

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT III



I.A No. 1854/2020

In

CP No.512/2019

Under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

DSK Motors Private Limited

Through its Liquidator Mr. Indrajit Mukherjee

... Applicant

Vs

Deputy Director

Directorate of Enforcement *(Prevention of Money Laundering Act, 2002)*

Mumbai Zonal Office II, Ground Floor,
Kaiser- I- Hind Building, Ballard Estate

... Respondent

In the matter of

Opulent Auto Care Private Limited

... Petitioner

Vs

DSK Motors Private Limited

... Corporate Debtor

Order pronounced on: 29.11.2024

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Sh. Charanjeet Singh Gulati (Technical)



Appearances:

For the Applicant/Liquidator : Adv. Pulkit Sharma a/w Adv. Vinod Kothari a/w Chinmay i/b Apex Law Partners (Mr. Indrajeet Mukherjee, the Liquidator, was present in person)

For the Respondent : Adv. M. S. Bhardwaj

Per: Ms. Lakshmi Gurung, Member (Judicial)

ORDER

1. This I.A. has been filed by DSK Motors Private Limited, through its Liquidator Mr. Indrajit Mukherjee (**Applicant**) under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**the Code**), seeking following reliefs: -

- a) *To direct the Respondent to release the attachment on all these assets and properties of the Corporate Debtor as more particularly set out as Exhibit B hereto and handover the charge thereof to the Applicant;*
- b) *Pending the hearing and final disposal the Respondents their agents and or any persons claiming through them be restrained from an order and injunction of this Tribunal dealing and disposing off the said properties set out in Exhibit B;*
- c) *For such further reliefs as this Tribunal may deemed necessary in the facts and circumstances of the case;*
- d) *For cost of the present Application.*

Facts and submissions as per the Application:

2. The Directorate of Enforcement (**ED/Respondent**), vide order dated 14.02.2019, had provisionally attached various assets in the name of



promoters and different companies in DSK Group amounting to Rs. 47,440.02 Lakhs [Rs 46490.29 Lakhs (Immovable Properties) + Rs.518.11 Lakhs (LIC) + Rs 431.62 Lakhs (Bank Balance)] as on 14.02.2019. The attachments were made under the Prevention of Money Laundering Act, 2002 (**PMLA, 2002**).

3. Thereafter, the instant Company Petition No. 512 of 2019 was filed against M/s DSK Motors Private Limited (**Corporate Debtor**) and this Tribunal vide its order dated 09.04.2019 admitted the same and appointed Mr. Rajkumar Mahto as an Interim Resolution Professional. Later, on 01.07.2019, Mr. Snehal Kamdar was appointed as the Resolution Professional (**RP**) of the Corporate Debtor.
4. It is submitted that the RP had intimated the ED about the initiation of the CIRP and imposition of the moratorium and also requested ED to withdraw its attachment on the properties and assets of the Corporate Debtor as he was required to take charge and custody of the same under the provisions of the Code. However, the ED did not release the assets. Thereafter, Learned Adjudicating Authority under PMLA vide its order dated 05.08.2019, confirmed the attachment of the properties of the Corporate Debtor.
5. Consequently, the RP filed an appeal challenging the order dated 05.08.2019 before the PMLA Appellate Authority and the same is pending adjudication.
6. In the meantime, resolution of the Corporate Debtor was unsuccessful, and the RP filed an Application under section 33(2) of the Code seeking liquidation of the Corporate Debtor in accordance with Law. By order dated 17.03.2020, liquidation process against the Corporate Debtor was initiated and Mr. Indrajit Mukherjee (**Applicant**) was appointed as the Liquidator.



