudication by the NCLT (in fact, in the IBC, 2016 the NCLT is the "Adjudicating Authority"). Once the law is declared by the Hon'ble Supreme Court, officers presiding over judicial proceedings must necessarily take judicial notice of the law as declared, and act in a manner consistent with the law as declared by the Hon'ble Supreme Court. If such Adjudicating Authority does not act in line with the law declared by the Hon'ble Supreme Court, it would present a fit case for writ petitions to be considered by a constitutional court to issue an appropriate writ or direction to remedy the situation.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

37. We have no hesitation in holding that there is no scope whatsoever for the attachment effected by the ED over the Attached Properties to continue once the Approval Order came to be passed. We are not opining on whether the attachment could have continued after commencement of the CIRP. We find that the NCLT has simply answered the question of law arising in relation to the resolution of the corporate debtor and that too within the limits of the jurisdiction conferred on it. It is Section 32A of the IBC, 2016, on which the NCLT based its declaration that the Attached Properties must be released, and that is entirely correct. Whether the ED was right in continuing the attachment between the commencement of the CIRP and before the Approval Order, is also something that the April 2023 Order deals with, but in our view that issue has been overtaken, as explained earlier in this judgement.

38. One does not even need to embark on interpreting the PMLA, 2002 to see whether the NCLT was right in its declaration that the attachment of the ED, insofar as it relates to the Attached

Properties, would abate. It is a consequence of explicit statutory provisions that any prosecution of the Corporate Debtor would come to an end, without any discretion being conferred on any agency to positively declare that the immunity under Section 32A may be accorded.

39. The Adjudicating Authority under Section 8 of the PMLA, 2002 has been given powers to conduct quasi-judicial proceedings before deciding to make any attachment. Towards this end, the Adjudicating Authority is obligated to issue a show-cause notice, provide an opportunity of being heard and pass a reasoned order. Evidently, orders passed by the Adjudicating Authority are appealable orders under Section 26 of the PMLA, 2002. To enable the Adjudicating Authority to discharge its quasi-judicial function, Section 11 of the PMLA, 2002 confers on the Adjudicating Authority the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of discovery; inspection; enforcing attendance of witnesses and examining them on March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx oath; compelling production of records; receiving evidence on affidavits; issuing commissions for examination of witnesses and documents; and any other matter which may be prescribed by making rules. Lest there be any doubt, Section 11(3) of the PMLA, 2002 explicitly states that every proceeding under Section 11 would be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860.

40. Regardless of whether Respondent No. 1 in WP 9943 (the Adjudicating Authority under the PMLA, 2002) discharges its duty on its own accord (by taking judicial notice) or on the ED drawing its attention to the decision of the Hon'ble Supreme Court, to release the attachment by operation of Section 32A of the IBC, 2016, the NCLT (the Adjudicating Authority under the IBC, 2016), is clothed with the explicit power to answer questions of law relating to the resolution (and that too notwithstanding anything contained in any other applicable law, which includes the PMLA, 2002. Section 60(5) clearly empowers the NCLT to answer the question of whether the statutory immunity under Section 32A has accrued to a corporate debtor. As a consequence, the NCLT is well within its jurisdiction and power to rule that prior attachment of the property of a corporate debtor that is subject matter of an approved resolution plan, must be released, if the jurisdictional facts for purposes of Section 32A exist.

41. We are unable to be persuaded by the argument made on behalf of the ED that the Corporate Debtor or the Resolution Applicants must necessarily be relegated to execution proceedings under Section 424 of the Companies Act, 2013 read with Rule 56 of the NCLT Rules. To begin with, every writ of mandamus directing an arm of the State to do something or every writ of prohibition directing an arm of the State not to do something could get labelled as an execution proceeding. The power of a constitutional court to issue a writ is meant, among others, to direct that an action be taken or be refrained from being taken. It is now trite law that March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx constitutional courts indeed have the discretion to set right and enforce the rule of law as evident from the legislation and indeed the law declared by the Hon'ble Supreme Court, where the situation so warrants. Such discretion, where warranted, must be exercised.

