* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 05 September 2022**
Judgment pronounced on: 11 November 2022

\+ W.P.(C) 9531/2020, CM APPL. 30578/2020(Direction)
CM APPL. 22986/2022(Amendment)

RAJIV CHAKRABORTY RESOLUTION PROFESSIONAL OF EIEL .....Petitioner
Through: Mr. Abhinav Vashisht, Sr. Adv. with Mr. Shivank Diddi, Adv.

versus

DIRECTORATE OF ENFORCEMENT .....Respondent
Through: Mr. Zoheb Hossain, SC for ED with Mr. Vivek Gurnani and Mr. Kavish Garach, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

A. PROLOUGE

1. This writ petition raises the important question of the impact that a moratorium that comes into effect in terms of Section 14 of the **Insolvency and Bankruptcy Code, 2006**[1] would have on the powers of the **Enforcement Directorate**[2] to enforce an attachment under the provisions of the **Prevention of Money Laundering Act, 2002**[3]**.** The petition raises a challenge to orders of attachment which have been made by the ED in exercise of powers conferred by the PMLA. While

[1] IBC
[2] ED
[3] PMLA

the writ petition as originally framed had assailed the validity of **Provisional Attachment Orders**[4] dated 08 July 2020 and 05 August 2020, subsequently and since those orders came to be confirmed by the Adjudicating Authority, an amendment application was moved questioning the confirmation orders dated 01 January 2021 and 29 January 2021. The petition has been instituted by the **Resolution Professional**[5] of **Era Infra Engineering Limited**[6] which was admitted to insolvency proceedings under the provisions of the IBC. The challenge to the orders of attachment is essentially founded on the provisions of Section 14 of the aforesaid enactment with the petitioner contending that once the moratorium had come into effect, the ED stood denuded of jurisdiction to exercise powers under the PMLA. Before proceeding ahead to notice the submissions which have been addressed, it would be pertinent to notice the following essential facts.

B. THE ESSENTIAL FACTS

2. On 19 April 2018, the ED proceeded to freeze 74 bank accounts of EIEL in purported exercise of powers conferred by Section 102 of the **Code of Criminal Procedure, 1973**[7]**.** The insolvency proceedings would be deemed to have commenced on 08 May 2018 when the petition was admitted and it is this date which would thus constitute the date of commencement of the **Corporate Insolvency Resolution Process**[8]. Assailing the action initiated by the respondent under Section 102 of the CrPC, the petitioner preferred W.P.(C)9566/2019

[4] PAO
[5] RP
[6] EIEL
[7] CrPC
[8] CIRP

which came to be allowed with the learned Judge quashing the orders dated 04 October 2018 and 19 April 2018 in terms of which its bank accounts had been frozen. The learned Judge, however, refrained from interfering with the order of 07 October 2019 which had been passed under Section 5 of the PMLA and had provisionally attached certain properties. The Court shall deal with the aforesaid order hereinafter. Proceeding further, it may be noted that on 04 October 2018, the Adjudicating Authority passed an order upholding the freezing of the bank accounts detailed hereinabove. Thereafter and on 07 October 2019, the respondent proceeded to attach 49 bank accounts of EIEL in exercise of powers conferred by Section 5 of the PMLA. It was this order which was left untouched on the first writ petition which had been filed by the petitioner and was referred to hereinabove.

3. Aggrieved by the PAO pertaining to the 49 bank accounts of EIEL, the petitioner filed an application to set aside the same before the **National Company Law Tribunal**[9]. During the pendency of that challenge, the Adjudicating Authority by its order of 17 March 2020 confirmed the order of attachment. On 21 May 2020, the corporate debtor is said to have received an income tax refund pertaining to the assessment year 2015-2016. On 07 July 2020, the petitioner received an e mail from Axis Bank, with which its bank accounts aforenoted were maintained, to ascertain whether the debit freeze as imposed by ED stood lifted. The petitioner was also called upon to ascertain whether any other attachment orders had come to be passed effecting the assets of EIEL, the corporate debtor. On 08 July 2020, the

[9] NCLT

respondent attached two tunnel boring machines valued at Rs. 33,71,19,466/- again in exercise of powers conferred under the PMLA. Aggrieved by the aforesaid action as initiated by the respondent, the petitioner filed an Interlocutory Application[10] before the NCLT seeking directions for the respondent being restrained from proceeding further in terms of the order of 08 July 2020 of the Adjudicating Authority and for them being further restrained from taking any further action against the assets of EIEL during the pendency of the proceedings before the NCLT under the IBC.

4. It appears that in the meanwhile confusion reigned with respect to the income tax refund which had been received by the petitioner. That amount is stated to have been credited in the accounts of the corporate debtor maintained with Axis Bank. Since the petitioner was apprised by the Axis Bank of a restraint which operated on its right to deal with the income tax refunds which had been received, the petitioner preferred a contempt petition before this Court. In the said contempt petition, on 06 August 2020, counsels appearing for the respondent are stated to have taken time to obtain instructions and apprise the Court whether the income tax refund also stood attached in proceedings under the PMLA. The petitioner alleges that after the hearing on the aforesaid contempt petition had concluded, the petitioner was e-mailed a copy of yet another PAO dated 05 August 2020 in terms of which the income tax refund also stood attached. In view of the aforesaid development, the contempt petition came to be dismissed on 13 August 2020 with the petitioner being accorded the

[10] I.A.

liberty to initiate appropriate steps in challenge to the PAO of 05 August 2020. In the meanwhile, on 11 August 2020, the Supreme Court while dealing with a civil appeal preferred by another creditor of EIEL, aggrieved by its non-inclusion in the list of operational creditors, stayed further proceedings in the CIRP. That interim order was ultimately vacated on 16 November 2020. It is thereafter that the instant writ petition came to be preferred before the Court.

5. On 08 April 2021, an interim order was passed by this Court where after hearing the contentions of respective sides, the Court directed the ED to create a separate fixed deposit for the amount of Rs.19,22,11,271/- which had been attached by the said respondent. The aforesaid fixed deposit was to abide by the final result of the writ petition. On 01 January 2022, the Adjudicating Authority confirmed the PAO dated 08 July 2020. The Adjudicating Authority further and on 29 January 2022 proceeded to confirm the PAO dated 05 August 2020. In the meanwhile, and upon the restraint on the CIRP being lifted by the Supreme Court, the NCLT extended the resolution period by 120 days. As would be evident from a reading of the order dated 04 February 2022 of the NCLT, the petitioner is stated to have received offers from fourteen **Prospective Resolution Applicants**[11]**.** The Court is informed that the aforesaid PRAs" are in the process of conducting due diligence of the corporate debtor.

6. On 06 May 2022, the Court took note of certain preliminary objections which were raised by Mr. Hossain, learned counsel

[11] PRAs

appearing for the ED, who had urged that the writ petition only lays a challenge to provisional attachment orders when in fact both of which have subsequently come to be confirmed by the Adjudicating Authority in terms of its orders of 01 January 2021 and 29 January 2021. Mr. Hossain pointed out that those two orders had not been assailed in the writ petition. He also referred to the fact that objections to the aforesaid proceedings as drawn by the ED had also been raised before the Adjudicating Authority who had proceeded to reject the same on merits. Mr. Hossain submitted that the said order of the Adjudicating Authority has also been challenged in the writ petition. Mr. Hossain further contented that the validity of the PAO No.07/2020 dated 08 July 2020 had also been questioned before the NCLT. In view of the aforesaid, it was submitted that the petitioner could not pursue parallel remedies. The said objection as was addressed by Mr. Hossain was made without prejudice to his contention that the NCLT would have no jurisdiction to rule on the validity of the orders passed under the PMLA in light of the law as declared by the Supreme Court in **Embassy Property Developments Pvt. Ltd. vs. State of Karnataka**[12].

7. On 10 May 2022 and upon hearing Mr. Vashisht, learned Senior Counsel appearing for the petitioner, at some length in response to the preliminary objections which had been noticed on the earlier occasion, the Court granted the prayer made on behalf of the petitioner to be accorded the liberty to move a formal application seeking addition of reliefs in the writ petition. The petitioner proceeded to move an

[12] 2019 SCC OnLine SC 1542

application for amendment thereafter which came to be allowed on 12 May 2022. The respondent concluded their submissions on 29 August 2022 whereafter the matter was closed for judgement on 05 September 2022. While closing proceedings on the petition, the Court had also granted liberty as sought by learned counsels for parties to place their Brief Synopsis of Submissions on record. Pursuant to the liberty so granted, the petitioner submitted their written submissions on 23 September 2022 and the respondent on 07 October 2022.

C. PRELIMINARY OBJECTIONS

8. Having noticed the essential facts, which would be relevant for the purposes of disposal of the instant writ petition and before proceeding to consider the arguments addressed on merits, the Court deems it appropriate to deal with the preliminary objections which were raised by Mr. Hossain. Mr. Hossain had firstly referred to the petitioner having filed I.A. No. 2576/2019 before the NCLT and submitted that an identical prayer for the lifting of the attachment orders made by the ED had been moved before the said Tribunal. Learned counsel had also drawn the attention of the Court to the order dated 26 June 2020 passed on the aforesaid application whereby the Tribunal had restrained the respondent from realisation of the funds based on the attachment order, the validity of which was questioned. It was further contended that the writ petition as it stands has only impugned the provisional attachment orders dated 08 July 2020 and 05 August 2020. It was further contended that insofar as the PAO dated 08 July 2020 was concerned, that also formed subject matter of I.A. No_____/2020 (placed at page 343 of the paper book) in which

too, the petitioners had sought issuance of directions requiring the respondents to desist from proceeding further with the conformation of the PAO. It was lastly urged that the orders in terms of the which the PAO came to be confirmed by the Adjudicating Authority have also not been assailed in the writ petition.

9. On behalf of the petitioners, it was contended that the jurisdiction of the Court to rule upon the challenge which stands raised in the writ petition would have to be considered bearing in mind the nature and extent of the jurisdiction which could be exercised either by the NCLT or the Appellate Tribunal constituted under the PMLA bearing in mind the principles laid down in **Embassy Property**. Learned counsel for the petitioner submitted that both the aforenoted Tribunals exercise jurisdiction over matters entrusted to them under their respective statutes. It was submitted that they would thus clearly have no authority to rule on the question which arises and touches upon the interplay between the provisions and powers conferred by the IBC and the corresponding power and authority which stands conferred upon the ED under the PMLA. Learned counsel for the petitioner also drew the attention of the Court to the conflicting views which had been rendered on the interplay between IBC and PMLA and referred to the decision in **Directorate of Enforcement vs. Manoj Kumar Agarwal**[13] which had held that the Enforcement Directorate would have no jurisdiction to interfere or interdict proceedings under the IBC once a moratorium came into effect. Learned counsel also invited the attention of the Court to the

[13] 2021 SCC OnLine NCLAT 121

conflicting views which had been expressed in **Varrsana Ispat Limited vs. Deputy Director of Enforcement**[14] as well as **Andhra Bank vs. Sterling Biotech Limited**[15]**, Rotomac Global Private Limited vs. Deputy Director, Directorate of Enforcement**[16] on the one hand and **Manoj Kumar Agarwal** on the other and contended that in light of the flux in the legal position, it would but be appropriate for this Court to effectively rule upon the questions which arise. The attention of the Court was also drawn to the judgement rendered by a larger bench of the National Company Law Appellate Tribunal[17] in **Kiran Shah v. Enforcement Directorate**[18] which had taken a view diametrically opposed to what was held in **Manoj Kumar Agarwal**. In view of the aforesaid, it was urged that the Court should render an authoritative pronouncement on the questions which arise for determination.

10. Before proceeding to rule upon the preliminary objections noticed above, it would be pertinent to note that insofar as I.A. No. 2576/2019 filed before the NCLT is concerned, the said application does not pertain to the PAOs" which have been challenged in the instant writ petition. The subsequent miscellaneous application which was moved in respect of the PAO dated 8 July 2020 does not in effect carry any prayer for its quashing. In any case and in the considered opinion of this Court, the preliminary objections raised with respect to proceedings drawn or initiated before the NCLT would have to be

[14] 2019 SCC OnLine NCLAT 236
[15] Company Appeal (AT) (Insolvency) No.601, 612, 527 of 2019
[16] 2019 SCC OnLine NCLAT 961
[17] NCLAT
[18] 2022 SCC OnLine NCLAT 2

examined and evaluated based upon the stand of the respondents themselves who had contended that the said Tribunal would have no jurisdiction to rule on the validity of the PAO in light of the judgement rendered by the Supreme Court in **Embassy Property**. This is evident from the minutes of the order dated 06 May 2022, which is reproduced hereinbelow: -

> "In the lead matter being W.P.(C) 9531/2020 after Mr. Abhinav Vasisht, learned Senior Counsel had concluded his submissions, Mr. Hossain, learned counsel appearing for the Directorate has at the outset raised various preliminary objections. It is contended that the writ petition challenges provisional orders of attachment when in fact both the impugned attachment orders have subsequently come to be affirmed by the Adjudicating Authority in terms of its orders of 1 January 2021 and 29 January 2021. It is pointed out that there is no challenge made to those two orders in the writ petition. The Court is further apprised of the fact that the objections on lines similar to those which were addressed on this petition were also raised before the Adjudicating Authority and have since come to be rejected after consideration on merits. That order which stands placed as Annexure-E to the affidavit filed on behalf of the Directorate is also not assailed. In view of the above, Mr. Hossain would contend that the writ petitions as it stands presently framed is liable to dismissed.
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> It is lastly pointed out that insofar as the Provisional Order of Attachment No. 7/2020 is concerned, its validity has also been questioned before the National Company Law Tribunal [NCLT] by the petitioner and before which Authority the matter is still pending. The last of the preliminary objection is addressed without prejudice to the contention of the Directorate that even the invocation of the jurisdiction of the NCLT would be barred by law and in light of the principles laid down by the Supreme Court in **Embassy Property Development Pvt. Ltd. vs. State of Karnataka & Ors.** [(2020) 13 SCC 308]. In view of the above, Mr. Hossain would contend that the petitioner cannot pursue parallel remedies.
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> Bearing in mind the aforenoted preliminary objections that are raised, let Mr. Vasisht, learned Senior Counsel respond to the same."

11. In view of the stand as taken by and on behalf of the ED and so encapsulated in the order of 6 May 2022, the Court notes that the respondents cannot be permitted to approbate and reprobate. Having taken the stand that a challenge to orders of attachment made under the PMLA cannot be considered or ruled upon by the NCLT while discharging its functions under the IBC, the preliminary objections which are raised in this regard clearly do not merit acceptance. Once the respondents have taken the principled stand that the NCLT would have no jurisdiction to either decide or rule upon the validity of proceedings initiated under the PMLA, it would be wholly illogical to dismiss the instant writ petition and thus compel the petitioners to pursue the applications made and pending before the said tribunal. The Court also takes note of the orders dated 29 January 2021 and 08 April 2021 passed on the instant writ petition and in which the Court had clearly recognised the jurisdictional issues which stood raised and thus merited the writ petition itself being entertained.

12. The Court further notes that the orders of confirmation passed by the Adjudicating Authority have been directly assailed and questioned in terms of the amendment which was permitted and thus the objection raised on this score is also liable to be negatived. In any case, this Court is of the considered opinion that in light of the conflicting views which have been expressed by different Benches of the NCLT/NCLAT, it is imperative that the Court answer the questions raised in order to confer clarity and lend a quietus to the controversy. In view of the aforesaid, the preliminary objections as raised by Mr. Hossain are negatived.

D. SUBMISSIONS OF THE PETITIONER/ RESOLUTION PROFESSIONAL

13. Proceeding then to the merits of the issues which arise, the Court firstly proceeds to record the submissions which were addressed at the behest of the petitioner. Learned counsel for the petitioner firstly urged that the IBC is a special legislation and a complete code insofar as insolvency and resolution of a corporate debtor is concerned. It was submitted that provisions relating to revival and resolution of a corporate debtor stand engrafted in and controlled by the IBC exclusively. Learned counsel placed reliance upon the judgments rendered in **Avani Projects & Infrastructure Limited vs. The Official Liquidator**[19] and **Jotun India Private Limited vs. PSL Limited**[20] to submit that since the subject of resolution of a corporate debtor is governed exclusively by the IBC which has been duly recognised to be a special statute, it must consequently be held that its provisions would have primacy over any other general statute including the PMLA.

14. Turning then to the admitted fact that both the IBC as well as the PMLA adopt and incorporate non obstante clauses in terms of Sections 238 and 71 respectively, it was argued on behalf of the petitioner that it would be the IBC and its provisions which would prevail. It was submitted that IBC being a later statute, would prevail and override the provisions of the PMLA. According to learned

[19] CP 1 of 2016 (High Court of Calcutta)
[20] Company Petition No.434 of 2015 (Bombay High Court)

counsel, the attachment orders as made are thus liable to be tested on the aforesaid lines.

15. Turning then to the provisions contained in Section 14 of the IBC, learned counsel for the petitioner laid stress upon the fact that section 14(1)(a) places a complete embargo on continuation and institution of suits or "proceedings" against the corporate debtor and which may be pending before any court of law, tribunal, arbitration panel or other authority. It was urged on behalf of the petitioner that proceedings of attachment that may be initiated under the PMLA are inherently civil in nature. It was argued that the provisions contained in Chapter III of the PMLA and which deal with attachment of properties alleged to have been derived or obtained from proceeds of crime or value thereof are purely civil in nature and distinct from proceedings which may otherwise be drawn under the aforesaid statute under Chapter VII. It becomes pertinent to note that Chapter VII puts in place provisions for the creation of Special Courts and for the trial of offences under the PMLA. Learned counsel thus sought to draw a distinction between the proceedings that may be initiated under Chapters III and VII of the PMLA and contended that while the former would be civil in character, those taken in Chapter VII are, undisputedly, criminal in nature. The submission essentially was that since the attachment of properties under Sections 5 or 8 contained in Chapter III of the PMLA are civil proceedings, they would clearly fall within the ambit of the expression "*proceedings*" as contained in Section 14. This contention was premised on the assertion that the expression "proceedings" would encompass all civil proceedings

including those which may be described as quasi criminal and only exclude those which are inherently and purely criminal in character. According to learned counsel, it is only the latter which would not be impacted by the legislative injunction comprised in Section 14.