7. It is submitted that the Liquidator is required to take control of all the Assets and Properties of the Corporate Debtor including those Assets and Properties which may not be in the possession of the Corporate Debtor. The provisions of the Code prohibit institution of suits and/or proceedings against the Corporate Debtor including execution of any judgement, decree or order of any court, tribunal, arbitration panel or any other authority. Further, the provisions of the Code prevail over the provisions of PMLA.
8. It is submitted that out of the total properties and assets attached by the ED, 17 (Seventeen) properties identified till the date of filing of this application, belong to the Corporate Debtor. The said properties have been attached without verifying the actual ownership and/or documents by the Respondents.
9. Further, the said properties are also mortgaged in favour of Indian Overseas Bank (IOB), JM Financial ARC, Union Bank of India, Toyota Financial Services Ltd, Aditya Birla Finance Ltd, Laxmi Vilas Bank. Reliance Finance Limited, Magma Financials Limited and Tata Capital Financial Services, who are the financial creditors of the Corporate Debtor. Unless the attachment of the Respondent is vacated, the properties and assets of the Corporate Debtor under liquidation cannot be liquidated and/or appropriated by the Applicant.
10. The Liquidator further states that the Adjudicating Authority or the Appellate Authority established under the PMLA, 2002 being a criminal court can only decide whether the properties attached during investigation from the possession of the Corporate Debtor could be said to be the properties acquired by them by using the proceeds of crime. It is for this Tribunal to decide on whether the properties and assets of the Corporate Debtor under liquidation can be appropriated and held.
11. Section 63 of the Code provides that no City Civil Court or Authority shall have jurisdiction to entertain any suit or proceedings in respect of any



matter on which NCLT or NCLAT has jurisdiction under this Code. The Adjudicating Authority under PMLA does not have jurisdiction to attach the properties of the Corporate Debtor undergoing liquidation process.

12. The Liquidator further states that the criminal proceedings before the PMLA are likely to take a much longer time and by that time, there will be an erosion in the value of assets.

Reply by the Enforcement Directorate (ED):

13. It is pertinent to note here that vide order dated 02.02.2021, ED was set *ex-parte* and the present application was allowed. Pursuant thereto, the Liquidator requested ED to release the attachment, however, no action was taken by ED to comply with the order dated 02.02.2021. Consequently, the Liquidator filed a contempt application bearing no. IA/1401/2021 under section 424 of the Companies Act, 2013 against ED for non-compliance of the order dated 02.02.2021. Subsequently, ED filed IA/1436/2021 (recall application) seeking recall of the order dated 02.02.2021.
14. After careful consideration of the peculiar facts and submissions made by the parties, the recall application was allowed vide order dated 22.12.2023 and the ED was directed to file its reply. The contempt application being consequential in nature was rendered infructuous.
15. In compliance with the order dated 22.12.2023, ED filed its reply and submitted as follows:
 - i. The condition precedent to investigate the offence of money laundering by the Respondent is that there should be FIR or Police Report under section 173 of Criminal Procedure Code, 1973 (**Cr.P.C.**) or a complaint in respect of the scheduled offence under PMLA. In the present case, investigations were carried out by the



Directorate of Enforcement under PMLA on the basis of FIRs registered by the Police at Pune, Kolhapur and Mumbai.

- ii. The critical condition for issuance of Provisional Attachment Order (**PAO**) and invocation of section 5(1) relate to reason to believe of the authorized officer that such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of any such proceeds of crime. Hence, with regard to the case in hand it is submitted that the officer authorised on the basis of the material in possession and reason to believe which was duly recorded in writing has come to the conclusion that if the properties suspected to be involved in the money laundering is not attached immediately, the non-attachment of properties is likely to frustrate any proceedings under PMLA, 2002 and therefore the PAO has been issued and Original Complaint is filed which was duly confirmed by the Ld. Adjudicating Authority vide order dated 05.08.2019.
- iii. On the basis of such reason, Original Complaint in *OC No. 1104 of 2019* was filed and the same is restricted to the satisfaction of the authorized officer that the property is *prima facie* obtained or derived as the result of money laundering or used in any process or activity for committing the offence of money laundering. The Adjudicating Authority, PMLA, found that there is considerable evidence regarding generation of proceeds of crime by commission of scheduled offences and sufficient evidence of such proceeds of crime having been utilised and even sent abroad by the concerned defendants. The Adjudicating Authority, PMLA, accordingly after the judicial application of mind and on the basis of the material produced formed the reason to believe and vide its order dated 05.08.2019 in Original Complaint (OC) No. 1104/2019, The Ld. Adjudicating Authority, PMLA confirmed the said PAO No. 01/2019 dated 14.02.2019.