42. In the instant case, the NCLT has ruled on the import of Section 32A of the IBC, 2016 in the Approval Order. The NCLT has once again ruled in the April 2023 Order on the import of Section 32A. Both these orders, unexceptionable for the reasons stated above, have been ignored by the ED. To suggest that the Resolution Applicants or the Corporate Debtor should yet again go to the same forum, this time under the execution jurisdiction and that the writ court should not remedy the conscious violation of the direction, is untenable. Besides, the ED itself has filed a writ petition seeking to challenge the April 2023 Order, when an appellate remedy of going to the National Company Law Appellate Tribunal was available to it. The ED did not appeal the Approval Order either within the limitation period. Therefore, while one may raise technical grounds that alternate remedies may exist in the law, a constitutional court adjudicating the two competing writ petitions based on the same set of facts, is indeed an efficacious remedy.

43. Mr. Vyas has contended that the NCLT may indeed interpret the provisions of the IBC, 2016 but when such interpretation could have an effect on actions taken under the PMLA, 2002, it should hold its hands. In our view, such a submission is misconceived. Both Section 32A and Section 60(5) in the IBC, 2016 being non-obstante provisions, there is no question of an interpretation of the IBC, 2016 rendering the provisions of the PMLA, 2002 nugatory. Parliament, when legislating Section 32A, was fully aware of the provisions of the PMLA, 2002 and in fact, specially legislated that subject to the ingredients of Section 32A being met, the immunity must flow and the assets of the corporate debtor must get their full statutory protection, notwithstanding the provisions of, among others, the PMLA, 2002. Parliament was also aware that Section 60(5) was March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx already in the IBC, 2016 and did not think it was necessary to carve out the provisions of the PMLA, 2002 from the scope of the other applicable law which the NCLT had jurisdiction to interpret.

44. The Resolution Applicants, in WP 9943 have indeed sought the quashing of the ECIR, the original complaint and the attachment orders insofar as they relate to the corporate debtor. We do not believe any measure of quashing is necessary in view of the explicit and clear statutory immunity for the corporate debtor and its properties by operation of law, as set out in Section 32A of the IBC, 2016. Such instruments of enforcement are simply rendered inoperative and ineffective insofar as they relate to the corporate debtor and its assets. No further act, deed or thing is required to be done, since the immunity fastens itself by operation of law from the point in time at which the resolution plan is approved. Therefore, there is no requirement for any partial quashing of the instruments of enforcement under the PMLA, 2002. These instruments of enforcement would simply have no effect whatsoever against the corporate debtor to its detriment. The corporate debtor would indeed be obligated to cooperate in the investigation and prosecution that would continue against the other accused.

Case Law Cited:

45. To our mind, the aforesaid analysis is adequate to dispose of the two writ petitions. Both sides have presented exhaustive and voluminous case law, moulding propositions and building on multiple elements of their propositions, to depict them as being backed by precedent. They have also filed their respective short written submissions, which has been useful in appreciating the

propositions advocated by each side.

46. In the interest of brevity, and more so because it would be unnecessary, we do not intend to get into an exhaustive deliberation over every sub-strand of every argument presented to us. We have explained above, in detail, our opinion on every element we believe is essential to March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx adjudicate the writ petitions. However, for completeness, some of the key facets canvassed, based on case law presented by both sides, is dealt with below.