16. Learned counsel then laid stress upon the objects of Section 14 and submitted that the said provision had come to be introduced on the statute book in order to ensure that the CIRP could proceed unhindered and without any action being taken against the corporate debtor or its assets. Learned counsel contended that Section 14 is essentially designed to ensure that the assets and properties of the corporate debtor are duly preserved and no coercive steps are taken against them during the pendency of the CIRP. According to learned counsel, the objectives underlying Section 14 are liable to be gathered from the **Report of the Insolvency Law Committee, February 2020** and more particularly Paras 8.2 and 8.11 thereof, which are extracted hereinbelow: -

> "8.2. The moratorium under Section 14 is intended to keep *"the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default."* Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it *"facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."*

> 8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute *"money claims or recovery"* proceedings. In this regard, the Committee also noted that in some jurisdictions, laws allow *"regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety"* to be continued during the moratorium period."

17. The petitioners also sought to draw sustenance from the following observations as made by the Supreme Court in its recent decision of **P. Mohanraj vs. M/s. Shah Brothers Ispat Pvt. Ltd.**[21]

> "32. Viewed from another point of view, clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of *any* of its assets or *any* legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtors" assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur."

In view of the aforesaid and bearing in mind the fact that the proceedings initiated under the PMLA are civil in character, learned counsel contended that the PAOs" impugned herein cannot be sustained.

[21] (2021) 6 SCC 258

18. Turning then to Section 32A of the IBC**,** it was urged that it would be wholly incorrect to assume or assert that the assets of the corporate debtor stand protected from attachment only after the stages which are contemplated in the aforenoted provision are reached. Learned counsel submitted that Section 32A is liable to be viewed bearing in mind its principal purpose of bringing about a cessation of criminal proceedings that may be pending against a corporate debtor and with the legislative measure mandating that they would come to an end once a Resolution Plan is approved or a measure relating to liquidation adopted. The submission was that Section 32A is merely an extension of the protection conferred by Section 14(1)(a) and, therefore, the impugned orders of attachment are rendered wholly unsustainable.

E. CONTENTIONS OF THE ENFORCEMENT DIRECTORATE

19. Appearing for the respondents, Mr. Zoheb Hossain, learned counsel appearing for the ED argued that "*proceeds of crime*" as defined under Section 2(1)(u) of PMLA is not an operational debt as per the provisions of Section 5(21) of the IBC. It was submitted that ED would not fall within the definition of an operational creditor as defined by Section 5(20) of the IBC. Learned counsel submitted that when the ED proceeds to attach properties representing proceeds of crime, it is not doing so by virtue of being a creditor of the corporate debtor. Mr. Hossain submitted that while an operational debt would mean a debt arising under any law for the time being in force, proceeds of crimes stand on a completely different pedestal and relate

to ill gotten assets derived or obtained from the commission of a scheduled offence. In view of the aforesaid, learned counsel would submit that it would be wholly incorrect to proceed on the basis that orders of attachment made in respect of properties which constitute proceeds of crime is akin to an action taken by a creditor against the assets of a debtor. Learned counsel submitted that while proceeding to attach and confiscate proceeds of crime, the action of the ED is essentially aimed at taking away from a person or an entity all that may have been illegitimately secured by indulging in proscribed criminal activity. In support of the aforesaid submissions, Mr. Hossain, firstly, placed reliance upon the following passages as appearing in the decision of this Court in **Deputy Director Deputy Director of Enforcement, Delhi v. Axis Bank & Ors** [22]:-

> "105. It is vivid that the legislature has made provision for "*provisional attachment*" bearing in mind the possibility of circumstances of urgency that might necessitate such power to be resorted to. A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the investigation is completed. The authority for "*provisional*" attachment of suspect assets is to ensure that the same remain within the reach of the law.
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> xxx xxx xxx
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> 141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "*proceeds of crime*" concerns a property the value whereof is "*debt*"

[22] 2019 SCC OnLine Del 7854

> due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity.
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> xxx xxx xxx
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> 143. The proceeds of crime, there is no doubt, are not even remotely covered by the expressions "*revenues*, *taxes*, *cesses*" or other "*rates*." The word "*revenue*" is the controlling word, the expressions following (taxes, cesses, rates) taking the colour from the same. The word revenue, in the context of Government is to be understood to be conveying taxation [*Gopi Pershad v. State of Punjab*, AIR 1957 Punjab 45 (DB)]. This is how the expression is defined by *Black's Law Dictionary, Eighth Edition* as also by *Cambridge English Dictionary (accessible online)*. The reliance by the respondents on the use of the expression "*non-tax revenue*" with reference to PMLA under major accounting head "*0047 Other Fiscal Services*" in the list of Heads of Accounts of Union and States issued by Controller General of Accounts, Department of Expenditure in the Ministry of Finance, Government of India under the Government of India (Allocation of Business) Rules, 1961 is misplaced. The use of the expression for accounting purposes - to take care of receipts flowing into the Consolidated Fund - cannot give to the value of proceeds of crime realised by sale of properties confiscated under PMLA the colour of taxation."

20. Mr. Hossain then proceeded to submit that the decision of the Supreme Court in **P. Mohanraj** had succinctly explained and acknowledged the difference between a debtor-creditor relationship which may otherwise arise in the context of the IBC and being one which would stand on a completely different pedestal from an attachment or confiscation under PMLA. Learned counsel submitted that **P. Mohanraj** categorically finds and holds that the authorities while proceeding to attach and confiscate properties under the PMLA

do not act as creditors. Learned counsel referred to the following observations as appearing in the judgement of **P. Mohanraj**: -

> "100. Lastly, Shri Mehta relied upon Directorate of Enforcement v. Axis Bank [Directorate of Enforcement v. Axis Bank, 2019 SCC OnLine Del 7854 : (2019) 259 DLT 500] , and in particular, on paras 127, 128 and 146 to 148 for the proposition that an offence under the Prevention of Money-Laundering Act could not be covered under Section 14(1)(a). The Delhi High Court's reasoning is contained in paras 139 and 141, which are set out hereinbelow: (SCC OnLine Del)
>
> > "139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, Sarfaesi Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "*due*" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.
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> > 141. This Court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "*proceeds of crime*" concerns a property the value whereof is "*debt*" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away

> what has been illegitimately secured by proscribed criminal activity."
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> (emphasis in original)
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> This raison d'être is completely different from what has been advocated by Shri Mehta. The confiscation of the proceeds of crime is by the Government acting statutorily and not as a creditor. This judgment, again, does not further his case."

21. Learned counsel then submitted that a person who is engaged in or has committed the offence of money-laundering cannot be permitted to avail or enjoy the proceeds thereof under the garb of seeking a discharge of his civil liability owed to its creditors. It was submitted that the provisions of the IBC cannot be used as an *"amnesty route"* for an accused under the PMLA and if that contention were to be accepted, it would defeat the very objectives informing the confiscation regime under the PMLA. Learned counsel submitted that the aforesaid issue is, in any case, no longer *res integra* in view of the line of decisions which have unhesitatingly held that the powers conferred on the authorities to attach properties under the PMLA is not impacted by Section 14 of the IBC. Reliance in this respect was firstly placed upon the judgement rendered by NCLAT in **Varrsana Ispat**, where the Appellate Tribunal had held as under:

> "8. Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the „Prevention of Money-laundering Act, 2002" is to prevent the money-laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.
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> 12. From the aforesaid provisions, it is clear that the „Prevention of Money-Laundering Act, 2002" relates to „proceeds of crime" and the offence relates to „money-laundering" resulting confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the

> „Prevention of Money-laundering Act, 2002" or provisions therein relates to „proceeds of crime", we hold that Section 14 of the „I&B Code" is not applicable to such proceeding.
>
> 14. As the „Prevention of Money-laundering Act, 2002" relates to different fields of penal action of „proceeds of crime", it invokes simultaneously with the „I&B Code", having no overriding effect of one Act over the other including the „I&B Code", we find no merit in this appeal. It is accordingly dismissed. No costs."

22. Mr. Hossain further apprises the Court that the civil appeal which was taken against the aforesaid decision of NCLAT came to be dismissed by the Supreme Court on 22 July 2019. Learned counsel would submit that in view of the dismissal of the civil appeal, not only did the judgement of NCLAT stand merged, it also became the law of the land as declared by the Supreme Court and thus binding on all authorities in view of Article 141 of the Constitution.

23. Reliance was then placed on the following observations as made by NCLAT in **Andhra Bank v Sterling Biotech Limited**[23]**:**

> "15. In so far the assets of the „Corporate Debtor" is concerned, if it is based on the proceeds of crime, it is always open to the „Enforcement Directorate" to seize the assets of the „Corporate Debtor" and act in accordance with the „Prevention of Money-laundering Act, 2002" (for short, „the PMLA")."

Mr. Hossain further urged that the flux in the legal position that may have existed in light of the decisions rendered by the NCLT and NCLAT in different decisions, in any case stands laid to rest in light of the decision pronounced by the larger bench of NCLAT in **Kiran Shah** where the decision in **Manoj Kumar Agarwal** was held to have been rendered per incuriam and the Tribunal had held as follows: -

[23] (Company Appeal (AT) (Insolvency) No. 601, 612, 527 of 2019),

> "98. 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 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.
>
> 99. 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".
>
> 100. 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".
>
> 101. 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."

24. In view of the aforesaid, Mr. Hossain would submit that Section 14 of the IBC cannot, by any stretch of imagination, be recognised as prohibiting an action of attachment under the PMLA. Mr. Hossain submitted that the question of whether the provisions of the IBC would have precedence over those engrafted in the PMLA, in any case, stands answered in favour of the respondents as would be evident from the following passages of the decision of the Court in **Axis Bank**:-

"139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, SARFAESI Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "due" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.

xxx xxx xxx

144. The respondent have referred to the following observations of the Supreme Court in order dated 10.08.2018 in Special Leave to Appeal (Civil) No. 6483/2018, *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited*:—

> "*Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.*
>
> *We may also refer in this connection to Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons."*

145. Noticeably, the effect of Insolvency Code on PMLA was not in issue before the Supreme Court in the aforesaid case, the prime concern being the conflict arising out of claims of revenue under Income Tax Act, 1961 vis-à-vis proceedings under the Insolvency Code. For the same reasons, the ruling of the full bench of the Madras High Court in *Indian Overseas Bank* (supra) also would have no effect here.

146. A Resolution Professional appointed under the Insolvency Code does not have any personal stake. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of Section 14 of Insolvency Code cannot come in the way of the statutory authority conferred by PMLA on the enforcement officers for depriving a person (may be also a debtor)

> of the proceeds of crime. A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route. After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason such assets are not lawfully his to claim.
>
> 147. To sum up on the issue, the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA."

25. Proceeding along this thread, Mr. Hossain also sought to draw and sustenance and strength from the principles which were enunciated in **Axis Bank,** where the learned Judge had held that the provisions of the IBC cannot be interpreted in a fashion which would defeat the very objective of the PMLA or open an escape route and thus rendering the authorities under the aforesaid enactment denuded of the power to move against proceeds of crime. It was pointed out that in **Axis Bank** and, more particularly, Para 146 of the report, the learned Judge had unequivocally held that a person indulging in money laundering cannot be permitted to avail of the proceeds of crime.

26. Mr. Hossain then submitted that the IBC creates a specific bar with respect to proceedings that may be initiated under the PMLA by virtue of the provisions contained in Section 32A. It was submitted that the said provision was introduced essentially to fill *"critical gaps"* in the corporate insolvency framework. According to Mr. Hossain, the introduction of Section 32A throws light upon the scope of Section 14 in the sense of providing an indication of the terminal point whereafter no further steps can be taken with respect to the

assets of the corporate debtor. Learned counsel submitted that this Court in **Nitin Jain Liquidator of PSL Limited vs. Enforcement Directorate**[24] had clearly enunciated the *"trigger events"* under the IBC which would constitute an embargo on attachment under the PMLA. Referring to the said decision, Mr. Hossain submitted that the Court had found that the provisions of Section 32A would come into play only upon a Resolution Plan being approved or a measure towards liquidation being adopted and those alone constituting the *"defining moment"* for the aforesaid purpose. Learned counsel referred to the following passages as appearing in the decision of the Court in **Nitin Jain**: -

> "96. While Mr. Malhotra, learned senior counsel appearing for the secured creditors, has sought to invoke and draw sustenance from the provisions of Order XXI Rule 92 and 94 of the Civil Procedure Code to contend that the confirmation of the proposal for the settlement of the affairs of the corporate debtor should be held to be the determinative, the Court while not rejecting that submission completely is of the opinion that the answer to the same cannot rest on the pedestal of Order XXI. This since no pari materia provision stands engrafted in the IBC. It becomes apposite to note that Order XXI Rule 92 of the Civil Procedure Code unequivocally spells out and mandates that the sale shall become absolute upon its confirmation. The decisions cited by Mr. Malhotra in this respect are also not consequently being elaborately dealt with for the purposes of answering this particular issue.
>
> 97. This Court is of the opinion that the answer to determining when the bar under Section 32A would come into play must be answered bearing in mind the ethos of Section 32A and upon an interpretation of the provisions of the IBC and the Regulations framed thereunder. As is evident from a careful reading of Section 32A(2), the Legislature in its wisdom has provided that no action shall be taken against the properties of the corporate debtor in respect of an offense committed prior to the commencement of the CIRP and once either a resolution plan comes to be approved or when a sale of liquidation assets takes place. The objective

[24] 2021 SCC OnLine Del 5281

underlying the introduction of this provision has been eloquently explained by the Supreme Court in **Manish Kumar**. The intent of the mischief sought to be addressed is clearly borne out from the Committee Reports as well as the SOA. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the Adjudicating Authority approving the course of action to be finally adopted in relation to the corporate debtor. Section 32A legislatively places vital import upon the decision of the Adjudicating Authority when it approves the measure to be implemented in order to take the process of liquidation or resolution to its culmination. It is this momentous point in the statutory process that must be recognised as the defining moment for the bar created by Section 32A coming into effect. If it were held to be otherwise, it would place the entire process of resolution and liquidation in jeopardy. Holding to the contrary would result in a right being recognised as inhering in the respondent to move against the properties of the corporate debtor even after their sale or transfer has been approved by the Adjudicating Authority. This would clearly militate against the very purpose and intent of Section 32A. It becomes pertinent to recollect that one of the primary objectives which informed the introduction of this provision was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor or from penalties connected with offenses committed prior thereto. The imperative for the extension of this legislative guarantee subserves the vital aspect of maximization of value."

27. Drawing the attention of the Court to the decision of NCLAT in **JSW Steel Limited vs. Mahender Kumar Khandalwal & Ors.**[25], Mr. Hossain laid emphasis on the fact that in the said case an order of provisional attachment had come to be made on 10 October 2019 and

[25] 2020 SCC OnLine NCLAT 431

thus, admittedly, after the Resolution Plan had been approved by NCLT on 05 September 2019. It is this factor which, according to Mr. Hossain, clearly distinguishes the aforesaid decision and consequently, the observations as appearing therein are liable to be construed accordingly. It was pointed out that, undisputedly, in the facts of the present case neither a Resolution Plan stands approved nor has a measure towards liquidation been adopted. In view of the above, it was submitted that it would be incorrect in law to hold that the authorities under the PMLA stood restrained from proceeding to attach properties which constituted proceeds of crime.

28. Mr. Hossain then submitted that Section 32A is the only special dispensation which had been adopted and enforced by the Legislature in terms of which the powers of attachment as conferred upon the ED are required to yield. Section 32A, according to Mr. Hossain, essentially incorporates measures in furtherance of the principles of a *"clean slate"* and a *"clean break"*. He referred to the Report of the Insolvency Law Committee and which had recommended the adoption of a measure for enabling a Resolution Applicant to take over the properties of a corporate debtor without any prior liabilities or fetters. It was submitted that this is evident from Paras 17.1 and 17.2 of the Report, which reads thus: -

> "17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and

> purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.
>
> 17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively."

29. According to Mr. Hossain, the power of attachment when viewed in juxtaposition of the measure which ultimately came to be adopted by the Legislature granting immunity only from the stage of approval of the Resolution Plan or a liquidation measure being adopted, is evidence of the intent of the authors of the statute not envisaging an embargo operating on the powers of the ED under the PMLA prior thereto. In view of the aforesaid, it was his submission that the protection which came to be accorded by Section 32A cannot possibly be read as being applicable prior to a Resolution Plan being approved or a liquidation measure being enforced.

30. This, according to Mr. Hossain, is manifest also when one bears in mind the fact that if Section 14 prohibited provisional attachments being made under the PMLA and conceived of such a bar, there would have been no need for the introduction of Section 32A or for provisioning for trigger events in the manner that the Parliament

ultimately chose to adopt. The submission urged on behalf of the petitioners of Section 32A being a continuation of the intent of Section 14 was also countered with Mr. Hossain submitting that the Legislature being conscious of the legal position chose to introduce and confer statutory protection only in terms of Section 32A. In view of the above, Mr. Hossain submitted that the arguments addressed along these lines at the behest of the petitioner is liable to be negatived.

31. It was then contended that PMLA is a special legislation aimed at dealing with the offence of money-laundering. Mr. Hossain argued that insofar as aspects relating to the aforesaid offence is concerned, PMLA would clearly have primacy over the IBC. Mr. Hossain argued that the Court should bear in mind that Parliament while enacting the PMLA, chose to refrain from providing any exceptions and thus clearly intending its provisions insofar as they related to offences of money laundering to operate unhindered by any other statute. It was further contended that courts in India have consistently held that economic offences constitute a separate and distinct class and thus must be treated differently. He further argued that PMLA is a statute which has been enacted in light of the international obligations owed by India by virtue of being a signatory to various treaties and agreements. Learned counsel would submit that an interpretation of the IBC provisions in a manner which stifles or fetters the powers conferred upon authorities by the PMLA in aid of the fight against organised crime and money laundering would clearly be detrimental

to the economic interests and international commitments of the country itself.

32. Mr. Hossain then submitted that the principal objective of the PMLA is to prevent money-laundering and to confiscate all properties that may have been derived or obtained from commission of the aforesaid offence. It was urged that investigation under the PMLA is primarily aimed at unearthing and attaching proceeds that may be gained from the commission of scheduled offences. According to Mr. Hossain, the power of provisional attachment aids the ultimate confiscation of properties that may have been obtained by committing the offence of money laundering. The IBC, on the other hand, according to Mr. Hossain is an umbrella legislation which deals with the subject of insolvency resolution. That statute, according to learned counsel, is primarily concerned with a revival of a corporate debtor and for the protection of its interests and those of its various creditors during the insolvency resolution process. According to Mr. Hossain, since the primary purpose of the IBC is restricted to facilitating lenders of a corporate debtor to ensure a timely recovery or restructuring of stressed assets, its provisions cannot possibly be interpreted as overriding the provisions contained in the PMLA.