- iv. The attachment as per the scheme of the law of money laundering is required to be confirmed by the Adjudicating Authority, PMLA and in case the order of provisional attachment is confirmed by the Adjudicating Authority, PMLA then the grievance against the said order can be made by any aggrieved party only before the Appellate Tribunal, PMLA by way of appeal under section 26 of the PMLA, 2002.
- v. An Appeal has been admittedly filed by the then RP before the Appellate Tribunal, PMLA against the order dated 05.08.2019 which is pending for adjudication. By preferring the present application, the Liquidator is trying to escape and evade the due process and the procedure of the law and is trying to over-step the procedure of the PMLA, 2002.
- vi. The jurisdiction of NCLT is limited and restricted by the statute and the NCLT is not a civil court and do not have the subject-matter jurisdiction as given in section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Thus, this Tribunal cannot nullify the attachment under PMLA.
- vii. The following cases have been submitted to state that NCLT has no jurisdiction matters governed under the Prevention of Money Laundering Act, 2001 (PMLA):
 - a) *Embassy Developers Private Limited Vs State of Karnataka, Special Leave Petition (C) No. 22596 of 2019;*
 - b) *Phoenix Tech Tower Ltd. vs. AP Gems and Jewellery Park Pt. Ltd., CP (IB) No. 147/2019;*
 - c) *Rotomac Global v. Deputy Director in Company Appeal (AT) (Insolvency) No. 140 of 2019;*



- d) *Judgement of Hon'ble High Court of Madras in the matter of Deputy Director, Office of the Joint Director, Directorate of Enforcement Vs. Asset Reconstruction Company) India Ltd and others (Writ Petition No. 29970 of 2019 and WMP Nos. 29872 & 34971 of 2019).*
- e) *Kiran Shah v. ED, in Company Appeal (AT) (Insolvency) No. 817 of 2020*

viii. ED submits that a person who is involved in Money Laundering is not to be allowed to enjoy the fruits of proceeds of Crime with a view to ward off is Civil indebtedness, in respect of his Creditors. Reference is made to the decision of Hon'ble High Court of Delhi in the case of **Rajiv Chakrabarty Resolution professional EIEL Vs. Directorate of Enforcement, W.P. (C) 9531/2020** wherein it is held that:

"94. The Court then deems it pertinent to observe that while proceeding to attach the tainted property, the respondents are not in essence effacing the property rights that may be claimed by an individual. It is a symbolic taking over of the custody of the property and for its preservation till such time as the proceedings that may be initiated under the PMLA come to a conclusion. Attachment thus is not liable to be viewed as an effacement of all rights that may exist or be claimed to be exercisable in respect of a property. Attachment essentially seeks to stamp the tainted property of having been found to represent proceeds of crime pursuant to the adjudicatory process which is undertaken under Sections 5 and 8 of the Act. It is essentially a seizure of property bringing it into the constructive possession of a court or as in this case, the authorities under the PMLA. Attachment under the PMLA, as was noted hereinabove, is not an attachment for debt but principally a measure to deprive an entity of property and assets which comprise proceeds of crime."

ix. The proceedings under the PMLA, 2002 are protected from the applicability of moratorium under section 14 of the Code since PMLA is a penal act and by virtue of section 71 thereunder, PMLA has an overriding effect over other laws that are inconsistent. The Hon'ble High Court of Gujarat in the matter of **Union of India**



Versus Bhuvan Madan, R/First Appeal No. 5180 Of 2019 held that:

“6.2 The submission on behalf of the appellants was acceptable that Section 71 of the PML Act gives an overriding effect to the provisions of the Act over any other law. The whole object of the law of money laundering is to prevent the money laundering and to confiscate the properties derived from and involved in the money laundering or which are those held incidental thereto. The powers exercised for attachment of the properties by the appellants herein have to be justified in that view. If the attachment is released while the appeal is pending, it would render the appeal virtually meaningless from the backdoor, which cannot be permitted.”