47. A substantial part of the submissions made on behalf of the ED is founded on the structure of how the relief sought by the Resolution Applicants in WP 9943 seeks quashing of instruments of enforcement deployed under the PMLA, 2002 - such as the provisional attachment order, the original complaint and the ECIR. We have already explained why we would not need to quash these instruments of enforcement. Such quashing is wholly necessary by the sheer formulation of Section 32A(1) and Section 32A(2) of the IBC, 2016. The position in law is that once Section 32A is attracted, such instruments of enforcement would continue in force, and would be pressed into service to prosecute the other accused and their properties - those other than the corporate debtors and properties of such accused, who do not enjoy immunity. Neither Paragraph 17(e) of the Approval Order nor the April 2023 Order purports to quash any of these instruments of enforcement deployed under the PMLA, 2002. We have explained above why the two orders of the NCLT are unexceptionable and present the accurate application of Section 32A to the corporate debtor and its assets.

48. Therefore, in our opinion, the judgements cited to buttress the proposition that the NCLT does not have jurisdiction to use its judicial discretion to adjudicate upon or to disturb enforcement actions taken under the PMLA, 2002 are wholly irrelevant. These are:-

(i) Kiran Shah, Resolution Professional of KSL and Industries Ltd.

Vs. Enforcement Directorate - (Company Appeal (AT) (Insolvency) No. 817/2021;

(ii) Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors - (2019 SCC OnLine SC 1542);

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

(iii) Deputy Director, Office of the Joint Director, Directorate of Enforcement Vs. Asset Reconstruction Company India Ltd. & Ors. - (2020 SCC OnLine Mad 28090);

(iv) Phoenix Tech Tower Ltd. Vs. AP Gems and Jewellery Park Pt.

Ltd. - (2020 SCC OnLine NCLT 12503);

(v) Manohar Lal Vij Vs. The Directorate of Enforcement - ([IB]-

1205/[ND]/2019)

49. Likewise, the proposition that "proceeds of crime" cannot be an operational debt for the ED to stand as a creditor for purposes of IBC, 2016 is a complete distraction from the core issue at hand. At the heart of the two petitions is the implication of the immunity under Section 32A of the IBC, 2016 for an eligible corporate debtor. Once a corporate debtor is eligible for the immunity, the corporate debtor and its properties are outside the pale and reach of the ED's jurisdiction. By extinguishing any scope for continued action against the property of a corporate debtor covered by Section 32A of the IBC, 2016 and by enabling the proceeds of crime to be chased in the hands of the other accused, any action, as a matter of law, against the assets of the corporate debtor, would come to an end. No element of the PMLA, 2002 would matter any more once a corporate debtor falls within the scope of Section 32A of the IBC, 2016. The ED would not be a creditor at all, and no debt would be owed by the corporate debtor to the ED. Therefore, whether the ED is to be classified as an operational creditor or a financial creditor is totally irrelevant. Section 32A simply accords immunity (i) to the corporate debtor from prosecution; and (ii) to the corporate debtor's assets from continuation of attachment under any other law in force, including the PMLA, 2002. Therefore, the following judgements cited on behalf of the ED to advance the aforesaid proposition, would have no relevance at all:-

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

(i) Deputy Director of Enforcement, Delhi vs. Asix Bank & Ors -

(2019 SCC OnLine Del 7854); and

(ii) P. Mohanraj Vs. Shah Brothers Ispat Pvt Ltd. - (2021 SCC OnLine SC 152) (P Mohanraj).

50. It is also noteworthy that Section 32A of the IBC, 2016 was introduced with effect from 28th December, 2019. It was a material legislative intervention to provide a shield to from prosecution and continued attachment of the properties of a qualifying corporate debtor from antecedent proceedings under any other law in force. Therefore, it is inappropriate to cite judgements rendered before the introduction of Section 32A to argue how the PMLA, 2002 stands on a separate footing and how its interface with the IBC, 2016 should be reconciled. The introduction of Section 32A was a conscious shift with a specific and conscious adoption of the non-obstante provision, with a legislative intent to give primacy to the IBC, 2016 in respect of corporate debtors who qualify for the immunity under Section 32A. Therefore, citing judgements rendered before the introduction of Section 32A to canvass how to interpret Section 32A, is wholly inappropriate. In fact, such judgements declaring the law as they did, are addressed by the conscious departure by way of substantive legislative changes through Section 32A. Such judgements that would be inappropriate to cite are:-

(i) Deputy Director of Enforcement, Delhi vs. Asix Bank & Ors -

(2019 SCC OnLine Del 7854) - decided on 2nd April, 2019; and

(ii) Rai Foundation through its Trustee Vs. The Director, Directorate of Enforcement (WP (Crl.) No. 100/2015) - decided on 20th February, 2015.