33. Elaborating upon the aforesaid submissions, Mr. Hossain urged that the view as advocated by the petitioner would clearly impact the power of the respondent to take suitable action against money laundering and thus derogate from India's international obligations and may in fact have wider ramifications including impacting the position of India before the Financial Action Task Force. Learned counsel

submitted that the view as expressed and commended for acceptance on behalf of the respondents would be consistent with the **UNODC Model Money-laundering Proceeds of Crime in Terrorist Financing Bill 2003** and more particularly Section 51 thereof which reads as follows: -

> "**51. Paramountcy of this Part in bankruptcy or winding up**
>
> (1) Where a person who holds realizable property is [**adjudged**] bankrupt:
>
> (a) property for the time being subject to a restraining order made before the order adjudging him bankrupt; and
>
> (b) any proceeds of property realized by virtue of **section 48(5) or (6)** for the time being in the hands of a person appointed under **section 48(2) or 68(1)(g)**,
>
> is excluded from the property of the bankrupt for the purposes of the [**Bankruptcy Act**].
>
> (2) Where a person has been [**adjudged**] bankrupt, the powers conferred on [**the Court**] by **section 48 or 68** or on a person appointed under **section 48(2) or 68(1)(g)** shall not be exercised in relation to property for the time being comprised in the property of the bankrupt for the purposes of the [**Bankruptcy Act**].
>
> [**(3) Where, in the case of a debtor, a receiver stands appointed under section [ ] of the [Bankruptcy Act] and any property of the debtor is subject to [a restraint order under or for the purposes of that Act], the powers conferred on the receiver by virtue of that Act do not apply to property for the time being subject to such restraint order.]**
>
> **[(4) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by this Part:**
>
> **(a) no order shall be made by virtue of sections [ ] of the [Bankruptcy Act] in respect of the making of the gift at any time when the person has been charged with a serious offence and the proceedings have not been concluded by the acquittal of the defendant or discontinuance of the proceedings, or when property of the person to whom the gift was made is subject to [a restraint order or a charging order made under or for the purposes of that Act]; and**

(b) any order made by virtue of those sections after the conclusion of the proceedings shall take into account any realisation under this Part of property held by the person to whom the gift was made].”

34. Mr. Hossain then referred to the decision of the Supreme Court in **Biswanath Bhattacharya vs. Union of India**[26] which had accorded a judicial seal of approval to the concept of civil forfeiture. Mr. Hossain referred to the following passages as appearing in the aforesaid decision:

> “39. If a subject acquires property by means which are not legally approved, the sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Articles 300-A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.
>
> 40. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the *Journal of Financial Crime, 2004* by Anthony Kennedy. [Head of Legal Casework, Northern Ireland for the Assets Recovery Agency in his article “Justifying the Civil Recovery of Criminal Proceeds” published in the Journal of Financial Crime, 2004, Vol. 12, Issue 1.]
>
> > “… It has been suggested that a logical interpretation of Article 1 of the First Protocol of the European Convention on Human Rights is:
> >
> > > „Everyone is entitled to own whatever property they have (lawfully) acquired….“
>
> hence implying that they do not have a right under Article 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in Gilligan v. Criminal Assets Bureau, Galvin, Lanigan & Revenue Commissioners [(1994-97) 5 Irish Tax Reports 424] , namely, that where a defendant is in possession or control over assets which directly or indirectly constitute the

[26] (2014) 4 SCC 392

proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in *Welch v. United Kingdom* [(1995) 20 EHRR 247] :„in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol". This principle has also been explored in US jurisprudence. In *United States v. Van Horn* [789 F 2d 1492 (1986)] a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In *United States v. Dusenbery* [34 F Supp 2d 602 (1999)] the Court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the Government"s decision to destroy the property without recourse to formal forfeiture proceedings. The UK Government has impliedly adopted this perspective, stating that:

> „… It is important to bear in mind the purpose of civil recovery, namely, to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct.""

41. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: the United States of America, Italy, Ireland, South Africa, UK, Australia and certain Provinces of Canada.

42. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:

> "Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the „trophies" of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that „half a loaf is better than no bread"."

43. For all the abovementioned reasons, we are of the opinion that the Act is not violative of Article 20 of the Constitution. Even otherwise, as was rightly pointed out by the learned Additional

> Solicitor General, in view of its inclusion in the Ninth Schedule, the Act is immune from attack on the ground that it violates any of the rights guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B."

Bearing in mind the purpose which a civil forfeiture subserves, it was contended that the impugned orders would merit no interference.

35. It is these rival submissions which fall for the consideration of the Court. However, before proceeding to consider the submissions of respective counsels, it would be profitable to briefly notice the relevant provisions of the two statutes in the backdrop of which the dispute itself arises. This since the answer to the question which stands posited would have to be evaluated in the backdrop of the intent of the two competing statutes and the various provisions engrafted therein.

F. THE SCHEME OF THE IBC

36. IBC, as a statutory enactment, came to be formally promulgated on 28 May 2016. While Sections 181 to 194 thereof came into force on 05 August 2016, its other provisions came to be enforced by separate notifications issued on 19 August 2016, 01 November 2016, 15 November 2016, 09 December 2016, 30 March 2017, 15 May 2017, 01 May 2018 and 15 November 2019. Section 14 came to be enforced on 01 December 2016 by a notification dated 30 November 2016. A „*corporate debtor*" has been defined in Section 3(8) to mean a corporate person who owes a debt to any person. A „*creditor*" is defined by Section 3(10) to mean a person to whom a debt is owed and includes a financial creditor, operational creditor, secured creditor

an unsecured creditor and a decree holder. The word „*debt*" is defined in section 3(11) to mean a liability or obligation in respect of a claim which is due from any person and includes a financial or an operational debt. A „*secured creditor*" is defined in Section 3(30) to mean a creditor in whose favour a security interest stands created. The expression „*security interest*" is defined in Section 3(31) to include transactions which secure payment or performance of an obligation and also include mortgages, charges, hypothecation and the like. A „*financial creditor*" is defined in Section 5(7) to mean a person to whom a financial debt owed. A *„financial debt*" is defined in Section 5(8) as follows: -

> "5(8). "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—
>
> (a) money borrowed against the payment of interest;
>
> (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
>
> (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
>
> (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
>
> (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
>
> (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
>
> [Explanation.- For the purposes of this sub-clause,-
>
> (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

37. Section 5(21) falling in Part II of the Act then proceeds to define an operational debt in the following terms:-

> "5(21). "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

38. A *„Resolution Applicant"* is defined in terms of Section 5(25) as being a person who individually or jointly submits a Resolution Plan for the purposes of restructuring and resolution of a corporate debtor. A *„Resolution Plan"* is defined in Section 5(26) to mean a plan proposed for insolvency resolution of the corporate debtor. A financial creditor is entitled to initiate a CIRP either by itself or jointly with other financial creditors in terms of Section 7. As per Section 7(5) of the IBC where an Adjudicating Authority is satisfied that a default has occurred, it may proceed to admit the insolvency petition. Section 7(6) of the IBC stipulates that the CIRP shall commence from the date of admission of the application in terms of sub-section (5) noticed

hereinabove. Section 8 of the IBC confers an identical right upon an operational creditor to initiate insolvency proceedings against a corporate debtor. In terms of Section 9(5) of the IBC, the Adjudicating Authority, may after due consideration and upon being satisfied that an operational debt has remained unpaid, admit the application. Section 13 empowers the Adjudicating Authority to declare a moratorium for purposes specified in Section 14. Sections 13 and 14 of the IBC are extracted hereinbelow: -

> **"13. Declaration of moratorium and public announcement.**
>
> (1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order—
>
> (a) declare a moratorium for the purposes referred to in section 14;
>
> (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and
>
> (c) appoint an interim resolution professional in the manner as laid down in section 16.
>
> (2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional."
>
> **"14. Moratorium-**
>
> (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—
>
> (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
>
> (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[*Explanation*.- For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to -

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority:

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

39. The IBC then obliges the Adjudicating Authority to make a public announcement with respect to the CIRP process in accordance with the provisions contained in Section 15. Section 16 empowers the Adjudicating Authority to appoint an Interim Resolution Professional. Section 17 charges the Interim Resolution Professional to manage the affairs of the corporate debtor in the interregnum and reads thus: -

> **"17. Management of affairs of corporate debtor by interim resolution professional.-**
>
> (1) From the date of appointment of the interim resolution professional,—
>
> a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
>
> b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;
>
> c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
>
> d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.
>
> (2) The interim resolution professional vested with the management of the corporate debtor shall—
>
> a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
>
> b) take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
>
> c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
>
> d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.

e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor."

40. The duties of an Interim Resolution Professional are set out in Section 18 which reads as follows: -

"18. Duties of interim resolution professional.-

The interim resolution professional shall perform the following duties, namely:—

a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

c) constitute a committee of creditors;

d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

e) file information collected with the information utility, if necessary; and

f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this sub-section, the term "assets" shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

41. IBC envisages the constitution of a **Committee of Creditors**[27] as per the provisions set forth in Section 21. The CoC in turn is empowered to appoint a Resolution Professional for the purposes of carrying forth the CIRP. The statute confers a role of primordial importance upon the CoC since it is its ultimate decision based upon a consideration of the economics and commercial viability of all factors which decides the fate of the corporate debtor. The economic wisdom of the measure which may ultimately be adopted in respect of the corporate debtor is left to the sound judgment of the CoC. The Resolution Plans which may be submitted are required to be placed before the Adjudicating Authority for approval in accordance with Section 31, which reads as follows:-

[27] CoC

"**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 of any local authority to whom a debt in respect of the payment of due4s 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 approved 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 Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

42. Section 32A came to be introduced by virtue of the **Insolvency and Bankruptcy (Amendment) Act No.1 of 2020**[28] with retrospective effect from 28 December 2019 and reads thus: -

> "**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:
>
> 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 incharge 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.

[28] Amending Act No. 1 of 2020

(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 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."

43. The principal objectives of Section 32A and its scheme were noticed and explained by the Court in **Nitin Jain** in the following terms: -

"**97.** This Court is of the opinion that the answer to determining when the bar under Section 32A would come into play must be answered bearing in mind the ethos of Section 32A and upon an interpretation of the provisions of the IBC and the Regulations framed thereunder. As is evident from a careful reading of Section 32A(2), the Legislature in its wisdom has provided that no action shall be taken against the properties of the corporate debtor in respect of an offense committed prior to the commencement of the CIRP and once either a resolution plan comes to be approved or when a sale of liquidation assets takes place. The objective underlying the introduction of this provision has been eloquently explained by the Supreme Court in **Manish Kumar**. The intent of the mischief sought to be addressed is clearly borne out from the Committee Reports as well as the SOA. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the Adjudicating Authority approving the course of action to be finally adopted in relation to the corporate debtor. Section 32A legislatively places vital import upon the decision of the Adjudicating Authority when it approves the measure to be implemented in order to take the process of liquidation or resolution to its culmination. It is this momentous point in the statutory process that must be recognised as the defining moment for the bar created by Section 32A coming into effect. If it were held to be otherwise, it would place the entire process of resolution and liquidation in jeopardy. Holding to the contrary would result in a right being recognised as inhering in the respondent to move against the properties of the corporate debtor even after their sale or transfer has been approved by the Adjudicating Authority. This would clearly militate against the very purpose and intent of Section 32A. It becomes pertinent to recollect that one of the primary objectives which informed the introduction of this provision was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor or from penalties connected with offenses committed prior thereto. The imperative

> for the extension of this legislative guarantee subserves the vital aspect of maximization of value."

44. The Court in **Nitin Jain** had also noticed the background and the various committee reports which had preceded the introduction of Section 32A. It also had the occasion to notice the decision of the Supreme Court in **Manish Kumar versus Union of India**[29] where while negativing the constitutional challenge to Section 32A, significant and pertinent observations came to be made explaining the legislative intent underlying the introduction of that provision. These aspects were noticed by the Court in **Nitin Jain** as under: -

> "43. The SOA of Act 1 of 2020 also alludes to the need to ensure that the successful bidder is kept immune from the liabilities attached to the commission of an offense by the corporate debtor prior to the commencement of the CIRP under certain circumstances. The SOA in more explicit terms alludes to Section 32A when it records that it is intended "*to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions*."
>
> 45. The SOA as well as the contemporaneous material referred to above, indubitably establish a conscious adoption of a legislative measure to insulate the resolution applicant from the prospect of prosecution in respect of offenses that may have been committed by the erstwhile management of the corporate debtor prior to commencement of the CIRP. This legislative guarantee stands enshrined in Section 32A (1). Similarly, the provision unmistakably also insulates the property of the corporate debtor from any action that may otherwise be taken in respect thereof for an offense committed prior to the commencement of the CIRP. A close reading of Section 32A (1) and (2) establishes that the legislature in its wisdom has erected two unfaltering barriers. It firstly prescribes that the offense, which may entail either prosecution of the debtor or proceedings against its properties, must be one which was committed prior to the commencement of the CIRP. Secondly the cessation of liability for the offense

[29] 2021 SCC OnLine SC 30

committed is to occur the moment when a resolution is approved by the Adjudicating Authority or upon sale of liquidation assets. The provision in unequivocal terms terminates the prospect of prosecution or coercive action against properties on the happening of either of two critical events: —

(a) the date from which a resolution plan comes to be approved by the Adjudicating Authority, or

(b) the sale of liquidation assets.

47. Proceeding then to rule upon the validity of the provision itself the Supreme Court held: —

> "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 applicable 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 maximisation 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 judgment 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.

330. There is no basis at all to impugn the section on the ground that it violates Articles 19, 21 or 300-A."

49. The learned Judges of the Supreme Court in **Manish Kumar** reiterated the principal objective of maximization of value under the IBC and the corresponding requirement of ensuring that the resolution applicant is freed of the ghost of past offenses committed by the corporate debtor.

50. Undisputedly and as has been explained in the decisions of the Supreme Court noticed above, maximization of value would be clearly impacted if a resolution applicant were asked to submit an offer in the face of various imponderables or unspecified liabilities. The amendment to sub-Section (1) of Section 31 and the introduction of Section 32A undoubtedly seek to allay such apprehensions and extend an assurance of the resolution applicant being entitled to take over the corporate debtor on a fresh slate. Section 32A assures the resolution applicant that it shall not be held liable for any offense that may have been committed by the corporate debtor prior to the initiation of the CIRP. It similarly extends that warranty in respect of the properties of the corporate debtor once a resolution plan stands approved or in case of a sale of liquidation assets.

51. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered.

52. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the adjudicating authority approving the course of action to be finally adopted in relation to the corporate debtor. The Supreme Court in Manish Kumar also took note of the sufficient safeguards and the prerequisite conditions that stand attached to the cessation of liabilities to ultimately come to the conclusion that the Legislature had undertaken a well-considered balancing exercise to ensure that larger public interest was subserved."

45. Section 238 of the IBC which embodies the non obstante clause reads thus: -

"238. **Provisions of this Code to override other laws**.

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

G. PMLA AND THE PROCEEDS OF CRIME

46. Turning then to the provisions of the PMLA, the Court deems it apposite to firstly notice its Statements of Objects and Reasons as appended to the Bill which was introduced in Parliament and the same is extracted hereinbelow: -

> **"STATEMENT OF OBJECTS AND REASONS**
>
> It is being realised, world over, that money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. Some of the initiatives taken by the international community to obviate such threat are outlined below:—
>
> (a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.
>
> (b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.
>
> (c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—
>
> (i) declaration of laundering of monies carried through serious crimes a criminal offence;
>
> (ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;
>
> (iii) confiscation of the proceeds of crime;
>
> (iv) declaring money-laundering to be an extraditable offence; and
>
> (v) promoting international co-operation in investigation of money-laundering.

(d) the Political Declaration and Global Programme of Action adopted by United Nations General Assembly by its Resolution No. S-17/2 of 23rd February, 1990, *inter alia*, calls upon the member States to develop mechanism to prevent financial institutions from being used for laundering of drug related money and enactment of legislation to prevent such laundering.

(e) the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to the 10th June, 1998 has made another declaration regarding the need to combat money-laundering. India is a signatory to this declaration.

2. In view of an urgent need for the enactment or a comprehensive legislation *inter alia* for preventing money-laundering and connected activities confiscation of proceeds of crime, setting up of agencies and mechanisms for co-ordinating measures for combating money-laundering, etc., the Prevention of Money-Laundering Bill, 1998 was introduced in the Lok Sabha on the 4th August, 1998. The Bill was referred to the Standing Committee on Finance, which presented its report on the 4th March, 1999 to the Lok Sabha. The recommendations of the Standing Committee accepted by the Central Government are that (a) the expressions "banking company" and "person" may be defined; (b) in Part I of the Schedule under Indian Penal Code the word offence under section 477A relating to falsification of accounts should be omitted; (c) „knowingly" be inserted in clause 3(b) relating to the definition of money-laundering; (d) the banking companies financial institutions and intermediaries should be required to furnish information of transactions to the Director instead of Commissioner of Income-tax (e) the banking companies should also be brought within the ambit of clause II relating to obligations of financial institutions and intermediaries; (f) a definite time-limit of 24 hours should be provided for producing a person about to be searched or arrested person before the Gazetted Officer or Magistrate; (g) the words "unless otherwise proved to the satisfaction of the authority concerned" may be inserted in clause 22 relating to presumption on inter-connected transactions; (h) vacancy in the office of the Chairperson of an Appellate Tribunal, by reason of his death, resignation or otherwise, the senior-most member shall act as the Chairperson till the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill the vacancy, enters upon his office; (i) the appellant before the Appellate Tribunal may be authorised to engage any authorised representative as defined under section 288 of the Income-tax Act, 1961, (j) the punishment for vexatious search and

for false information may be enhanced from three months imprisonment to two years imprisonment, or fine of rupees ten thousand to fine of rupees fifty thousand or both; (k) the word „good faith" may be incorporated in the clause relating to Bar of legal proceedings. The Central Government have broadly accepted the above recommendations and made provisions of the said recommendations in the Bill.

3. In addition to above recommendations of the standing committee the Central Government proposes to (a) relax the conditions prescribed for grant of bail so that the Court may grant bail to a person who is below sixteen years of age, or woman, or sick or infirm, (b) levy of fine for default of non-compliance of the issue of summons, etc. (c) make provisions for having reciprocal arrangement for assistance in certain matters and procedure for attachment and confiscation of property so as to facilitate the transfer of funds involved in money-laundering kept outside the country and extradition of the accused persons from abroad.