- x. The Hon'ble Supreme Court of India in **Bank of India v. Ketan Parekh & Ors. [(2008) 8 SCC 148]** held as follows:

“...cases might arise where both the enactments have the non-obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by those contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons.”

- xi. In the case of **P. Chidambaram Vs. Directorate of Enforcement (CRL APPEAL NO. 1340 2019)**, the Hon'ble Supreme Court of India held that:

“35. Section 71 of PMLA gives overriding effect to the provisions of PMLA. Section 71 of PMLA states that the provisions of the Act would have overriding effect on the provisions of all other Acts applicable. The provisions of PMLA shall prevail over the contrary provisions of the other Acts. Section 65 of PMLA states that the provisions of Code of Criminal Procedure, 1973 shall apply to the provisions under the Act in so far as they are not inconsistent with the provisions of PMLA.”

- xii. Thus, the fact that the properties being hypothecated or mortgaged or pledged to any bank cannot be attached under the provisions of PMLA, 2002 cannot prevent the Deputy Director, ED to pass order



of provisional attachment under section 5(1) of PMLA, in respect of any proceeds of crime. The object of the provisional attachment is to see that the attached properties remain available for the purpose of confiscation, if any, that may be ordered by the concerned Court/Special Court.

- xiii. A new provision in the shape of second proviso of sub-Section 8 under the PMLA has been inserted by the amendment under the Finance Act, 2018 which reads as under:

“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.” Apart from the above provision, first proviso of section 8(8) of the PMLA, 2002 also laid down significant provision which is read as under: “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.”

- xiv. It is submitted that the properties mortgaged to the banks are the properties involved and identified as involved in money laundering under the provisions of the PMLA, 2002, and the banks must approach the Special Court in terms of the provisions stated in the second proviso to section 8(8) of the PMLA, 2002 as the Designated Special Court (PMLA) if it thinks fit, is empowered to 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. For instance, the Special Court, PMLA in **Deputy Director, Directorate of Enforcement & others vs. Kingfisher Airlines limited and Ors [Special case no. 05 of 2018]** has restored the properties to the Applicants Banks on their executing bond undertaking to produce restore properties before this Special Court as and when required.



- xv. The settled point of law is that the order of Provisional Attachment passed by the Directorate Enforcement Provisional Attachment is not affected by the order of liquidation passed by this Tribunal. In the present case the Provisional Attachment Order bearing PAO No. 01 of 2019 dated 14.02.2019 was passed by respondent for provisional attachment of the assets of a corporate debtor and such order of Provisional Attachment was duly confirmed by the Hon'ble Adjudicating Authority PMLA vide order dated 05.08.2019 and such confirmation by the Adjudicating Authority PMLA was prior to the order of Liquidation passed by the NCLT i.e. on 17.03.2020. The Liquidator was fully aware of the attachment proceedings of the Directorate of Enforcement.
- xvi. That offence of Money Laundering creates a serious threat not only to the financial and economic framework of the country but at the same levels up the grave risk & omen to the sovereignty and integrity of the nation.
- xvii. The proceedings with regard to arrest, search and seizure, attachment, confiscation investigation, and prosecution by the Directorate of Enforcement is governed by the provisions of the PMLA, 2002 as also stated in section 65 of the PMLA, 2002 and further PMLA, 2002 being the special enactment is a complete code in itself and has its own set of rules and procedures and therefore, where the properties/assets which were provisionally attached by the Directorate of Enforcement under section 5 of the PMLA, 2002 and such provisional attachment was duly confirmed by the Ld. Adjudicating Authority, PMLA under section 8(3) of the PMLA, 2002 then the person aggrieved of such order of confirmation can seek remedy from the Appellate Tribunal, PMLA by preferring an appeal under section 26 of the Act. Since in the present case, an appeal is already pending under section 26 of PMLA, the matter is now *sub-judice*.