51. One judgement that each side in these proceedings has sought to draw our attention to is the case of P. Mohanraj (supra). This decision March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx makes it clear that the Hon'ble Supreme Court considered the interplay between Section 14 of the IBC, 2016 and Section 32A to note that the former only casts a shadow on enforcement against the corporate debtor while the latter brings a complete cessation of prosecution against the corporate debtor. It was held that Section 32A(1), operates only after the moratorium under Section 14 comes to an end, and cannot have any bearing on interpretation of Section 14. We have already opined above that the interplay between the operation of the moratorium under Section 14 of the IBC, 2016 and the power of attachment under the PMLA, 2002 became a redundant subject for purposes of these proceedings, once the resolution plan that qualifies for immunity under Section 32A was approved. We have consciously decided not to rule upon a question of law in a vacuum, when dealing with an issue that is of no relevance to dealing with the case at hand.

Summary of Conclusions:

52. As a result, we return the following findings and conclusions in disposing of the two writ petitions:-

i. The NCLT was well within its jurisdiction in declaring, both in the Approval Order (dated 17th February, 2023) under Section 31 of the IBC, 2016 and in the April 2023 Order (under Section 60(5) of the IBC, 2016), that the corporate debtor would stand discharged from the offences alleged to have been committed prior to the CIRP and that the Attached Properties as identified in the Approval Order became free of attachment from the time of approval of the resolution plan eligible for benefit of Section 32A. On facts, it is evident that the NCLT was accurate in the valid exercise of its explicit jurisdiction;

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx ii. The jurisdiction of Section 32A of the IBC, 2016 would be attracted from the point at which a qualifying resolution plan is approved under Section 31 of the IBC, 2016. The protections afforded by Section 32A would become available only when the resolution plan is so approved, and such resolution plan meets the other necessary ingredients to qualify for the immunity, namely, that there is a clean break with a change in ownership of, and control over, the corporate debtor;

iii. IA 383 could be regarded as having become infructuous since the Approval Order had already, and rightly, protected the corporate debtor and the Attached Properties from continued prosecution of the scheduled offenses and the offense of alleged money laundering under the PMLA, 2002. However, the April 2023 Order that disposed of IA 383 was founded on applying the provisions of Section 32A to the facts

of the case;

iv. There is one other facet that makes the scheme and import of Section 32A of the IBC, 2016 clear, logical and reasonable. The attachment under Section 5 of the PMLA, 2002 is but a measure in aid of eventual potential confiscation under Section 8(5) of the PMLA, 2002. Confiscation of the property of the corporate debtor can only be effected upon conviction of the corporate debtor for an offence of money laundering. Where Section 32A(1) of the IBC, 2016 confers immunity to the corporate debtor from prosecution, there can be no conviction that can follow. Consequently, it is but logical that the property of the corporate debtor would have protection from any continued attachment by reason of March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx Section 32A(2). Therefore, when there is no potential in law for an eventual confiscation, the attachment, which is only an interim measure in aid of the final measure of confiscation must necessarily abate and come to an end, since it cannot continue in a vacuum.