4. The Bill seeks to achieve the above objects."

47. The expression „*proceeds of crime*" as defined in Section 2(1)(u) reads thus: -

"2(1)(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country] [or abroad];

[*Explanation*: For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;]"

48. The word „*property*" is defined in Section 2(1)(v) as follows: -

"2(1)(v) "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;

[*Explanation*: For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences;]"

49. The expression „*transfer"* is defined in Section 2(1)(za) as under: -

"2(1)(za) "transfer" includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;"

50. Section 3 defines the offence of money laundering and reads thus:-

"**3. Offence of money-laundering**

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

[*Explanation*: For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it

as untainted property or claiming it as untainted property in any manner whatsoever.]"

51. The power of provisional attachment of properties as created by Section 5 reads as under: -

"5. Attachment of property involved in money-laundering.—

(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) 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 confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

PROVIDED that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:

PROVIDED FURTHER that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act:

PROVIDED ALSO that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be

excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.;

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority."

52. As would be evident from the aforesaid provision the competent authority after passing an order of provisional attachment, is obliged to forward a copy of the order along with all other material in its possession to the Adjudicating Authority. Section 5(3) then stipulates that every order of attachment shall cease to have effect upon the expiry of 180 days or upon the making of an order under Section 8(3). The PAO thus continues to remain in force for a period of 180 days and it is within the aforesaid period that the Adjudicating Authority is obliged to step in and consider the issue of whether the PAO is liable to be confirmed. Section 8 which deals with the subject of adjudication reads as under: -

"**8. Adjudication**.—

(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:

PROVIDED that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

PROVIDED FURTHER that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under subsection (1) are involved in money-laundering:

PROVIDED that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a

finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

(a) continue during investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court;

Explanation: For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

PROVIDED that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of money-laundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass appropriate orders regarding confiscation or release of the property, as the case

may be, involved in the offence of money-laundering after having regard to the material before it.

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

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

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

53. The Adjudicating Authority upon receipt of the material under Section 5(5) or upon an application under Section 17(4) or Section 18(10) and upon formation of the belief that a person has committed an offence of money laundering and is in possession of proceeds of crime, is required to serve a notice on such person to show cause why such properties be not declared to be properties involved in money laundering and confiscated by the Union Government. In terms of Section 8(2) the Adjudicating Authority, after considering the replies if any received, hearing the aggrieved persons and upon taking into account all relevant material, may by an order record a finding whether all or any properties are involved in money laundering. It would be apposite to note that the powers conferred on the Adjudicating Authority by Section 8 is essentially to review and consider the validity of the order of provisional attachment that may have been made by the competent authority under Section 5. In terms

of Section 8(3) the Adjudicating Authority may upon coming to form an opinion that the property is involved in money laundering, confirm the attachment made under Section 5(1) or retention of property or record ceased or frozen under Sections 17 or 18. Once such an order of confirmation is passed, the attachment, retention or freezing of property is to continue during the process of investigation for a period not exceeding 365 days or the pendency of proceedings that may have been initiated in respect of an offence under the PMLA before a court. The order passed by the Adjudicating Authority is conferred statutory finality upon an order of confiscation coming to be passed by the Special Court under sub-sections (5) or (7) of Section 8 or Section 58B or Section 60(2)(a). Sub-section (5) of Section 8 deals with the consequences of the Special Court, ultimately and upon conclusion of trial, coming to hold that the offence of money-laundering had in fact been committed. Upon such a conclusion being reached, the Special Court stands statutorily empowered to order confiscation of the property in favour of the Union Government. As per Section 8(7), where the trial under the aforesaid statute is not concluded on account of the death of the accused or the accused being declared a proclaimed offender or for any other reason, the Special Court may pass appropriate orders either for confiscation or for release of the property.

54. Section 8(8) confer the power on the Special Court to direct restoration of confiscated property on an application of a claimant who is able to establish that he had acquired a legitimate interest in the same and who may have suffered a quantifiable loss as a result of the commission of the offence of the money-laundering.

55. Section 58B which is a provision which is also noticed in Section 8(3)(a) reads as follows: -

> "**58B. Letter of request of a contracting State or authority for confiscation or release the property**
>
> Where the trial under the corresponding law of any other country cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Central Government shall, on receipt of a letter of request from a court or authority in a contracting State requesting for confiscation or release of property, as the case may be, forward the same to the Director to move an application before the Special Court and upon such application the Special Court shall pass appropriate orders regarding confiscation or release of such property involved in the offence of money-laundering."

56. Section 60(2A) deals with consequences of a finding of guilt having been returned by a criminal court situate outside India and reads as follows: -

> "**60. Attachment, seizure and confiscation, etc., of property in a contracting State or India**
>
> (2A) Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to the Central Government."

57. The property which comes to be confiscated is to ultimately vest in the Union Government as per Section 9, which reads thus: -

> "**9. Vesting of property in Central Government**
>
> Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all

> the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances:
>
> PROVIDED that where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized 2 or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest:
>
> PROVIDED FURTHER that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages."

58. PMLA puts in place a structure of Special Courts for the purposes of trial of offences under the said statute. These are contained in Chapter VII thereof. The provisions of the PMLA are accorded overriding effect in terms of Section 71, reads as under: -

> "**71. Act to have overriding effect**
>
> The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

It may while closing the discussion on the respective provisions of the two competing statues, be additionally noted, that although PMLA was a statute which was passed by Parliament on 17 January 2003, it came to be ultimately enforced with effect from 01 July 2005.

59. In order to answer the questions that stands posited, it would be pertinent to firstly understand the basic ethos and objective of the PMLA. PMLA represents the commitment of India to the Vienna and Palermo Conventions and the global resolve to fight the scourge of

money laundering. As would be evident from its Statement of Objects and Reasons, it is not just an act meant to punish perpetrators of the crime of money laundering but to also deprive and confiscate properties which may have been derived from the commission of that offence. That approach has been adopted globally in order to spread the message that crime would not pay, to disrupt criminal networks and markets, as also to strike at the very heart of criminal enterprise and the assets that they may have garnered from such activities. PMLA also incorporates collaborative and reciprocal measures in furtherance of the resolve of nations to tackle the menace of crime and wealth obtained therefrom unhindered by frontiers and borders.

60. The heart of the PMLA was captured in paragraphs 64 and 65 of the decision of the Court in **Nitin Jain**:-

> "64. The PMLA essentially represents the commitment of the Union to frame a comprehensive legislation to deal with the pernicious crime of money laundering as flowing from the Political Declaration and Global Programme of Action as adopted by the General Assembly of the United Nations on 23 February 1990, the Political Declaration adopted in the Special Session of the U.N. between 8 to 10 June 1998, the Financial Action Task Force held in Paris from 14 to 16 July 1989. Taking cognizance of the scourge of money laundering faced by governments across the globe and the legitimization of moneys derived from criminal activities as well as the imperative need to deprive the perpetrators of such action of the fruits derived from such activities, lead to the Government introducing the Prevention of Money-laundering Bill, 1998 in Parliament. The PMLA ultimately came to be enforced with effect from 1 July 2005.
>
> 65. As is manifest from a reading of the long title of the PMLA, it has essentially been promulgated to prevent money laundering and to provide for confiscation of property derived from or involved in the crime of money laundering. The expression "proceeds of crime" has been defined in Section 2(u) of the PMLA to mean any property derived or obtained whether directly or indirectly by a

> person as a result of criminal activity relating to a scheduled offence or the value of any such property and where such property is taken or held outside the country, then property equivalent in value thereto."

61. It is pertinent to note that while Section 3 creates the offence of money laundering, Section 4 of the PMLA prescribes the punishment for the aforesaid offence. The powers of attachment which stand comprised in Sections 5 and 8 are an adoption of the principles of civil forfeiture and are in implementation of the intent of the Legislature that perpetrators of money-laundering offences are not permitted to enjoy the fruits thereof. The principle of civil forfeiture was duly explained by the Supreme Court in **Biswanath Bhattachrya** as would be evident from the following passages of that decision which read thus: -

> **"33.** Dealing with the question — whether such forfeiture (in the factual setting of the case) violated Article 20 of the Constitution of India, a Constitution Bench of this Court held that the forfeiture contemplated in the Ordinance was not a penalty within the meaning of Article 20 but it is only a speedier mode of recovery of the money embezzled by the accused. [*State of W.B.* v. *S.K. Ghosh*, AIR 1963 SC 255, p. 263, para 15: "*15*. … We are therefore of opinion that forfeiture provided in Section 13(3) in case of offences which involve the embezzlement, etc. of government money or property is really a speedier method of realising government money or property as compared to a suit which it is not disputed the Government could bring for realising the money or property and is not punishment or penalty within the meaning of Article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realise the fine that may have been imposed by a criminal court in connection with the offence."]
>
> **34.** In *Ajit Mills case* [(1977) 4 SCC 98 : 1977 SCC (Tax) 536] , the question was whether it was permissible for the State Legislature to enact that sums collected by dealers by way of sales tax but not exigible under the State law—indeed prohibited by it—shall be forfeited to the exchequer. The question whether such a forfeiture was a penalty violating Article 20 did not arise in the

facts of that case. The discussion revolved around the question whether such a forfeiture is a penalty for the violation of a prohibition contained under Section 46 of the relevant Sales Tax Act? The contravention of Section 46 is made punishable with imprisonment and fine under Section 63 of the said Act. Apart from that, Section 37 of the said Act provided for a departmental proceeding against the dealers who violated the prohibition under Section 46. The said departmental proceeding could result in the forfeiture of "… any sums collected by any person by way of tax in contravention of Section 46 …".

35. The legal issue before this Court in *Ajit Mills case* [(1977) 4 SCC 98 : 1977 SCC (Tax) 536] was — whether the State Legislature had necessary competence to provide for such forfeiture? The answer to the query depended upon whether such a forfeiture is a penalty for the violation of law made by the State for the levy and collection of sales tax. If it is not a penalty but a plain transfer of money (illegally collected by the dealer) to the State it would be incompetent for the legislature to make such a provision in the light of an earlier Constitution Bench decision of this Court in *R. Abdul Quader & Co.* v. *STO* [*Abdul Quader case*, AIR 1964 SC 922, pp. 923-24, para 4: "*4*. The first question therefore that falls for consideration is whether it was open to the State Legislature under its powers under List II Entry 54 to make a provision to the effect that money collected by way of tax, even though it was not due as a tax under the Act, shall be made over to the Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State Legislature was directly legislating for the imposition of sales or purchase tax under List II Entry 54 when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State Legislature to make provision for the recovery of an amount which is not a tax under List II Entry 54 in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which, in the present case, is a tax on

sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to the Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to the Government, as if it were tax. The legislature cannot under List II Entry 54 make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in Section 11(2) cannot be made under List II Entry 54 and cannot be justified even as an incidental or ancillary provision permitted under that entry."] .

36. As explained above, the issue and the ratio decidendi of *Ajit Mills case* [(1977) 4 SCC 98 : 1977 SCC (Tax) 536] is entirely different and has nothing to do with the application of Article 20 of the Constitution of India.

39. If a subject acquires property by means which are not legally approved, the sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Articles 300-A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

40. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the *Journal of Financial Crime, 2004* by Anthony Kennedy. [Head of Legal Casework, Northern Ireland for

the Assets Recovery Agency in his article "Justifying the Civil Recovery of Criminal Proceeds" published in the Journal of Financial Crime, 2004, Vol. 12, Issue 1.]

> "… It has been suggested that a logical interpretation of Article 1 of the First Protocol of the European Convention on Human Rights is:
>
> > „Everyone is entitled to own whatever property they have (lawfully) acquired…."

hence implying that they do not have a right under Article 1 to own property which has been unlawfully acquired. This point was argued in the Irish High Court in Gilligan v. Criminal Assets Bureau, Galvin, Lanigan & Revenue Commissioners [(1994-97) 5 Irish Tax Reports 424], namely, that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in *Welch v. United Kingdom* [(1995) 20 EHRR 247] :„in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol". This principle has also been explored in US jurisprudence. In *United States v. Van Horn* [789 F 2d 1492 (1986)] a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In *United States v. Dusenbery* [34 F Supp 2d 602 (1999)] the Court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the Government"s decision to destroy the property without recourse to formal forfeiture proceedings. The UK Government has impliedly adopted this perspective, stating that:

> „… It is important to bear in mind the purpose of civil recovery, namely, to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct.""

41. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: the United States of America, Italy, Ireland, South Africa, UK, Australia and certain Provinces of Canada.

42. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:

> "Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the „trophies" of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that „half a loaf is better than no bread"."
>
> 43. For all the abovementioned reasons, we are of the opinion that the Act is not violative of Article 20 of the Constitution. Even otherwise, as was rightly pointed out by the learned Additional Solicitor General, in view of its inclusion in the Ninth Schedule, the Act is immune from attack on the ground that it violates any of the rights guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B."

62. The provisions thus incorporated in Sections 5 and 8 of the PMLA are in essence the adoption of the *"non-conviction based asset forfeiture model"* which now stands adopted the world over in the fight against organised crime and money laundering. These principles were also lucidly explained by the U.S. Supreme Court in **Caplin & Drysdale, Chartered vs. United States**[30]. The Court deems it apposite to extract the following passages from the aforesaid decision:-

> "16. Petitioner seeks to distinguish such cases for Sixth Amendment purposes by arguing that the bank's claim to robbery proceeds rests on "pre-existing property rights," while the Government's claim to forfeitable assets rests on a "penal statute" which embodies the "fictive property-law concept of... relation-back" and is merely "a mechanism for preventing fraudulent conveyances of the defendant's assets, not.. a device for determining true title to property." Brief for Petitioner 40-41. In

[30] 1989 SCC OnLine US SC 136

light of this, petitioner contends, the burden placed on defendant's Sixth Amendment rights by the forfeiture statute outweighs the Government's interest in forfeiture. Ibid. The premises of petitioner's constitutional analysis are unsound in several respects. First, the property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges. In § 853(c), the so-called "relation-back" provision, Congress dictated that "[a]ll right, title and interest in property" obtained by criminals via the illicit means described in the statute "vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. § 853(c) (1982 ed., Supp. V). As Congress observed when the provision was adopted, this approach, known as the "taint theory," is one that "has long been recognized in forfeiture cases," including the decision in *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1890). See S.Rep. No. 98-225, p. 200, and n. 27 (1983). In *Stowell*, the Court explained the operation of a similar forfeiture provision (for violations of the Internal Revenue Code) as follows:

> "As soon as [the possessor of the forfeitable asset committed the violation] of the internal revenue laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the... [possessor]," *Stowell*, supra, at 19, 10 S.Ct., at 248.

17. In sum, § 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture. Concluding that Reckmeyer cannot give good title to such property to petitioner because he did not hold good title is neither extraordinary or novel. Nor does petitioner claim, as a general proposition that the relation-back provision is unconstitutional, or that Congress cannot, as a general matter, vest title to assets derived from the crime in the Government, as of the date of the criminal act in question. Petitioner's claim is that whatever part of the assets that is necessary to pay attorney's fees cannot be subjected to forfeiture. But given the Government's title to Reckmeyer's assets upon conviction, to hold that the Sixth Amendment creates some right in Reckmeyer to alienate such assets, or creates a right on petitioner's part to receive these assets, would be peculiar.

18. There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right. While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, see, e.g., Brief for American Bar Association as Amicus Curiae 6, there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise, Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights.

19. Petitioner's "balancing analysis" to the contrary rests substantially on the view that the Government has only a modest interest in forfeitable assets that may be used to retain an attorney. Petitioner takes the position that, in large part, once assets have been paid over from client to attorney, the principal ends of forfeiture have been achieved: dispossessing a drug dealer or racketeer of the proceeds of his wrong-doing. See Brief for Petitioner 39; see also 814 F.2d, at 924-925. We think that this view misses the mark for three reasons.

20. First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. See 28 U.S.C. § 524(c), which establishes the Department of Justice Assets Forfeiture Fund. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.

21. Second, the statute permits "rightful owners of forfeited assets to make claims for forfeited assets before they are retained by the Government. See 21 U.S.C. § 853 (n)(6)(A). The Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank

the proceeds of a bank robbery; and a forfeiture defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.

22. Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. See *Russello v United States*, 464 U.S. 16, 27-28, 104 S.Ct. 296, 302-303, 78 L.Ed.2d 17 (1983). This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent." 837 F.2d, at 649. The notion that the Government has a legitimate interest in depriving criminals of economic power, even insofar as that power is used to retain counsel of choice, may be somewhat unsettling. See, e.g., Tr. of Oral Arg. 50-52. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy" *Morris v. Slappy*, 461 U.S. 1, 23 103 S.Ct. 1610, 1622, 75 L.Ed.2d 610 (1983) (BRENNAN, J., concurring in result). Again, the Court of Appeals put it aptly: "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money... entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense." 837 F.2d, at 649.

23. It is our view that there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense. Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial. So-called "jeopardy assessments Internal Revenue Service (IRS) seizures of assets to secure potential tax liabilities, see 26 U.S.C. § 6861-may impair a defendant's ability to retain counsel in a way similar to that complained of here. Yet these assessments have been upheld against constitutional attack, and we

note that the respondent in *Monsanto* concedes their constitutionality, see Brief for Respondent in No. 88-454, p. 37, n. 20. Moreover, petitioner's claim to a share of the forfeited assets postconviction would suggest that the Government could never impose a burden on assets within a defendant's control that could be used to pay a lawyer. Criminal defendants, however, are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney.

24. We therefore reject petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the Government's-assets adjudged forfeitable, as Reckmeyer's were-to pay attorneys' fees, merely because those assets are in their possession. See also *Monsanto*, 491 U.S., at 613, 109 S.Ct., at 2665, which rejects a similar claim with respect to pretrial orders and assets not yet judged forfeitable.

B

25. Petitioner's second constitutional claim is that the forfeiture statute is invalid under the Due Process Clause of the Fifth Amendment because it permits the Government to upset the "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed.2d 82 (1973). We are not sure that this contention adds anything to petitioner's Sixth Amendment claim, because, while "[t]he Constitution guarantees a fair trial through the Due Process Clauses... it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, "*Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674 (1984). We have concluded above that the Sixth Amendment is not offended by the forfeiture provisions at issue here. Even if, however, the Fifth Amendment provides some added protection not encompassed in the Sixth Amendment's more specific provisions, we find petitioner's claim based on the Fifth Amendment unavailing.

26. Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly. But due process claims alleging such abuses are cognizable only in specific cases of prosecutorial misconduct (and petitioner has made no such allegation here) or when directed to a rule that is inherently unconstitutional. "The fact that the... Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it.... Invalid," *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). Petitioner's claim-that the power available to prosecutors under the statute *could* be abused-proves too much, for

many tools available to prosecutors can be misused in a way that violates the rights of innocent persons. As the Court of Appeals put it, in rejecting this claim when advanced below: "Every criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of facial invalidity." 837 F.2d, at 648.

27. We rejected a claim similar to petitioner's last Term, in *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In *Wheat*, the petitioner argued that permitting a court to disqualify a defendant's chosen counsel because of conflicts of interest-over that defendant's objection to the disqualification-would encourage the Government to "manufacture" such conflicts to deprive a defendant of his chosen attorney. Id., at 163, 108 S.Ct. at 1699. While acknowledging that this was possible, we declined to fashion the *per se* constitutional rule petitioner sought in *Wheat*, instead observing that "trial courts are undoubtedly aware of [the] possibility" of abuse, and would have to "take it into consideration," when dealing with disqualification motions.

28. A similar approach should be taken here. The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them, e.g., by attempting to impose them on persons who should not be subjected to that punishment. Cf. *Brady* v. United States, 397 U.S. 742, 751, and n. 8, 90 S.Ct. 1463, 1470, and n. 8, 25 L.Ed.2d 747 (1970). Cases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise.

IV

29. For the reasons given above, we find that petitioner's statutory and constitutional challenges to the forfeiture imposed here are without merit. The judgment of the Court of Appeals is therefore

30. Affirmed."

63. While explaining the aforesaid decision, the U.S. Supreme Court in **Sila Luis vs. United States**[31] observed as under: -

"Pretrial freezes of untainted forfeitable assets did not emerge until the late 20th century. ```[T]he lack of historical precedent for the asset freeze here is "[p]erhaps the most telling indication of a severe constitutional problem.``` *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505-506 (2010) (quoting *Free Enterprise Fund v. Public Company Accounting*

[31] 2016 SCC OnLine US SC 4

Oversight Bd., 537 F. 3d 667, 699 (CADC 2008) (Ka-vanaugh, J., dissenting)). Indeed, blanket asset freezes are so tempting that the Government's "prolonged reticence would be amazing if [they] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); see *Printz v. United States*, 521 U.S. 898, 907-908 (1997) (reasoning that the lack of early federal statutes commandeering state executive officers "suggests an assumed absence of such power" given "the attractiveness of that course to Congress").

The common law prohibited pretrial freezes of criminal defendants' untainted assets. As the plurality notes, *ante*, at 13, for *in personam* criminal forfeitures like that at issue here, any interference with a defendant's property traditionally required a conviction, Forfeiture was "a part, or at least a consequence, of the judgment of conviction." The *Palmyra*, 12 Wheat. 1, 14 (1827) (Story, J.). The defendant's "property cannot be touched before... the forfeiture is completed." 1 J. Chitty, *A Practical Treatise on the Criminal Law 737* (5th ed. 1847). This rule applied equally "to money as well as specific chattels," Id., at 736, And it was not limited to full-blown physical seizures, Although the defendant's goods could be appraised and inventoried before trial, he remained free to "sell any of them for his own support in prison, or that of his family, or to assist *him in preparing for his defence on the trial." Id.*, at 737 (emphasis added). Blackstone likewise agreed that a defendant "may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the [offense] and conviction." 4 Blackstone 380; see *Fleet wood's* Case, 8 Co. Rep. 171a, 171b, 77 Eng. Rep. 731, 732 (K.B. 1611) (endorsing this rule). At most, a court could unwind prejudgment fraudulent transfers after conviction. 4 Blackstone 381; see *Jones v. Ashurt*, Skin, 357, 357-358, 90 Eng. Rep. 159 (K.B. 1693) (unwinding a fraudulent sale after conviction because it was designed to defeat forfeiture). Numerous English authorities confirm these common-law principles. Chitty, *supra*, at 736-737 (collecting sources).

The common law did permit the Government, however, to seize tainted assets before trial. For example, "seizure of the *res* has long been considered a *prerequisite* to the Initiation of *in rem* forfeiture proceedings. "*United States v. James Daniel Good Real Property*, 510 U.S. 43, 57 (1993) (emphasis added); see *The Brig Ann*, 9 Cranch 289, 291 (1815) (Story, J.). But such forfeitures were traditionally "fixed... by determining what property has been 'tainted' by unlawful use." *Austin v. United States*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in judgment). So the civil *in rem* forfeiture tradition tracks the tainted-untainted line. It provides no support for the asset freeze here.

There is a similarly well-established Fourth Amendment tradition of seizing contraband and stolen goods before trial based only on probable cause. See *Carroll v. United States*, 267 U.S. 132, 149-152 (1925) (discussing this history); *Boyd v. United States*, 116 U.S. 616, 623-624 (1886) (same). Tainted assets fall within this tradition because they are the fruits or instrumentalities of crime. So the Government may freeze tainted assets before trial based on probable cause to believe that they are forfeitable. See *United States v. Monsanto*, 491 U.S. 600, 602-603, 615-616 (1989). Nevertheless, our precedents require "a nexus... between the item to be seized and criminal behavior." Warden, Md. *Penitentiary v. Havden.* 387 U.S. 294. 307 (1967). Untainted assets almost never have such a nexus. The only exception is that some property that is evidence of crime might technically qualify as "untainted" but nevertheless has a nexus to criminal behavior. See *Ibid*. Thus, untainted assets do not fall within the Fourth Amendment tradition either.

It is certainly the case that some early American statutes did provide for civil forfeiture of untainted substitute property. See Registry Act, §12, 1 Stat. 293 (providing for forfeiture of a ship or "the value thereof "); Collection Act of July 31, 1789, §22, 1 Stat. 42 (similar for goods); *United States v. Bajakajian*, 524 U.S. 321, 341 (1998) (collecting statutes). These statutes grew out of a broader "six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue." Id., at 345-346 (KENNEDY, J., dissenting).

But this long tradition of *in personam* customs fines does not contradict the general rule against *pretrial* seizures of untainted property. These fines *in personam* status strongly suggests that the Government did not collect them by seizing property at the outset of litigation. As described, that process was traditionally required for *in rem* forfeiture of tainted assets, See *supra*, at There appears to be scant historical evidence, however, that forfeiture ever involved seizure of untainted assets before trial and judgment, except in limited circumstances not relevant here. Such summary procedures were reserved for collecting taxes and seizures during war. See *Phillips v Commissioner*, 283 U.S. 589, 595 (1931); *Miller v. United States*, 11 Wall. 268, 304-306 (1871). The Government's right of action in tax and custom-fine cases may have been the same- “a civil action of debt." *Bajakajian*, *supra*, at 343, n, 18; *Stockwell v. United States*, 13 Wall. 531, 543 (1871); *Adams* v. *Woods*, 2 Cranch 336, 341 (1805). Even so, nothing suggests trial and judgment were expendable. See *Miller*, supra, at 304-305 (stating in dicta that confiscating Confederate property

> through *in rem* proceedings would have raised Fifth and Sixth Amendment concerns had they not been a war measure).
>
> The common law thus offers an administrable line: A criminal defendant's untainted assets are protected from Government interference before trial and judgment. His tainted assets, by contrast, may be seized before trial as contraband or through a separate *in rem* proceeding. Reading the Sixth Amendment to track the historical line between tainted and untainted assets makes good sense. It avoids case-by-case adjudication, and ensures that the original meaning of the right to counsel does real work. The asset freeze here infringes the right to counsel because it "is so broad that it differs not only in degree, but in kind, from its historical antecedents. *James Daniel Good*, *supra*, at 82 (THOMAS, J., concurring in part and dissenting in part)."

64. While dealing with the aforesaid issue and the decisions of the U.S. Supreme Court in **Caplin** and **Sila Luis,** the Court may only incidentally observe that insofar as PMLA is concerned, it enables the Enforcement Directorate to not only move against properties which may have been derived or obtained directly or indirectly while committing a scheduled offence, but also against property equivalent in value as would be evident from a reading of the expansive definition of the expression *"proceeds of crime"* in Section 2(1)(u).

65. It also becomes important to note that the provisions for a pre-conviction attachment of properties was consciously adopted and incorporated in the PMLA to strengthen the fight against the offence of money laundering. This is evident from the recordal of the following facts by the Supreme Court in **Vijay Madan Lal Chaudhary & Ors. v. Union of India & Ors.**[32]:-

> "292. The background in which the amendment of 2013 became necessary can be culled out from the Report titled "Anti-Money

[32] 2022 SCC OnLine SC 929

Laundering and Combating the Financing of Terrorism" dated 25.6.2010. The relevant paragraphs of the said report read thus:

> "143. It is no formal and express legal condition that a conviction for the predicate offence is required as a precondition to prosecute money laundering, although some practitioners the assessment team met with felt that only a conviction would satisfactorily meet the evidentiary requirements. The definition of property in the PMLA (see supra) however requires property to be "related to a scheduled offence. Consequently, the section 3 ML offence not being an "all crimes offence, in the absence of case law, it is generally interpreted as requiring at the very minimum positive proof of the specific predicate offence before a conviction for money laundering can be obtained, be it for third party or self-laundering.
>
> 144. Similarly, under section 8A of the NDPS Act, although it is debatable that the person charged with money laundering needs to have been convicted of a predicate offence, the positive and formal proof of a nexus with a drug related predicate offence is essential.
>
> *********
>
> 168. The linkage and interaction of the ML offence with a specific predicate criminality is historically very tight in the Indian AML regime. The concept of stand-alone money laundering is quite strange to the practitioners, who cannot conceive pursuing money laundering as a sui generis autonomous offence. Some interlocutors were even of the (arguably erroneous) opinion that only a conviction for the predicate criminality would effectively satisfy the evidential requirements. As said, this attitude is largely due to the general practice in India to start a ML investigation only on the basis of a predicate offence case. Even if the ML investigation since recently can run concurrently with the predicate offence enquiry, there is no inter-agency MOU or arrangement to deal with evidentiary issues between the various agencies in investigating predicates and ML offences. Also, the way the interaction between the law enforcement agencies is presently structured carries the risk that ML prosecutions could be delayed while the other predicate offence investigation agencies try to secure convictions.
>
> *********
>
> 175. Although recently an increased focus on the ML aspect and use of the ML provisions is to be

acknowledged, there are still some important and often long-standing legal issues to be resolved. To that end following measures should be taken:

- The monetary threshold limitation of INR 3 million for the Schedule Part B predicate offences should be abolished.
- The section 3 PMLA definition of the ML offence should be brought in line with the Vienna and Palermo Conventions so as to also fully cover the physical concealment and the sole acquisition, possession and use of all relevant proceeds of crime.
- The present strict and formalistic interpretation of the evidentiary requirements in respect of the proof of the predicate offence should be put to the test of the courts to develop case law and receive direction on this fundamental legal issue.
- The level of the maximum fine imposable on legal persons should be raised or left at the discretion of the court to ensure a more dissuasive effect.
- The practice of making a conviction of legal persons contingent on the concurrent prosecution/conviction of a (responsible) natural person should be abandoned.
- Consider the abolishment of the redundant section 8A NDPS Act drug-related ML offence or, if maintained, bring the sanctions at a level comparable to that of the PMLA offence.

****

233. Confiscation under Chapter III of the PMLA is only possible when it relates to "proceeds of crime as defined in s. 2(1)(u), i.e. resulting from a scheduled offence, and when there is a conviction of such scheduled (predicate) offence. In addition, in such cases, only proceeds of the predicate offence can be confiscated and not the proceeds of the ML offence itself.

234. The predicate offence conviction condition creates fundamental difficulties when trying to confiscate the proceeds of crime in the absence of a conviction of a predicate offence, particularly in a stand-alone ML case, where the laundered assets become the corpus delicti and should be forfeitable as such. In the international context, the predicate conviction requirement also seriously affects the capacity to recover criminal assets where the predicate

offence has occurred outside India and the proceeds are subsequently laundered in India (see also comments in Section 2.1 above).

235. The definition of proceeds of crime and property in the PMLA are broad enough to allow for confiscation of property derived directly or indirectly from proceeds of crime relating to a scheduled (predicate) offence, including income, profits and other benefits from the proceeds of crime. These definitions also allow for value confiscation, regardless of whether the property is held or owned by a criminal or a third party. As section 65 of the PMLA refers to the rules in CrPC, instrumentalities and intended instrumentalities can be confiscated in accordance with section 102 and 451 of the CrPC. However, there is no case law in this respect.

236. Also, the procedural provisions of Chapter III make confiscation of the proceeds of crime contingent on a prior seizure of attachment of the property by the Adjudicating Authority, and consequently substantially limit the possibilities for confiscation under the PMLA."

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"General comments"

244. Since confiscation is linked to a conviction it is not possible to confiscate criminal proceeds when the defendant has died during the criminal proceedings. However, it is possible to attach and dispose of any property of a proclaimed offender when that person has absconded. The absence of a regulation when the defendant has died may have a negative impact on the effectiveness of the confiscation regime in place in India."

293. In view of the observations made in said Report, the FATF made recommendations as follows:

"2.3.3 Compliance with Recommendations 3

	Rating	**Summary of factors relative to s. 2.3 underlying overall rating**
R.3	PC	• Confiscation of property laundered is not covered in the relevant legislation and depends on a conviction for a scheduled predicate offence.
		• The UAPA does not allow for confiscation of intended instrumentalities used in terrorist acts or funds collected to

		be used by terrorist individuals.
		• The UAPA and NDPS Act do not allow for property of corresponding value to be confiscated.
		• There are no clear provisions and procedures on how to deal with the assets in the case of criminal proceedings when the suspect died.
		• Concerns based on the limited number of confiscations in relation to ML/FT offences.

294. As a sequel to these recommendations of FATF and the observations in the stated Report, Section 5 came to be amended vide Act 2 of 2013. In this connection, it may be useful to refer to the Fifty Sixth Report of the Standing Committee on Finance relating to the 2011 Bill, which reads thus:

"5. Amendment in provisions implemented by Enforcement Directorate:

(i) Attachment of property : The present Act in section 5 stipulates that the person from whom property is attached must "have been charged of having committed a scheduled offence". It is proposed to be deleted as property may come to rest with someone, who has nothing to do with the scheduled offence or even the money-laundering offence. Procedure for attachment is at present done as provided in the Second Schedule to the Income Tax Act, 196. Now it is proposed in section 5(1) that the procedure will be prescribed separately. Time for Adjudicating Authority to confirm attachment of property by ED has been proposed to be increased from 150 days to 180 days.

(ii) ****

(iii) Making confiscation independent of conviction : At present attachment of property becomes final under section 8(3) "after the guilt of the person is proved in the trial court and order of such trial court becomes final". Problems are faced in such cases where money-laundering has been done by a person who has not committed the scheduled offence or where property has come to rest with someone who has not

committed any offence. Therefore, it is proposed to amend section 8(5) to provide for attachment and confiscation of the proceeds of crime, even if there is no conviction, so long as it is proved that predicate offence and money laundering offence have taken place and the property in question (i.e. the proceeds of crime) is involved in money laundering."

****

However, the MER 2010 highlighted certain deficiencies in the AML legislation which adversely affected the ratings on a few FATF recommendations. The areas are broadly summarized below:—

a) Commodities market out of the ambit of PMLA.

b) DNFBP sector not subjected to PMLA (except Casino).

c) Effectiveness concerns due to absence of ML conviction.

d) Identification and verification of beneficial ownership of legal persons.

e) Ineffective sanctions regime for non-compliance. India has suggested an Action Plan with short, medium and long term objectives to address the specific issues raised in the MER 2010 that includes proposed amendments in the PMLA."

(emphasis supplied)

295. As aforesaid, in this backdrop the amendment Act 2 of 2013 came into being. Considering the purport of the amended provisions and the experience of implementing/enforcement agencies, further changes became necessary to strengthen the mechanism regarding prevention of money-laundering. It is not right in assuming that the attachment of property (provisional) under the second proviso, as amended, has no link with the scheduled offence. Inasmuch as Section 5(1) envisages that such an action can be initiated only on the basis of material in possession of the authorised officer indicative of any person being in possession of proceeds of crime. The precondition for being proceeds of crime is that the property has been derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence. The sweep of Section 5(1) is not limited to the accused named in the criminal activity relating to a scheduled offence. It would apply to any person (not necessarily being accused in the scheduled offence), if he is involved in any process or activity connected

> with the proceeds of crime. Such a person besides facing the consequence of provisional attachment order, may end up in being named as accused in the complaint to be filed by the authorised officer concerning offence under Section 3 of the 2002 Act."

66. The PMLA is thus a distinct regime adopted by the Nation aimed to strengthen the arms of enforcement agencies in the fight against crime, representative of the new tools adopted across the world to force the perpetrators of crime to disgorge the benefits that may have been derived or obtained and thus stands on a pedestal distinct and different from the insolvency regimen which has come to be erected in terms of the IBC. The two statutes thus subserve completely different, divergent and distinct purposes. The objectives underlying the introduction of the PMLA, the international obligations of the country which lead to its promulgation based upon the views expressed by the **Financial Action Task Force**[33] and which have been elaborately noticed in **Vijay Madanlal** clearly lend credence to the aforesaid conclusion.

H. ATTACHMENT NOT A DEBT RECOVERY ACTION

67. The Court also deems it apposite to observe that the Government while proceeding to act under the PMLA can also not be recognized to be acting as a creditor who seeks to enforce a debt. This is clearly evident from the definition of the words "creditor" and "debt" which is employed under the IBC. Its action to attach a property is not one which is taken by a person to whom a debt may be said to be owed. It would be relevant to note that when the ED moves

[33] FATF

to provisionally attach properties which constitute proceeds of crime, it does not do so acting as a creditor. The steps that are taken under the aforesaid provisions are aimed at principally attaching properties which have been determined as representing proceeds of crime and thus placing a fetter on the right of the holder thereof to deal with or fritter away the same. It essentially seeks to strip the perpetrator of the right to enjoy the same during the pendency of proceedings under the PMLA. The order of attachment thus puts a restraint on the further enjoyment of the property by the possessor thereof as also to put a restraint on its powers to transfer or alienate the same pending the trial of the offence of money laundering by the Special Court.