- xviii. It is submitted that though I&B code, 2016 as well as the prevention of Money Laundering Act, 2002(PMLA) are Special Statutes but the PMLA, 2002 being different in pith and substances from IBC, 2016 will not be affected by it and all actions taken under PMLA would be saved by virtue of Section 71 of the PMLA.

ANALYSIS & FINDINGS

16. Heard Ld. Counsel for the Applicant/Liquidator and the Respondent/ED and perused the record.
17. The present application is filed by the Liquidator of M/s. DSK Motors Private Limited (**Corporate Debtor**) seeking direction to the Enforcement Directorate (**Respondent/ED**) to release the attachment on the assets and properties of the Corporate Debtor.
18. Going by the factual matrix of the case, it is noticed that various assets of DSK Group which includes immovable properties and bank balance aggregating to total value of Rs. 47,440.02 lakhs were provisionally attached by the ED vide Provisional Attachment order No. 01/2019 dated 14.02.2019 under the PML Act, 2002.
19. Thereafter, the Corporate Debtor was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated 09.04.2019 and Mr. Rajkumar Mahto was appointed as the Interim Resolution Professional (IRP). Later, vide order dated 01.07.2019, Mr. Snehal Kamdar was appointed as the Resolution Professional (RP) of the Corporate Debtor.
20. While the Corporate Debtor was undergoing CIRP, the Adjudicating Authority of PMLA, 2002, vide order dated 05.08.2019, confirmed the provisional attachment dated 14.02.2019. The Applicant submits that the RP filed an appeal under section 26(1) of the PMLA, 2002.



21. The Liquidation process of the Corporate Debtor commenced vide order dated 17.03.2020 and the Applicant herein was appointed as the Liquidator.
22. It is the case of the Liquidator that the properties of the Corporate Debtor attached by the ED vide order dated 14.02.2019 are also mortgaged to the financial creditors of the Corporate Debtor and unless the attached properties are released, the Liquidator cannot proceed with the liquidation process of the Corporate Debtor which has to be completed in a time bound process.
23. Accordingly, on 10.10.2020, the Liquidator filed the present IA seeking a direction to release the attachment on the properties and assets of the Corporate Debtor. The said IA was allowed vide order dated 02.02.2021 with the following directions:
- “None appeared for the Respondent despite service of notice. Heard the Counsel appearing for the liquidator in IA 1854/2020. IA 1854/2020 is allowed in terms of prayer clause ‘a’ directing Deputy Director, Directorate of Enforcement, to release the attachment against the assets of the Corporate Debtor M/s DSK Motors Pvt. Ltd. (in Liquidation) more fully described in Exhibit ‘B’ to the above application.”*
24. Thereafter, the Liquidator sent letters and emails to the ED to release the attachment, however, the ED failed to do so. Consequently, IA/1401/2021 (**Contempt Application**) was filed by the Liquidator against the ED for non-compliance of the order dated 02.02.2021. In turn, the ED filed IA/1436/2021 (**Recall Application**) seeking recall of the order dated 02.02.2021 as the same was heard and decided *ex-parte*.
25. This Tribunal vide order dated 22.12.2023 allowed the recall application and consequently, the Contempt Application was dismissed as infructuous.



26. The ED was directed to file its reply and the matter was heard on merits. The ED has primarily raised the following objections:

- i. The attachment order of the Adjudicating Authority of PMLA can only be set aside by the Appellate Tribunal constituted under PMLA and this Tribunal has no jurisdiction to issue any such orders directing the ED to release properties attached under PMLA, 2002.
- ii. The attachment of properties is not to efface property right but it is only a symbolic taking over of the custody of property and seeks to stamp tainted property of having been found to represent proceeds of crime as held in **Rajiv Chakraborty, RP of EIEL vs. Directorate of Enforcement [(2022) SCC OnLine Del 3703]**.
- iii. The order dated 14.02.2019 of provisional attachment predates the insolvency commencement date of the Corporate Debtor i.e. 09.04.2019.
- iv. It is contended that there is already an appeal bearing no. 3280/2019 pending before the Appellate Authority, PMLA and the Liquidator has filed the present application seeking the same reliefs. Reliance has been placed on **Mumbai International Airport Pvt. Ltd. vs. Golden Chariot Airport [(2010) 10 SCC 422]** objecting the Liquidator's conduct of approbating and reprobating at the same time.