v. We are not opining on the implications of Section 14 of the IBC, 2016 for continuation of a prior attachment during the course of a CIRP. In the facts at hand, the jurisdiction of Section 14 came to an end, and the jurisdiction of Section 32A commenced, on 17 th February, 2023. Therefore, dealing with a conflict between the provisions of the PMLA, 2002 and Section 14 of the IBC, 2016 was rendered irrelevant with effect from 17th February, 2023;

vi. As a consequence of Section 32A of the IBC, 2016, the ED must now necessarily release the attachment on the Attached Properties, without being bogged down by the question of how to interpret the continuation of attachment after the commencement of the CIRP and before the Approval Order, and the implications for the same under Section 14 of the IBC, 2016. We are not opining on this facet of the law as it is wholly unnecessary to dispose of the case at hand. It is trite law that no court should rule on questions of law in a vacuum;

vii. The Approval Order, which interpreted questions of fact and answered the question of law on implications of Section 32A for the corporate debtor, has not been challenged by the ED - neither in an appeal from the Approval Order nor in WP 29111 filed before us. The ED's challenge is to the April 2023 Order that allowed IA 383 March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx on the strength of Section 32A. The April 2023 Order does contain remarks about the interplay between Section 14 and the attachment but that is not the ratio of the April 2023 Order, which explicitly relies on Section 32A of the IBC, 2016 to direct the release of the Attached Properties.

Even if purely for the sake of argument, the April 2023 Order were to be set aside, the Approval Order would hold the field and that order correctly requires the ED to release the Attached Properties owing to the operation of Section 32A of the IBC, 2016;

viii. The NCLT in its capacity as the Adjudicating Authority under the IBC, 2016 has only interpreted the provisions of Section 32A and applied them to the facts at hand, to declare that the attachment of the Attached Properties by the ED must come to an end. It is possible that in a given case, the application of Section 32A of the IBC, 2016 may have an effect on existing and intended attachments and prosecution by enforcement agencies operating under laws such as the PMLA, 2002. However, since both Section 32A and Section 60(5) are non-obstante provisions, they would prevail, with no room for concern, real or imagined, about any conflict between legislations. We, therefore, hold that the interpretation by the NCLT in both, the Approval Order, and the April 2023 Order, did not at all render nugatory, the provisions of the PMLA, 2002 or its legislative objectives. The NCLT has merely given effect to the provisions of Section 32A of the IBC, 2016 in its terms and that is an accurate decision, as explained by us above; and March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx ix. Finally, quasi-judicial authorities wielding powers of a civil court in relation to the functioning of a State agency such as the ED, have a role that is distinct and separate from the executive authorities in the same agency. The former are inherently a statutory check and balance on the latter. As quasi-judicial authorities exercising the powers of civil courts and functioning within the territory of India, the law declared by the Hon'ble Supreme Court would bind the quasi-judicial authorities. As required under Article 141 of the Constitution of India, such quasi-judicial authorities must act consistent with the law declared by the Hon'ble Supreme Court rather than disobey the rule of law to give rise to avoidable litigation.

53. In the result, we rule that the attachment by the ED over the Attached Properties, being the four bank accounts of the Corporate Debtor, (with aggregate balances to the tune of Rs.3,55,298/- and any interest earned thereon) and the 14 flats constructed by the Corporate Debtor valued at Rs.32,47,55,298/-, came to an end on 17th February, 2023. Such release has occurred by operation of Section 32A of the IBC, 2016, and the ministerial act of communicating must be communicated by the Respondents in WP 9943 and the Petitioner in WP 29111 forthwith to the Corporate Debtor, marking a copy to the Petitioner in WP 9943, within a period of six weeks from the date of this judgement. Such a communication is necessary to enable the Attached Properties to be bankable assets that can be deployed into the revival of the Corporate Debtor in terms of the objective of resolution.

54. Rule is made absolute in the aforesaid terms and the two Writ Petitions are disposed of accordingly. In the circumstances of this case and in order to not create further scope of conflict between the parties, we have persuaded ourselves to pass no orders as to costs.

March 01, 2024 Aarti Palkar/Shraddha WPL-9943-2023 & WP-29111-2023.docx

55. This judgment/order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment/order.

[SOMASEKHAR SUNDARESAN, J.] [B.P. COLABAWALLA, J.] March 01, 2024 Aarti Palkar/Shraddha