68. As was aptly observed by the Court in **Axis Bank,** the Government while seeking to attach properties under the PMLA is not liable to be viewed as exercising a sovereign prerogative to levy a tax or to recover a debt but essentially to take away what has been illegitimately obtained in the course of a person indulging in proscribed criminal activity. The aforesaid view also finds resonance in the following observations as were made by the Supreme Court in **P. Mohanraj**: -

> "100. Lastly, Shri Mehta relied upon Directorate of Enforcement v. Axis Bank [Directorate of Enforcement v. Axis Bank, 2019 SCC OnLine Del 7854 : (2019) 259 DLT 500] , and in particular, on paras 127, 128 and 146 to 148 for the proposition that an offence under the Prevention of Money-Laundering Act could not be covered under Section 14(1)(a). The Delhi High Court's reasoning is contained in paras 139 and 141, which are set out hereinbelow: (SCC OnLine Del)
>
> > "139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no

> overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, Sarfaesi Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "*due*" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.
>
> ***
>
> 141. This Court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "*proceeds of crime*" concerns a property the value whereof is "*debt*" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity."
>
> (emphasis in original)
>
> This raison d'être is completely different from what has been advocated by Shri Mehta. The confiscation of the proceeds of crime is by the Government acting statutorily and not as a creditor. This judgment, again, does not further his case."

69. Regard must also be had to the fact that the word "debt" itself is defined under the IBC to mean a liability or obligation which is due from any person. The action of attachment and ultimate confiscation under the PMLA is essentially to strip the possessor of the tainted property of all rights that may have otherwise been exercisable. When

the respondents proceed to invoke the provisions of the PMLA, they are in essence proceeding towards the ultimate confiscation of properties unlawfully acquired or those which were obtained by the use of proceeds garnered from the commission of a schedule offence.

I. ABSENCE OF CONFLICT

70. Turning then to the scope of the two statutes and the perceived conflict between the two, the Court in **Axis Bank** had while ruling on third-party interests observed as follows: -

> "105. It is vivid that the legislature has made provision for "*provisional attachment*" bearing in mind the possibility of circumstances of urgency that might necessitate such power to be resorted to. A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the investigation is completed. The authority for "*provisional*" attachment of suspect assets is to ensure that the same remain within the reach of the law.
>
> xxx xxx xxx
>
> 161. The law conceives of possibility of third party interest in property of a person accused of money-laundering being created legitimately or, conversely, with ulterior motive "*to frustrate*" or "*to defeat*" the objective of law against money-laundering. In case of tainted asset - that is to say a property acquired or obtained as a result of criminal activity - the interest acquired by a third party from person accused of money-laundering, even if *bona fide*, for lawful and adequate consideration, cannot result in the same being released from attachment, or escaping confiscation, since the law intends it to "*vest absolutely in the Central Government free from all encumbrances*", the right of such third party being restricted to

sue the wrong-doer for damages, the encumbrance, if created with the objective of defeating the law, being treated as void (Section 9).

162. But, in case an otherwise untainted asset (i.e. deemed tainted property) is targeted by the enforcement authority for attachment under the second or third part of the definition of "*proceeds of crime*", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest in such property was acquired *bona fide* and for lawful (and adequate) consideration, there being no intent, while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering.

163. Having regard to the above scheme of the law in PMLA, it is clear that if a bonafide third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the product whereof is suspected as proceeds of crime, the acquisition of such interest in such property (otherwise assumably untainted) by such third party cannot conceivably be on account of intent to defeat or frustrate this law. In this view, it can be concluded that the date or period of the commission of criminal activity which is the basis of such action under PMLA can be safely treated as the cut-off. From this, it naturally follows that an interest in the property of an accused, vesting in a third party acting bona fide, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under Section 8 PMLA.

164. Though the sequitur to the above conclusion is that the *bonafide third party claimant* has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the order of attachment under PMLA, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in such situations as above (third party interest being prior to criminal activity) the order of attachment under PMLA would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party.

> 165. Situation may also arise, as seems to be the factual matrix of some of the cases at hand, wherein a *secured creditor*, it being a *bonafide third party claimant* vis-a-vis the *alternative attachable property* (or *deemed tainted property*) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the PMLA attachment, though remaining valid and operative, takes a back-seat allowing the secured creditor *bonafide third party claimant* to enforce its claim by disposal of the subject property, the remainder of its value, if any, thereafter to be made available for purposes of PMLA."

71. As would be evident from the aforesaid passages of that decision, the Court had while preserving the right of the competent authorities under the PMLA to provisionally attach properties notwithstanding independent proceedings that may have been initiated or would have been pending under the IBC at the relevant point of time, accorded no precedence to the claim of the ED over that of secured creditors or other bonafide third party claimants. It was pertinently observed that while an attachment under the PMLA would remain valid and operative, it would have to ultimately take a *"back seat"* allowing the secured creditor or a bonafide third party claimant to enforce its claim by disposal of the subject property and the remainder alone being made available for the purposes of the PMLA.

72. The IBC on the other hand is a compendious legislation which engrafts measures pertaining to resolution of claims which may exist against a debtor facing the spectre of insolvency. It essentially creates a mechanism for speedy resolution of insolvency, exploration of the possibility of its revival and for appropriate steps towards liquidation

being taken if it be ultimately found that the entity cannot be revived. IBC is a comprehensive and all-encompassing code dealing with all aspects relating to insolvency. It is a legislative measure aimed at ensuring expeditious resolution of situations of insolvency and thus protecting the rights of all stakeholders. It is these aspects which appear to have guided the Legislature in adopting measures which removes the erstwhile management from the seat of control over the corporate debtor, the creation of a common platform for the examination of claims of various parties who may have had dealings with the debtor, the appointment of Resolution Professionals who may be charged with exploring the possibility of resettlement and revival of the debtor and for the adoption of appropriate steps which may enable the debtor to get back on its feet and if ultimately found to be unfeasible to take steps for its timely liquidation. It is a legislation which constructs a comprehensive structure aimed at timely resolution of stressed debtors and thus subserving the interests of its creditors and other stakeholders. Insolvency proceedings have thus been transformed into a collective engagement to examine whether there is a possibility for the revival of the debtor.

J. THE IMPACT OF THE MORATORIUM

73. The moratorium provision incorporated in the IBC is fundamentally aimed at maximisation of value, preservation of the assets of the debtor while possibilities of its resurrection are explored and ensuring that its various creditors do not initiate individual actions which may hamper or impede the resolution process. It is essentially aimed at preserving the insolvency estate and the suspension of

actions against the debtor. The moratorium order staves off actions that may be initiated for enforcing security interests, claims by individual creditors, a restraint against the dissipation of its assets while the process of its restructuring is explored. It essentially seeks to sequester the assets of the debtor from actions which may be initiated by its creditors. It is during this crucial period that the viability of the debtor is assessed during the CIRP.

74. The purpose of a moratorium provision was explained by the **Viswanathan Committee** in its **Insolvency Committee Report, 2015** as follows:-

> **"5.3.1.1**
>
> **Moratorium on debt recovery action**
>
> The motivation behind the moratorium is that it is value maximizing for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP. The order for the moratorium during the IRP imposes a stay not just on debt recovery actions, but also any claims or expected claims from old lawsuits, or on new lawsuits, for any manner of recovery from the entity. The moratorium will be active for the period over which the IRP is active. (Viswanathan Committee Report, 2015 para 5.3.1.1)"

75. The Court had already noticed the pertinent conclusions in the subsequent report which had explained the purpose behind a moratorium provision in the following terms:-

> "8.2. The moratorium under Section 14 is intended to keep *"the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default."* Keeping the corporate debtor running as a going concern during the CIRP helps

in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it *"facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate."*

8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute *"money claims or recovery"* proceedings. In this regard, the Committee also noted that in some jurisdictions, laws allow *"regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety"* to be continued during the moratorium period."

76. The Notes on Clauses for Section 14 in the original Bill read as under:-

"the purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default and *"the moratorium on initiation and continuation of legal proceedings, including debt enforcement action ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the corporate insolvency resolution process."*

77. The **United Nations Commission on International Trade Law[34], Legislative Guide on Insolvency Law, (2005)** while speaking of a moratorium provision observes as under:-

[34] UNCITRAL

"34. Other insolvency laws allow the commencement or continuation of legal proceedings (without leave of the court), but the application of the stay pre- vents enforcement of any resulting order. Some insolvency laws limit the actions that may be pursued and only specific actions, such as employee actions against the debtor, can be commenced or continued, but any enforcement action resulting from those proceedings will be stayed. In some insolvency laws a distinction is made between regulatory and pecuniary actions. Some laws allow claims of both a regulatory and pecuniary nature to be continued, others only regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety. As a procedural matter, some insolvency laws limit the initial scope of acts and actions to which the stay applies on commencement, but provide that upon application, the court might extend the stay to other types of action and act.

35. To ensure transparency and predictability, it is highly desirable that an insolvency law clearly identify the actions that are to be included within and specifically excepted from the scope of the stay, irrespective of who may commence those actions, whether unsecured creditors (including priority creditors such as employees, legislative lien holders or Governments), third parties (such as a lessor or owner of property in the possession or use of the debtor or occupied by the debtor), secured creditors or others. Exceptions might include set-off rights and netting of financial contracts; actions to protect public policy interests, such as to restrain environmental damage or activities detrimental to public health and safety; actions to prevent abuse, such as the use of insolvency proceedings as a shield for illegal activities; actions commenced in order to preserve a claim against the debtor; and actions against the debtor for personal injury or family law claims. With respect to claims against the debtor that have the potential for very large compensation awards, such as mass tort claims, it is desirable that they be included within the scope of the stay."

78. What would be manifest from the aforesaid enunciation of the intent and objective of the moratorium provision is that it principally subserves the purpose of preservation of the assets of the debtor, enables all stakeholders to explore the possibility of its revitalisation and if ultimately those efforts fail, for its expeditious liquidation. The

aforesaid objective would be clearly negated if individual creditors were granted the right to enforce their claims independently. That would not only result in a depletion of the insolvency estate, it would ultimately jeopardise the interests of the body of creditors as a whole. As was succinctly explained by the Supreme Court in **P. Mohanraj**, clauses (a) and (b) of Section 14(1) constitute a scheme which shields the corporate debtor from "pecuniary attacks". It is these imperatives which appear to inform the provisions of Section 14 of the IBC.

79. Regard must also be had to the fact that in **P. Mohanraj**, the Supreme Court had contrasted the breadth of the moratorium envisaged under Section 14 with that provided for in Sections 85 and 96 of the IBC. It had noted that the latter two provisions were concerned with a stay of proceedings "in respect of any debt". It was in that context observed that the moratorium provisioned for in Section 14(1)(a) would be far wider and would cover any legal proceedings *"even indirectly relatable to recovery of any debt."* **P. Mohanraj** was concerned with the question whether a Section 138 of the Negotiable Instruments Act proceeding would fall within the ambit of the expression "proceedings" as appearing in Section 14(1). The judgment in the aforesaid case is liable to be appreciated bearing in mind the fundamental fact that an action under Section 138 was recognised to be principally one for the recovery of a debt owed notwithstanding the proceedings being quasi criminal in character. The ratio of the aforesaid decision clearly appears to be that the word "proceedings" is not liable to draw colour or meaning from the words institution or continuation of suits and would thus cover all

proceedings which could be viewed as being in relation to the enforcement or recovery of a debt that may be owed by the corporate debtor.

80. As would be evident from the aforesaid discussion, the primordial purpose of a moratorium as enunciated hereinabove, is clearly distinct from the purpose and objectives of attachment action taken under the PMLA. PMLA is not concerned with the recovery or enforcement of a debt. Proceedings for attachment that may be initiated in terms thereof cannot by any stretch of imagination be viewed as being akin to an action for enforcement or recovery of a debt. PMLA is guided by the legislative policy of confiscation of proceeds of crime. That legislation is aimed primarily at fighting the scourge of organised crime, the generation and retention of criminal proceeds, denuding offenders of the economic benefits that may have been derived or obtained by the commission of scheduled offenses and thus become an iteration of the legislative policy that crime would not pay. PMLA seeks to adopt, enforce and unleash punitive measures against the commission of crime and the retention of ill-gotten gains.

81. The Government when it seeks to initiate pre-emptive measures which may ultimately lead to a civil forfeiture and confiscation of tainted assets is neither seeking to enforce a debt nor is it proceeding towards appropriation of moneys due or payable to it. Those proceedings are not liable to be viewed as an action to recover a tax or moneys owed to the Government. That action is fundamentally aimed at an ultimate confiscation of properties and assets which would have been obtained by a person by commission of a crime and thus deriving

a benefit which was otherwise if not impermissible, forbidden by law. Assets which may have been obtained by the commission of a scheduled offense thus cannot be accorded exemption or immunity from the rigours of the PMLA. Acceptance of such a contention would not only run contrary to the legislative policy but also undermine the efforts of the legislature to combat the offense of money laundering. In fact if Section 14 were to be interpreted in the manner as suggested by the petitioner, it would deprive the authorities charged with implementing the provisions of the PMLA of an essential weapon in their quest to confiscate proceeds of crime. It would be pertinent to note that the activity of money laundering is itself aimed at obfuscating the origins of property illegally derived from crime. It is a process which inherently entails the layering of proceeds which itself is a dynamic process. The power of attachment is thus an essential tool which is designed to ensure that the tainted asset is not transferred or alienated further and beyond the reach of the authorities itself.

82. The Court finds itself unable to accept the submission that the provisions of the PMLA are liable to be read as being subservient to the moratorium provision comprised in Section 14 of the IBC for the following additional reasons. PMLA seeks to subserve a larger public policy imperative. The enactment represents a larger public interest, namely the fight against crime and the debilitating impact that such activities ultimately have on the society and the economy of nations as a whole. Tainted assets are those which would have been obtained through surreptitious means and modes, through layered transactions aimed at obfuscating their origins. The legislation aims at denuding

the perpetrators of crime of gains obtained from such activities. It is a reparation measure which seeks to strip and deprive criminals of benefits derived and retained by the adoption of illegal and dishonest action. The PMLA is an enactment which is aimed at affecting the disgorgement of illegal gains. The Court deems it apposite to note that the Insolvency Law Committee Report, 2016 had pertinently observed in Para 8.11 that the moratorium provision is not liable to be interpreted as barring all possible actions *"especially where countervailing public policy concerns are involved"*. It also took note of laws prevailing in different jurisdictions which permit regulatory actions which though not aimed at collecting moneys for the estate protect other vital and urgent public interests. This view finds reiteration in the UNCITRAL Legislative Guide on Insolvency Law which had recognised *"actions to protect public policy concerns"* falling outside the ken of a moratorium.

83. Viewed in that light, it cannot possibly be said that actions taken under that statute are akin or similar to steps that may be taken by a creditor pursuing an ordinary monetary claim. The tainted property is not a debt owed to the Government. It is not something which is owed to the Government or a liability which is liable to be discharged or liquidated. On an overall conspectus of the aforesaid, the Court is of the considered opinion that on a fundamental plane, it would be incorrect to read Section 14 as completely shutting out actions under Sections 5 and 8 of the PMLA.

K. NCLAT AND CONFLICTING VIEWS

84. The scope of Section 14 of the IBC and the power of the authorities under the PMLA Act to effect attachment is an issue which appears to have fallen for consideration before the NCLT and the NCLAT on various occasions in the past. Since those decisions have also been cited before this Court, it would be apposite to briefly notice the principles laid down therein as well as to lend a quietus to the controversy which stands raised.

85. However, and before proceeding to do so, it would be pertinent to advert to certain decisions cited on behalf of the petitioner and who contended that they are authorities for the proposition that since proceedings of attachment under the PMLA are civil in character, they would fall within the ambit of the moratorium provision contained in Section 14 of the IBC. They had firstly relied upon a judgment rendered by the Andhra Pradesh High Court in **B. Rama Raju vs. Union of India**[35]. It becomes pertinent to note that **B. Rama Raju** was dealing with a batch of writ petitions which had laid challenge to the constitutionality of various provisions of the PMLA. This would be evident from a perusal of the issues which stood crystallized in paragraph 14 of the report. The said decision does not deal with the question of attachment and the scope or ambit of the moratorium under Section 14 at all. Similarly, the decision of the Gujarat High Court in **Foziya Godil vs. Union of India**[36] which was pressed into aid by the petitioner also does not consider the question which stands

[35] 2011 SCC OnLine AP 152
[36] 2014 SCC OnLine Guj 3417

posited before this Court in the present writ petition. The same is the position with respect to the judgment rendered by the Appellate Tribunal for Prevention of Money Laundering handed down in **Punjab National Bank vs. Deputy Director, Directorate of Enforcement**[37]

86. Turning then to the decisions rendered by the NCLAT on the subject, it appears that the question of the interplay between the provisions of the PMLA and Section 14 of the IBC firstly came to be considered in **Varrsana Ispat**. While dealing with the aforesaid issue, the NCLAT enunciated the legal position as follows: -

> **"8.** Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the „Prevention of Money Laundering Act, 2002" is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.
>
> **12.** From the aforesaid provisions, it is clear that the „Prevention of Money-Laundering Act, 2002" relates to „proceeds of crime" and the offence relates to „money-laundering" resulting confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the „Prevention of Money Laundering Act, 2002" or provisions therein relates to „proceeds of crime", we hold that Section 14 of the „I&B Code" is not applicable to such proceeding."

87. An identical issue fell for consideration before the NCLAT in the matter of **Sterling Biotech Limited.** In the aforesaid matter, the Appellate Tribunal observed thus: -

> "15. In so far the assets of the „Corporate Debtor" is concerned, if it is based on the proceeds of crime, it is always open to the

[37] [2019 SCC Online ATPMLA]

> „Enforcement Directorate" to seize the assets of the „Corporate Debtor" and act in accordance with the „Prevention of Money Laundering Act, 2002" (for short, „the PMLA")."