27. The ED's first objection was that this Tribunal has no jurisdiction to direct ED to release the attachment made under PMLA on properties of the Corporate Debtor. It is also the case of the ED that the order of provisional attachment predates the insolvency commencement date.

28. We understand that the Prevention of Money Laundering Act, 2002 (PMLA) and the Insolvency and Bankruptcy Code, 2016 (IBC) are two distinct and independent legislative pieces with different objects.



29. In **Kiran Shah vs. Directorate of Enforcement**, decided on 03.01.2022, the Hon'ble NCLAT has made the following observations:

"92. To put it, in clear and in an unequivocal term, this Tribunal points out that Section 32A of the I & B Code, 2016 in the present form and content in a cocksure manner will negate the action i.e. taken to discharge the criminally acquired asset/property in the considered opinion of this 'Tribunal'. Furthermore, such Illgotten/ Illegitimate Assets will be legitimised after the 'Corporate Insolvency Resolution Process' was completed.

93. A mere running of the eye of the 'Prevention of the Money Laundering Act 2002' latently and patently indicates that it pertains to 'Proceeds of Crime' and provides for the penal action in respect of the 'Proceeds of Crime'. It is to be remembered that only when an endeavour is made to show the source of that money as something legitimate, it would amount to projecting the 'Proceeds' as untainted property.

*94. One cannot brush aside a primordial fact that 'Money Laundering' is an 'Unlawful Bustle Activity' through which the Illegal/Illegitimate Proceeds take an outward appearance of 'Legitimacy'. In this connection, this Tribunal worth recalls and recollects the decision of Hon'ble Supreme Court in **Binoy Viswam vs. Union of India reported in 2017 7 SC 59** where in it is observed that 'unearthing black money' or checking money laundering is to be achieved to whatever extent possible.*

95. Although, Section 14 of I & B Code deals with 'moratorium', it is not a hindrance for the 'Authority' and the Officers under the 'Prevention of Money Laundering Act, 2002' to deny a person of the tainted 'Proceeds of Crime'. Suffice it for this 'Tribunal' to point out that a person who is involved in 'Money Laundering' is not to be allowed to enjoy the fruits of 'Proceeds of Crime' with a view to ward off is Civil indebtedness, in respect of his Creditors.

96. As seen from the 'Prevention of Money Laundering Act, 2002', the purpose of the Act is to prevent 'Money Laundering' and it deals with confiscation of property derived from or concerned with 'Money Laundering' etc. In fact, 'The Prevention of Money Laundering Act, 2002' is to fulfill our Country's obligation in adhering to the United Nations Resolutions and in regard to Assets/Properties being the 'Proceeds of Crime', it takes a 'primacy and precedence' over the 'Insolvency and Bankruptcy Code, 2016' which promotes "Resolution" as its objective over Liquidation in the considered opinion of this 'Tribunal'.



97. In the instant case, there is no 'Resolution Plan' as approved by the 'Tribunal' and further no Liquidation Proceedings had ended in the sale of Liquidation Assets of the 'Corporate Debtor'.

98. Besides this, the objective, purpose of two enactments (1) 'I & B Code' and (2) 'PMLA' even though at the first blush appear to be at logger heads, there is no repugnancy and inconsistency between them, in lieu of the fact the text, shape and its colour are conspicuously distinct and different, operating in their respective spheres. More importantly, when confiscation of the 'Proceeds of Crime' takes place, the said Act is performed by the Government not in its status/capacity/role as Creditor.

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102. ... in the decision of the Hon'ble Supreme Court in *Kanwar Singh Saini v High Court of Delhi* 2012 4 SCC page 307 it is held that "when a statute gives a right and provides a forum for adjudication of claims remedy has to be sought under the provisions of the Act".