88. Subsequently and in **Rotomac Global,** the question of a moratorium applying to proceedings that may be initiated under the PMLA fell for consideration yet again. NCLAT reiterated the position which had been elucidated in **Varrsana Ispat** and proceeded to dismiss the appeal. The sole discordant note which appears to have been struck by NCLAT was in the matter of **Manoj Kumar Agarwal**. It was in this decision that the NCLAT for the first time took the position that in light of the aims and objects of the IBC, it would be impermissible for the authorities under the PMLA being recognised to have a right to exercise the powers of attachment after a moratorium had come into effect. This is evident from the following conclusions which came to be recorded in that decision: -

> **"56.** Taking aid from this, it appears to us that after the attachment when matter goes before the Adjudicating Authority under PMLA, proceeding before Adjudicating Authority for confirmation would be civil in nature. That being so, Section 14 of IBC would be attracted and applies. In present matter, the Provisional Attachment took place on 29th May, 2018 and corrigendum was issued on 14th June, 2018. The CIRP started on 16th July, 2018. Once moratorium was ordered, even if the Appellant moved the Adjudicating Authority under PMLA, further action before Adjudicating Authority under PMLA must be said to have been prohibited. Even if confirmation has been done as stated to have been done on 20th November, 2018, the same will have to be ignored. Section 14 of IBC will hit institution and continuation of proceedings before Adjudicating Authority under PMLA. The CIRP will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur.
>
> **57.** In Judgment in the matter of "*P. Mohanraj* v. *Shah Brothers Ispat Pvt. Ltd.*" 2021 SCC OnLine SC 152, Hon'ble Supreme

Court of India considered the provisions of Section 138 of the Negotiable Instrument Act and Liabilities of the Corporate Debtor and Directors in the light of Section 14 of IBC and observed in Paragraph 63 as under:

> *"63. A conspectus of these judgments would show that the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and the interest and costs thereupon. Given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a "proceeding" within the meaning of Section 14(1)(a), the moratorium therefore attaching to such proceeding."*

58. Thus to quasi-criminal proceeding as regards Corporate Debtor, Section 14 applies has been found. Considering this as well as the nature of proceedings that takes place before the Adjudicating Authority under PMLA, it appears to us that even if the Authority issues order of provisional attachment, the institution and continuation of proceedings before the Adjudicating Authority for confirmation would be hit by Section 14 of IBC.

59. Alternatively, even if for any reason it was to be held that Section 14 of IBC would not help, it appears to us that Section 238 of IBC would still apply. Although it is argued that PMLA is a special statute and has an overriding effect still Section 238 of IBC is also a special statute and which is subsequent statute. IBC has specific object, which is to consolidate and amend laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interest of all stakeholders including alteration in the order of priority of payment of Government dues.

60. Section 238 of IBC reads as under:

"238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

61. If this Section is perused, the provisions of this Code would have effect notwithstanding anything inconsistent therewith contained "in any other law" for the time being in force. Section 238 of IBC does not give over riding effect merely to Section 14. The other provisions also are material, and will have effect if there is anything inconsistent therewith contained in any other law for the time being in force. Thus if the Authorities under PMLA on the basis of the attachment or seizure done or possession taken under the said Act resist handing over the properties of the Corporate Debtor to the IRP/RP/Liquidator the consequence of which will be hindrance for them to keep the Corporate Debtor a going concern till resolution takes place or liquidation proceedings are completed, the obstructions will have to be removed. We have already referred to the various Acts required to be performed by IRP/RP/Liquidator to achieve the aims and objects of IBC in time bound manner. If properties of Corporate Debtor would not be available to keep it a going concern, or to get the properties valued without which Resolution/Sale would not be possible, the obstruction will have to be removed. To take over properties of Corporate Debtor, and manage the same, and keep Corporate Debtor a going concern are acts which fall within purview of IBC. IRP/RP/Liquidator under IBC have duty and right to take over and manage assets of Corporate Debtor as long as the assets are property of the Corporate Debtor, so that the other duties conferred on them by the statute are performed. These are issues relating to resolution/liquidation. If hindrance is being created by the attachment or by taking over the possession, it would be a question of priority arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor and such question can be decided by the Adjudicating Authority under Section 60(5)(c) of IBC which reads as under:

"60……

(5)….

(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.

> **62.** In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A."

89. It becomes pertinent to observe that while the earlier decision of NCLAT in **Varrsana Ispat** was cited before the Bench of the NCLAT which was hearing **Manoj Kumar Agarwal,** it chose not to deal with the conclusions which had come to be recorded therein. It may only be observed that the previous judgment in **Varrsana Ispat** was perfunctorily dealt with and no cogent reasons assigned to doubt its correctness. The legal position up to the stage of the NCLT and NCLAT in any case ultimately came to be laid at rest by the larger Bench of the Appellate Tribunal in **Kiran Shah. Kiran Shah** after noticing the relevant statutory provisions which would apply as well as the earlier judgments rendered by the Tribunals in this respect while reiterating **Varrsana Ispat** held as under: -

> **"98.** 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.
>
> **99.** 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 fulfil 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".

100. 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".

101. 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.

108. The Hon'ble Supreme Court had confirmed the Judgment of this Tribunal in *Varrsana Ispat Ltd.* v. *Deputy Director of Enforcement* (Vide Comp. App. (AT) (Ins) No. 493 of 2018) through an order dated 22.07.2019 in Civil Appeal 5546 of 2019 and the same has become final, conclusive and the same being of a binding value upon this Tribunal. Indeed, as per Article 141 of the Constitution of India the Judgment of the Hon'ble Supreme Court is binding on this Appellate Tribunal.

109. In regard to the Judgment of the Hon'ble High Court of Delhi in the matter of *Deputy Director, Directorate of Enforcement Delhi* v. *Axis Bank* Reported in 2019 SCC OnLine Del 7854, it is to be pointed out that the Hon'ble Supreme Court had granted only a Status quo Order on 30.08.2019, but there is no stay of the Judgment of the Hon'ble High Court of Delhi. As on date, the Judgment of the Hon'ble High Court of Delhi in the matter of *Deputy Director Directorate of Enforcement Delhi* v. *Axis Bank* in law is binding upon this „Tribunal"."

The decision of **Manoj Kumar Agarwal** was disapproved with the NCLAT observing that it had come to be rendered contrary to the principles of stare decisis.

90. Having noticed the decisions which had been rendered by the Tribunals on the subject it may be noted that the Madras High Court in **Joint Director, Directorate of Enforcement Vs. Asset**

Reconstruction Company India Ltd and others[38] made the following pertinent observations: -

> "8. Section 14 of the IBC speaks of moratorium. A declaration has to be made through an order by the Adjudicatory Authority in this regard. If one carefully goes through the said section, there is no way professional attachment order passed under the provisions of the PMLA would automatically invite a moratorium. This provision only speaks about the consequence for institution of the suit, for continuance and other proceedings against the Corporate Debtor. Therefore, Section 14 of the IBC is consequent upon an order passed by the Adjudicative Authority declaring moratorium. This would not apply to a special enactment which travels on its own path. After all, one cannot presume a conflict between two enactments having it distinct roles with their objections. As stated, it only speaks about the follow up action over a property, which is subject matter of the proceedings before the National Company Law Tribunal under the IBC. Thus, Section 14 would not bar a proceeding under the PMLA.
>
> 9. Section 32-A of the IBC deals with the liability for prior offences. This provision would get attracted in a case where the resolution plan has been approved by the Adjudicating Authority under Section 31 of the IBC. Therefore, when no such approval has taken place, the Adjudicating Authority will not have any power or authority to exercise the power under Section 32-A of the IBC. We may note, this insertion by way of an amendment came into being with effect from 28.12.2019 onwards.
>
> 10. Section 60 of the IBC comes under Chapter VI.
>
> Chapter VI of the IBC deals with the Adjudicating Authority for corporate persons. Section 65 of the IBC gives jurisdiction to the Tribunal to entertain and dispose of any application on proceeding by or against the Corporate Debtor. Even this proceeding would not apply to a statutory Authority in another enactment and that too, a special one. As observed, the scope of enquiry under PMLA is rather wide and comprehensive."

[38] Writ Petition No.29970 of 2019

91. The perceived conflict between the IBC and the PMLA fell for consideration before a learned Judge of this Court in **Axis Bank.** While answering the aforesaid issue, the Court observed thus: -

> "139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, SARFAESI Act (with added chapter on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "*due*" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.
>
> 140. The purpose, purport and import of Section 31-B inserted in RDBA, and Section 26-E inserted in SARFAESI Act, has to be understood in above light. The marginal heads of both the provisions are identically worded - "*Priority to secured creditors*". Though Section 26-E of SARFAESI Act requires, as a condition precedent, "*the registration of security interest*", which is not requisite for Section 31-B of RDBA to operate, both provisions give precedence to realization of "*debts due to*" the "*secured creditor*", the clause in RDBA also clarifying it by additional words "*payable to them by sale of assets over which security interest is created*". Each of these provisions renders secondary "*all other debts*" and "*revenues, taxes, cesses*" and "*rates*" enforced by "*the Central Government, State Government or local authority*". Section 31-B of RDBA uses the expression "*due to*" while Section 26-E of SARFAESI Act uses the words "*payable to*" in relation to such debts, revenues, taxes, etc., the meaning being similar.
>
> 141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "*proceeds of crime*" concerns a property the value whereof is "debt" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not

acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity."

92. This Court while dealing with the scope of the two enactments had in **Nitin Jain** observed as under: -

"85. As would be evident upon a consideration of the decisions aforenoted, the IBC is primarily concerned with the subject of restructuring of indebted corporate debtors, adoption of means for their revival, securing the interests of creditors and for adoption of steps for effective and timely resolution of corporate insolvency. The PMLA, on the other hand, is a statute fundamentally concerned with trying offenses relating to money laundering, following the proceeds of crime and for confiscation of properties obtained in the course of commission of those offenses or connected therewith. It sets up an investigative and adjudicatory mechanism in respect of offenses committed, attachment of tainted properties and other related matters. It sets up Special Courts for trial of offenses and to bring the guilty to book.

86. Viewed in that backdrop, it is evident that the two statutes essentially operate over distinct subjects and subserve separate legislative aims and policies. While the authorities under the IBC are concerned with timely resolution of debts of a corporate debtor, those under the PMLA are concerned with the criminality attached to the offense of money laundering and to move towards confiscation of properties that may be acquired by commission of offenses specified therein. The authorities under the aforementioned two statutes consequently must be accorded adequate and sufficient leeway to discharge their obligations and duties within the demarcated spheres of the two statutes.

87. In a case where in exercise of their respective powers a conflict does arise, it is for the Courts to discern the legislative scheme and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations to the extent that the same does not impinge or encroach upon a facet which stands reserved and legislatively mandated to be exclusively controlled and governed by one of the competing statutes. The aspect of legislative fields of IBC and PMLA and the imperative to strike a correct balance was rightly noticed and answered by the learned Judge in Axis Bank."

93. On a consideration of the precedents which have come to be rendered on the aforesaid subject, this Court finds that both NCLT and NCLAT, have correctly taken the view that the moratorium would not prevent the authorities under the PMLA from exercising the powers conferred by Sections 5 and 8 notwithstanding the pendency of the CIRP. The view as taken and expressed in the decisions aforenoted clearly commends acceptance and reiteration for the reasons assigned in those decisions as well as those noted by this Court in paragraphs 78-83 of this decision.

L. ATTACHMENT AND ITS EFFECT

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.

95. The effect of attachment of property was succinctly explained by the Supreme Court in **Balkrishan Gupta vs. Swadeshi Polytex Ltd.**[39] as follows: -

> "20. We shall first consider the effect of appointment of a Receiver in respect of the shares in question. A perusal of the provisions of Section 182-A of the Land Revenue Act shows that there is no provision in it which states that on the appointment of a person as a Receiver the property in respect of which he is so appointed vests in him similar to the provision in Section 17 of the Presidency Towns Insolvency Act, 1909 where on the making of an order of adjudication the property of the insolvent wherever situate would vest in the official assignee, or in Section 28(2) of the Provincial Insolvency Act, 1920 which states that on the making of an order of adjudication, the whole of the property of the insolvent would vest in the court or in the Official Receiver. Sub-section (4) of Section 182-A of the Land Revenue Act provides that Rules 2 to 4 of Order 40 of the Code of Civil Procedure, 1908 shall apply in relation to a Receiver appointed under that section. A Receiver appointed under Order 40 of the Code of Civil Procedure only holds the property committed to his control under the order of the court but the property does not vest in him. The privileges of a member can be exercised by only that person whose name is entered in the Register of Members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein. In Mathalone v. Bombay Life Assurance Co. Ltd. [AIR 1953 SC 385 : (1954) SCR 117 : (1954) 24 Com Cas 1] it has been laid down clearly that a Receiver appointed by a court in respect of certain shares which had not been duly entered in the Register of Members of the company concerned as belonging to him could not acquire certain newly issued shares which could be obtained by the members of the company. This Court observed at p. 143 thus:
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> > "Mr Pathak argued that the plaintiff was entitled to relief A and B, both in his suit as well as in the Receiver's suit and that the Receiver's suit was wrongly dismissed by the High Court. We are unable to agree. In our opinion, the

[39] (1985) 2 SCC 167

> High Court rightly held that the Receiver appointed in the suit of Sir Padampat could not acquire the newly issued shares in his name. That privilege was conferred by Section 105-C only on a person whose name was on the Register of Members. The Receiver's name admittedly was not in the register and the company was not bound to entertain that application. Mr Pathak argued that that may be so but the Receiver was not making an application in his individual right but he had been armed by the court with power to apply in the right of the defendant Reddy. The fact however is that the Receiver made the application in his own name. Even if Mr Pathak's contention is right the company was no party to the suit filed by Sir Padampat against Reddy and that being so, no order could be issued to the company in that suit to recognize the Receiver as a share-holder in place of Reddy."

30. The consequence of attachment of certain shares of a company held by a share-holder for purposes of sale in a proceeding under Section 149 of the Land Revenue Act is more or less the same. The effect of an order of attachment is what Section 149 of the Land Revenue Act itself says. Such attachment is made according to the law in force for the time being for the attachment and sale of moveable property under the decree of a civil court. Section 60 of the Code of Civil Procedure, 1908 says that except those items of property mentioned in its proviso, lands, houses, or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities of money, debts, shares in a corporation and all other saleable property, moveable or immovable, belonging to a judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf, is liable for attachment and sale in execution of a decree against him. Section 64 of the Code of Civil Procedure, 1908 states that where an attachment of a property is made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is forbidden under Section 64 of the Code of Civil Procedure is a private transfer by the judgment-debtor of the property attached contrary to the attachment, that is, contrary to the claims of the decree-holder under the decree for realisation of which the attachment is effected. A private transfer under Section 64 of the Code of Civil Procedure is not absolutely void, that is, void as against all the world but void only as against the claims enforceable

under the attachment. Until the property is actually sold, the judgment-debtor retains title in the property attached. Under Rule 76 of Order 21 of the Code of Civil Procedure, 1908, the shares in a corporation which are attached may be sold through a broker. In the alternative such shares may be sold in public auction under Rule 77 thereof. On such sale either under Rule 76 or under Rule 77, the purchaser acquires title. Until such sale is effected, all other rights of the judgment-debtor remain unaffected even if the shares may have been seized by the officer of the Court under Rule 43 of Order 21 of the Code of Civil Procedure, 1908 for the purpose of effecting the attachment, or through a Receiver or though an order in terms of Rule 46 of Order 21 of the Code of Civil Procedure may have been served on the judgment-debtor or on the company concerned."

96. Similarly in **Kerala State Financial Enterprises Ltd. vs. Official Liquidator**[40] the Supreme Court explained the concept of attachment in the following terms: -

"10. The expression "attachment" has no definite connotation. An order of attachment is passed for achieving a limited purpose. It is subject to further orders as also the provisions of other statute.

11. The word "attachment" would only mean "taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it". It is used for two purposes: (i) to compel the appearance of a defendant; and (ii) to seize and hold his property for the payment of the debt. It may also mean prohibition of transfer, conversion, disposition or movement of property by an order issued by the court.

12. In *Sardar Govindrao Mahadik v. Devi Sahai* [(1982) 1 SCC 237 : AIR 1982 SC 989] this Court held: (SCC p. 268, para 58)

"58. What is the effect of attachment before judgment? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his

[40] (2006) 10 SCC 709

> decree if made would be satisfied. It is a sort of a guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. The provision in Section 64 of the Code of Civil Procedure provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment. What is claimed enforceable is the claim for which the decree is made."
>
> 13. Save and except certain special statutes in relation to recovery of debts from the properties of a company which has been directed to be wound up, the provisions of the Companies Act shall apply. An order of attachment made prior to passing of an order of winding up may not be void, but then the execution proceedings must be allowed to continue with the leave of the court in terms of Section 446 of the Companies Act. [See *Ovation International (India) (P) Ltd.*, Re [(1969) 39 Comp Cas 595 (Bom)].]
>
> *14.* There, indisputably, exists a distinction between attachment before judgment in terms of Order 38 of the Code of Civil Procedure and attachment for execution of a decree under Order 21 thereof. An order of attachment before judgment passed under Order 38 seeks to safeguard the interests of the plaintiff so that in the event a decree is passed, the same stands satisfied. On the other hand, the essential parties (*sic* purpose) of Order 21 is to see that the process of court is not defeated once execution starts, but the same would not mean that the provisions of the Companies Act become wholly inapplicable. [See *Faqir Chand Gupta v. Tanwar Finance (P) Ltd.* [(1981) 51 Comp Cas 60 (Del)]]"

97. The aforesaid principles would establish that an attachment is essentially aimed at preventing private alienations. It does not confer a title on the authority which has taken that step. The attachment only enables the authorities under the act to restrain any further transactions with respect to the aforesaid property till such time as a trial with respect to the commission of an offence of money laundering comes to an end. Attachment under the PMLA does not result in an extinguishment or effacement of property rights. It is essentially a

fetter placed upon the possessor of that property to deal with the same till such time as proceedings under the aforesaid enactment come to a definitive conclusion on the question of confiscation. As was noted hereinabove, it is essentially an action aimed at bringing into the control of a court or an authority, property over which multiple claims may exist. In any case, since the act of attachment does not result in the effacement of rights in property, it would clearly stand and survive outside the scope of a moratorium or an action relating to an action in respect of a debt due or payable.

98. It may additionally be noted that an attachment that may be come to be made under Sections 5 and 8 of the PMLA are only temporary steps which are taken by the authorities under the aforesaid Act in order to identify the properties which have been found to constitute proceeds of crime. The Court notes that Section 5 empowers the Director or any other officer so designated and empowered by the PMLA to provisionally attach properties which may be found to be in possession of a person and which constitute proceeds of crime. That power to provisionally attach such a property is based upon the Director having a reason to believe that such proceeds of crime are likely to be concealed, transferred or ferreted away with a view to frustrate proceedings under the PMLA. The powers so exercise by the Director under Section 5 is thereafter subjected to a review process before the Adjudicating Authority before whom the matter stands placed for the purposes of confirmation.

99. Section 5(2) enjoins the Director to forward a copy of the order of provisional attachment along with all other materials in his possession to the Adjudicating Authority for such purpose. On the receipt of the aforesaid order and the accompanying material, the Adjudicating Authority is enjoined by law to place persons who are alleged to have committed an offence under Section 3 to appear and show cause why the properties so attached under Section 5 be not declared to be properties involved in money laundering and confiscated by the Union Government. On a culmination of the aforesaid proceedings, the Adjudicating Authority would ultimately either pass an order of confirmation or is in case he differs with the conclusions arrived at by the Director and after considering any response that may be received, annul the provisional attachment.

100. However, both the orders under Sections 5 and 8 remain orders of attachment. The passing of those orders neither result in confiscation of those properties nor do those properties come to vest in the Union Government upon such orders being made. As was noticed by the Court in the earlier parts of this decision, the properties come to be confiscated only after a Special Court proceed to render a finding of guilt and frame orders for the properties so attached being confiscated in favor of the Union Government. As would be evident from a perusal of Section 8(6) where a Special Court finds or comes to the conclusion that an offence of money-laundering has not been established, it is obliged to release the attached property to the person entitled to receive it.

101. The attached property comes to vest in the Union Government only upon the passing of such an order as may be passed by the special Court either under sub-Sections 5 or 7 of Section 8 or Sections 58B or Section 60(2)(a). The aforesaid discussion leads the Court to conclude that the provisional attachment of properties would in any case not violate the primary objectives of Section 14 of the IBC.

M. NON OBSTANTE CLAUSE IN THE IBC AND PMLA

102. The Court had while noticing the submissions addressed on behalf of the petitioner taken note of the contention that Section 238 of the IBC would confer primacy upon the said statute and thus it would override the provisions of the PMLA bearing in mind that it was a special statute and had come to be promulgated later in point of time.

103. While there can be no doubt that where two special statutes incorporate non obstante clauses it is the later enactment which would ordinarily or normally prevail, the same cannot possibly be recognised as constituting the solitary principle of interpretation which would apply or an inviolable rule. It must be fundamentally borne in mind that a non obstante clause in any statute is looked at principally in case of an asserted irreconcilable conflict between statutes. However, that does not preclude courts from identifying or discerning the core objectives of the competing statutes. This would be manifest from the following pertinent observations that were made by the Supreme Court in **Maruti Udyog Vs. Ram Lal**[41] -

[41] (2005) 2 SCC 638

"41. The said Act contains a non obstante clause. It is well settled that when both statutes containing non obstante clauses are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the later shall prevail.

42. In *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.* [(2001) 3 SCC 71] it is stated: (SCC pp. 73-74, paras 9-10)

> "*9*. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: *Maharashtra Tubes Ltd.* v. *State Industrial & Investment Corpn. of Maharashtra Ltd.* [(1993) 2 SCC 144] ; *Sarwan Singh* v. *Kasturi Lal* [(1977) 1 SCC 750] ; *Allahabad Bank* v. *Canara Bank* [(2000) 4 SCC 406] and *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.* [1956 SCR 603 : AIR 1956 SC 614]
>
> *10*. We may notice that the Special Court had in another case dealt with a similar contention. In *Bhoruka Steel Ltd.* v. *Fairgrowth Financial Services Ltd.* [(1997) 89 Comp Cas 547 (Special Court)] it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ratio of the said decision is as follows:
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> > „Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the legislature was aware of the earlier legislation and its non obstante clause. If the legislature still confers the later enactment with a non obstante clause it means that the legislature wanted that enactment to prevail. If the legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply." "
>
> (See also *Engg. Kamgar Union* v. *Electro Steels Castings Ltd.* [(2004) 6 SCC 36 : 2004 SCC (L&S) 782])"

104. More importantly and while dealing with the question which arises for determination in this case, the Court would have to bear in

mind the undisputed fact that while the PMLA was originally promulgated on 01 July 2005, the IBC came to be enforced with effect from 28 May 2016 and on subsequent dates when its various provisions were separately enforced. Section 238 of the IBC came to be energised in terms of the notification dated 30 November 2016 and was ordained to come into effect from 01 December 2016. Section 32A of the IBC on the other was introduced by Amending Act No.1 of 2020 with retrospective effect from 28 December 2019.

105. The introduction of Section 32A constitutes an event of vital import since it embodies a provision which effectively shut out criminal proceedings including those under the PMLA upon the CIRP reaching the defining moment specified therein. However, when the Legislature introduced the said provision, it was conscious and aware of the fact that the provisions of the PMLA could be enforced against the properties of a corporate debtor notwithstanding the pendency of the CIRP. This the Court notes in light of the extent to which Section 14 could be recognised to legally operate under the statutory scheme and as has been explained hereinabove. Notwithstanding the above, the Legislature chose to structure that provision in a manner that the authorities under the PMLA would cease to have the power to attach or confiscate only when a Resolution Plan had been approved or where a measure towards liquidation had been adopted. The statutory injunct against the invocation or utilisation of the powers available under the PMLA was thus ordained to come into effect only once the trigger events envisaged under Section 32A came into effect. The Legislature thus in its wisdom chose to place an embargo upon the

continuance of criminal proceedings including action of attachment under the PMLA only once a Resolution Plan were approved or a measure in aid of liquidation had been adopted.

106. Section 32A which came to be introduced in 2020 in the IBC also represents the "later" enactment for the purposes of evaluating the non obstante clause argument as canvassed on behalf of the petitioner. It would be pertinent to observe that subsequent amendments in an existing statute have also been recognised to be viewed as later acts for the purposes of answering the import of a non obstante clause. In **Bank of India Vs. Ketan Parekh**[42], one of the questions which arose was whether the provisions of the **Special Courts (Trial of Offenses Relating to Transactions in Securities) Act, 1992** would have effect notwithstanding the enforcement of the **Recovery of Debts Due to Banks and Financial Institutions Act, 1993** which was the later statute. Since both statutes contained non obstante clauses, ordinarily the 1985 Act would have had to yield being the statute promulgated prior in point of time. However, the answer to the issue raised in **Ketan Parekh** came to be impacted by the insertion of Section 9-A in the 1985 Act by virtue of an amending act introduced 1994. Dealing with the impact of that later amendment the Supreme Court observed thus:-

> "28. In the present case, both the two Acts i.e. the Act of 1992 and the Act of 1993 start with the non obstante clause. Section 34 of the Act of 1993 starts with non obstante clause, likewise Section 9-A (*sic* 13) of the Act of 1992. But incidentally, in this case Section 9-A came subsequently i.e. it came on 25-1-1994. Therefore, it is a subsequent legislation which will have the overriding effect over

[42] (2008) 8 SCC 148

> the Act of 1993. But 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 that 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. However, so far as the present case is concerned, it is more than clear that Section 9-A of the Act of 1992 was amended on 25-1-1994 whereas the Act of 1993 came in 1993. Therefore, the Act of 1992 as amended to include Section 9-A in 1994 being subsequent legislation will prevail and not the provisions of the Act of 1993."

Their Lordships in **Ketan Parekh** thus came to hold that notwithstanding the original statute having been promulgated in 1985, the provisions of Section 9A would not stand overridden by the 1993 statute since the former had come to be enforced later in point of time.

107. While the decision of the Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. Vs. Union of India**[43] was also cited for the consideration of the Court, it would be pertinent to note that notwithstanding the two statutes in question there carrying non obstante clauses, the issue was ultimately answered based upon Section 88 of RERA which provided that its provisions would be in addition to and not in derogation of other statutes. This would be evident from the following observations as they appear in paragraphs 23 and 25 of the report:-

> "23. A perusal of the aforesaid provisions would show that, on and from the coming into force of RERA, all real estate projects (as defined) would first have to be registered with the Real Estate Regulatory Authority, which, before registering such projects, would look into all relevant details, including delay in completion

[43] (2019) 8 SCC 416

of other projects by the developer. Importantly, the promoter is now to make a declaration supported by an affidavit, that he undertakes to complete the project within a certain time period, and that 70% of the amounts realised for the project from allottees, from time to time, shall be deposited in a separate account, which would be spent only to defray the cost of construction and land cost for that particular project. Registration is granted by the authority only when it is satisfied that the promoter is a bona fide promoter who is likely to perform his part of the bargain satisfactorily. Registration of the project enures only for a certain period and can only be extended due to force majeure events for a maximum period of one year by the authority, on being satisfied that such events have, in fact, taken place. Registration once granted, may be revoked if it is found that the promoter defaults in complying with the various statutory requirements or indulges in unfair practices or irregularities. Importantly, upon revocation of registration, the authority is to facilitate the remaining development work, which can then be carried out either by the "competent authority" as defined by RERA or by the association of allottees or otherwise. The promoter at the time of booking and issue of allotment letters has to make available to the allottees information, inter alia, as to the stage-wise time schedule of completion of the project. Deposits or advances beyond 10% of the estimated cost as advance payment cannot be taken without first entering into an agreement for sale. Importantly, the agreement for sale will now no longer be a one-sided contract of adhesion, but in such form as may be prescribed, which balances the rights and obligations of both the promoter and the allottees. Importantly, under Section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment, etc. with such interest as may be prescribed and must, in addition, compensate the allottee in case of any loss caused to him. Under Section 19, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale. In addition, all allottees are to be responsible for making necessary payments in instalments within the time specified in the agreement for sale and shall be liable to pay interest at such rate as may be prescribed for any delay in such payment. Under Section 31, any aggrieved person may file a complaint with the authority or the adjudicating officers set up by such authority against any promoter, allottee or real estate agent, as the case may be, for violation or contravention of RERA, and Rules and Regulations made thereunder. Also, if after adjudication a promoter, allottee or real estate agent fails to pay interest, penalty

or compensation imposed on him by the authorities under RERA, the same shall be recoverable as arrears of land revenue. Appeals may be filed to the Real Estate Appellate Tribunal against decisions or orders of the authority or the adjudicating officer. From orders of the Appellate Tribunal, appeals may thereafter be filed to the High Court. Stiff penalties are to be awarded for breach and/or contravention of the provisions of RERA. Importantly, under Section 72, the adjudicating officer must first determine that the complainant has established "default" on the part of the respondent, after which consequential orders may then follow. Under Section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force and under Section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

25. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject-matter is concerned. Also, the non obstante clause of RERA came into force on 1-5-2016, as opposed to the non obstante clause of the Code which came into force on 1-12-2016. Further, the amendment with which we are concerned has come into force only on 6-6-2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of the learned Senior Counsel for the petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the Explanation to Section 5(8)(*f*) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is *in addition to and not in derogation of* the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1-5-2016, remedies before those authorities would come into effect only on and from 1-5-2017 making it clear that the provisions of the Code, which came into force on 1-12-2016, would apply in addition to RERA."

108. On a consideration of the aforesaid, the Court comes to the conclusion that Section 32A would constitute the pivot by virtue of being the later act and thus govern the extent to which the non

obstante clause enshrined in the IBC would operate and exclude the operation of the PMLA. As has been observed hereinabove, while both IBC and the PMLA are special statutes in the generic sense, they both seek to subserve independent and separate legislative objectives. The subject matter and focus of the two legislations is clearly distinct. When faced with a situation where both the special legislations incorporate non obstante clauses, it becomes the duty of the Court to discern the true intent and scope of the two legislations. Even though the IBC and Section 238 thereof constitute the later enactment when viewed against the PMLA which came to be enforced in 2005, the Court is of the considered opinion that the extent to which the latter was intended to capitulate to the IBC is an issue which must be answered on the basis of Section 32A. The introduction of that provision in 2020 represents the last expression of intent of the Legislature and thus the embodiment of the extent to which the provisions of the PMLA are to give way to proceedings initiated under the IBC.

109. The Court has independently come to the conclusion that the power to attach under the PMLA would not fall within the ken of Section 14(1)(a) of the IBC. Through Section 32A, the Legislature has authoritatively spoken of the terminal point whereafter the powers under the PMLA would not be exercisable. The events which trigger its application when reached would lead to the erection of an impregnable wall which cannot be breached by invocation of the provisions of the PMLA. The non obstante clause finding place in the IBC thus can neither be interpreted nor countenanced to have an

impact far greater than that envisaged in Section 32A. The aforesaid issue stands answered accordingly.

N. THE THIRD PARTY SAFEGAUARDS

110. The Court also bears in mind that the provisional attachment of tainted properties does not inevitably lead to the debtor or the persons who hold the tainted property being divested of a right to establish that the properties so attached would not constitute proceeds of crime. It would be apposite to recollect that **Axis Bank** had duly dealt with the issue of bona fide third-party interests that may have come to be created over a period of time and the various avenues which stand created under the PMLA itself for an aggrieved person to seek the release of attached properties.

111. Apart from the provision of an appeal that may be taken against the order passed by the Adjudicating Authority under Section 8 of the PMLA, the Court also takes note of sub-section (8) of Section 8 in terms of which an aggrieved party is granted a right to seek release of property even after it may have been confiscated in favor of the Union Government. The safeguards which stand created in respect of the third parties who may have bona fide obtained an interest in the attached properties was noticed and answered by **Axis Bank** as under:-

> **"149.** An order of attachment under PMLA, if it meets with the statutory pre-requisites, is as lawful as an action initiated by a bank or financial institution, or a *secured creditor*, for recovery of dues legitimately claimed or for enforcement of *secured interest* in accordance with RDBA or SARFAESI Act. An order of attachment under PMLA is not rendered illegal only because a *secured creditor* has a prior *secured interest* (charge) in the subject

property. Conversely, mere issuance of an order of attachment under PMLA cannot, by itself, render illegal the prior charge or encumbrance of a *secured creditor*, this subject to such claim of the third party (*secured creditor*) being *bonafide*. In these conflicting claims, a balance has to be struck. On account of exercise of the prerogative of the State under PMLA, the lawful interest of a third party which may have acted *bonafide*, and with due diligence, cannot be put in jeopardy. The claim of *bonafide third party claimant* cannot be sacrificed or defeated. A contrary view would be unfair and unjust and, consequently, not the intention of the legislature. The legislative scheme itself justifies this view. To illustrate, reference may be made to sub-section (8) of Section 8 PMLA where-under a power is conferred on the special court to direct the Central Government to "*restore*" a property to the claimant with a legitimate interest even after an order of confiscation has been passed.

150. The legislation on money-laundering, as is the case of similarly placed other legislations providing for forfeiture or confiscation of illegally acquired assets, contains sufficient safeguards to protect the interest of such third parties as may have acted *bonafide*. Such safeguards and rights to secure their lawful interest in the property subjected to attachment (with intent to take it to confiscation) have already been noticed at length with reference to the statutory provisions. To recapitulate, and by way of illustration, reference may be made to the opportunity afforded by law (Section 8) to a person claiming "*a legitimate interest*" to approach the adjudicating authority and the appellate tribunal, as indeed the court, to prove that he had "*acted in good faith*", taking "*all reasonable precautions*", himself not being involved in money-laundering, to seek its "*release*" or "*restoration*". In this context, however, as also earlier noted, the presumptions that can be drawn in terms of Sections 23 and 24 of PMLA are to be borne in mind, the burden of proving facts contrary to the case of money-laundering being on the person claiming to have acted *bonafide*.

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162. But, in case an otherwise untainted asset (i.e. *deemed tainted property*) is targeted by the enforcement authority for attachment under the second or third part of the definition of "*proceeds of crime*", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest in such property was acquired *bona fide* and for lawful (and adequate) consideration, there being no intent,

while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering.

163. Having regard to the above scheme of the law in PMLA, it is clear that if a *bonafide* third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the product whereof is suspected as proceeds of crime, the acquisition of such interest in such property (otherwise assumably untainted) by such third party cannot conceivably be on account of intent to defeat or frustrate this law. In this view, it can be concluded that the date or period of the commission of criminal activity which is the basis of such action under PMLA can be safely treated as the cut-off. From this, it naturally follows that an interest in the property of an accused, vesting in a third party acting *bona fide*, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under Section 8 PMLA.

164. Though the sequitur to the above conclusion is that the *bonafide third party claimant* has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the order of attachment under PMLA, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in such situations as above (third party interest being prior to criminal activity) the order of attachment under PMLA would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party.

165. Situation may also arise, as seems to be the factual matrix of some of the cases at hand, wherein a *secured creditor*, it being a *bonafide third party claimant* vis-a-vis the *alternative attachable property* (or *deemed tainted property*) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the PMLA attachment, though remaining valid and operative, takes a back-seat allowing the secured creditor *bonafide third party claimant* to enforce its claim by disposal of the

> subject property, the remainder of its value, if any, thereafter to be made available for purposes of PMLA."

112. It would also be pertinent to note that merely because a particular property may have come to be provisionally attached under the PMLA, that does not confer on the enforcing authority under the aforesaid enactment, a superior or overarching interest either in the property or the proceeds that may ultimately be obtained upon its disposal. This position was duly elucidated in **Axis Bank** in the following terms: -

> **"165.** Situation may also arise, as seems to be the factual matrix of some of the cases at hand, wherein a *secured creditor*, it being a *bonafide third party claimant* vis-a-vis the *alternative attachable property* (or *deemed tainted property*) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the PMLA attachment, though remaining valid and operative, takes a back-seat allowing the secured creditor *bonafide third party claimant* to enforce its claim by disposal of the subject property, the remainder of its value, if any, thereafter to be made available for purposes of PMLA."

113. Viewed in the aforenoted backdrop it is manifest that an order of attachment when made under the PMLA does not result in the corporate debtor or the Resolution Professional facing a fait accompli. The statutes provide adequate means and avenues for redressal of claims and grievances. It could be open to a Resolution Professional to approach the competent authorities under the PMLA for such reliefs in respect of tainted properties as may be legally permissible. Similarly, and as was explained by **Axis Bank**, a PAO made by the ED under the

PMLA does not invest in that authority a superior or overriding right in property. Ultimately the claims of parties over the property that may be attached and the question of distribution and priorities would have to be settled independently and in accordance with law.

114. Accordingly and for all the aforesaid reasons, the writ petition shall stand dismissed. The challenge to the Provisional Attachment Orders dated 08 July 2020 and 05 August 2020 as well as orders of confirmation passed by the Adjudicating Authority dated 01 and 29 January 2021 on grounds as raised fails and stands negatived.

115. This order, however, shall not preclude the petitioner Resolution Professional from seeking release of the provisionally attached properties in accordance with law.

116. The Court further observes that the rights of the Enforcement Directorate over the properties subject to attachment would stand restricted to the extent that has been recognised in this decision as well as the judgment of the Court in **Axis Bank**.

YASHWANT VARMA, J.

November 11, 2022
Neha/SU