103. In so far as anyone aggrieved against any decision or order of the 'Adjudicating Authority' of the PMLA, then it is open to him to prefer an Appeal before the Appellate Tribunal, PMLA by resorting to the relevant provision(s) of the 'Prevention of the Money Laundering Act, 2002'. Moreover, as against any decision or order of the Appellate Tribunal, PMLA, the concerned person/entity may file an 'Appeal' to the Hon'ble High Court under Section 42 of the PMLA.

104. There is no two opinion of the fact that the 'First Appeal' to the Appellate Tribunal is as per Section 26 of the PMLA against the Order passed by the 'Adjudicating Authority' under sub Sections 2 & 3 of Section 8 of the Act.

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110. ... this 'Tribunal' makes it candidly clear that filing of Application under Section 60(5) of the I & B Code is not an 'all pervasive' one, thereby conferring 'Jurisdiction' to an 'Adjudicating Authority' (NCLT) to determine 'any question/issue of priorities', question of Law or Facts pertaining to the 'Corporate Debtor' when in reality in 'Law', the 'Adjudicating Authority' (NCLT) is not empowered to deal with the matters falling under the purview of another authority under PMLA. Viewed in that perspective, IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 filed by the Applicant/IRP for KSL & Industries Ltd is held by this 'Tribunal' as not maintainable in law. Resultantly, the Appeal fails."



30. It is clearly understood that while the PMLA concentrates on preventing money laundering and to recover proceeds of crime, the IBC aims at insolvency resolution of the Corporate Debtor. Thus, this Tribunal, having derived its powers under the I&B Code, has no jurisdiction *per se* to decide on an order passed by the Adjudicating Authority under PMLA and to direct the ED to release attachment unless Section 32A of the Code is triggered.
31. Section 32A was inserted to the Code vide Act No. 1 of 2020 w.e.f. 28.12.2019, which came as a beneficial provision enabling the successful resolution Applicants or as the case may be, auction purchasers during liquidation, to take over the corporate debtor without any burden of the past liabilities incurred by the erstwhile management of the Corporate Debtor.
32. During the course of the hearing, Adv. Mr. Pulkit Kumar appearing for the Liquidator placed reliance on section 32A of the Code to contend that under IBC, the properties of the Corporate Debtor is protected from all kinds of attachments which also includes attachment under PMLA. On the other hand, Ld. Counsel for the ED argued that section 32A of the Code has no retrospective effect and in the present case since the liquidation order was passed prior to the insertion of section 32A, the Liquidator cannot take recourse under 32A of the Code.
33. As regards the retrospective effect of section 32A, we refer to **JSW Steel Limited vs. Mahender Kumar Khandelwal & Anr. [Company Appeal (AT) (Ins) No. 957/2019]**, decided on 17.02.2020, wherein the Hon'ble NCLAT while holding that section 32A has retrospective applicability, has observed as follows:

“43. A plain reading of Section 32A (1) and (2) clearly suggests that the Directorate of Enforcement/ other investigating agencies do not have the powers to attach assets of a ‘Corporate Debtor’, once the ‘Resolution Plan’ stands approved and the criminal investigations against the ‘Corporate Debtor’ stands abated. Section 32A of the ‘I&B



Code’ does not in any manner suggest that the benefit provided thereunder is only for such resolution plans which are yet to be approved. Further, there is no basis to make distinction between a resolution applicant whose plan has been approved post or prior to the promulgation of the Ordinance.

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*45. The Union of India had unequivocally stated that after the completion of the ‘Corporate Insolvency Resolution Process’, there cannot be any threat of criminal proceedings against the ‘Corporate Debtor’, or attachment or confiscation of its assets by any investigating agency, after approval of the ‘Resolution Plan’. In any event, by virtue of Section 238 of the ‘I&B Code’, the ‘I&B Code’ has an overriding effect over anything inconsistent therewith in any other law. Accordingly, it is clear that subsequent promulgation of the Ordinance is merely a clarification in this respect. Therefore, it is *ex facie* evident that the Ordinance being clarificatory in nature, must be made applicable retrospectively.”*

34. Thus, it is clear that section 32A of the Code operates retrospectively. However, this *ipso facto* is not enough to attract section 32A in the present case and it is important to see the essential conditions required to get the immunity under section 32A.
35. The Hon’ble Supreme Court in **Manish Kumar vs. Union of India & Anr. [Writ Petition (C) No. 26/2020]** while upholding the constitutional validity of section 32A of the Code had provided an elaborated analysis of the applicability of section 32A of the Code. Relevant paragraphs are extracted below:

“252. Section 32A has been divided into three parts consisting of sub-Sections (1) to (3). Under sub-Section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both, these immunities are subject to the following conditions:

- i. A Resolution Plan, in regard to the corporate debtor, must be approved by the Adjudicating Authority under Section 31 of the Code;*



- ii. *The Resolution Plan, so approved, must result in the change in the management or control of the corporate debtor;*
- iii. *The change in the management or control, under the approved Resolution Plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor;*
- iv. *The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant Investigating Authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a Report before the relevant Authority or the Court. This last limb may require a little more demystification. The person, who comes to acquire the management and control of the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a Resolution Plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected.*

xxx

254. ... The Explanation to sub-Section (2) has clarified that the words “an action against the property of the corporate debtor in relation to an offence”, would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word “include” is used under sub-clause (i) of the Explanation, the word “action” against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the Code. The other part of the clarification, under the Explanation, is found in the second sub-clause of the Explanation (ii). Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor



*or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person. Thus, reading sub-Section (1) and sub-Section(2) together, two results emerge – (i) subject to the requirements embedded in sub-Section (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease; (ii) The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated. The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. **The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in sub-Section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.”***

(Emphasis Provided)

36. From the above, it is clear that applicability of section 32A is contingent upon fulfilment of the following two essential conditions:

- i. A resolution plan must be approved by the Adjudicating Authority; or sale of property of the corporate debtor must be completed during the liquidation process, as the case may be;
- ii. The resolution plan or sale during liquidation, as the case may be, should result in change of the management of the Corporate Debtor.

37. Ld. Counsel for the Liquidator relied on the judgment passed by Hon'ble Bombay High Court in **Mr. Shiv Charan & Ors. Vs. Adjudicating Authority under PMLA & Anr. [Writ Petition (L) No. 9943/2023]**. We have perused the said judgment. The case of **Shiv Charan** (supra) is distinguishable since the observations made therein pertain to a circumstance where resolution plan was approved by the Adjudicating Authority. Admittedly, in the case at hand, no resolution plan has been approved by the Adjudicating Authority and the Corporate Debtor is



presently undergoing liquidation. The judgment does not answer whether attachment can be lifted prior to the sale of property/assets of the Corporate Debtor during Liquidation. In fact, in **Shiv Charan** (supra), the Hon'ble Bombay High Court has clearly emphasized that *Section 32A (2) affords immunity where successful sale of assets of the corporate debtor is effected to an unconnected purchaser in liquidation proceedings.*

38. Thus, it is clear that unless the pre-requisites under section 32A of the Code is fulfilled, there is no impediment to the ED or the Adjudicating Authority under PMLA to go ahead with the proceedings under PMLA. As already discussed above, recourse under section 32A of the Code is available only under two circumstances. One, after approval of a resolution plan by the Adjudicating Authority and two, after completion of sale under liquidation, with fulfilment of the other conditions specified therein. In the present case, neither of the two essential conditions of section 32A of the Code has been fulfilled.
39. From the averments in the application, it is seen that the Liquidator is still in the process of selling the Corporate Debtor under liquidation. Since the assets and properties of the Corporate Debtor have not yet been sold to an unconnected purchaser as required under section 32A of the Code, the benefit under section 32A cannot be availed at this stage. In view thereof, the prayer seeking release of attachment on all properties and assets of the Corporate Debtor is **rejected**.
40. Accordingly, the IA/1854/2020 is **dismissed** and **disposed of**. No order as to costs.

Sd/-

Charanjeet Singh Gulati
Member (Technical)

/Apurva, LRA/Uma, LRA/

Sd/-

Lakshmi Gurung
Member (Judicial)