

**NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

M.A 1280/2018

in

C.P. 405/ 2018

Under Section 60 (5) of the IBC,
2016

In the matter of

SREI Infrastructure Finance Limited

... Petitioner

v/s.

Sterling SEZ and Infrastructure
Limited

.. Corporate Debtor

M.A. No. 1280/2018

Sterling SEZ and Infrastructure
Limited

Represented by Mr. Vishal Ghisulal
Jain, Resolution Professional

... Applicant

v/s.

Deputy Director,

Directorate of Enforcement,

(Prevention of Money Laundering
Act)

Head Office Investigation Unit

10-A, Jam Nagar House, Akbar

Road, New Delhi.

Order delivered on: 12.02.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (J)

Hon'ble V. Nallasenapathy, Member (T)

For the Applicant: Mr. Shavez Mukri a/w Ms. Almira Lasrado, Advocates
i/b India Law, Mr. Vishal G. Jain, Resolution
Professional.

Respondent: Mr. Retesh Srivastava, Advocate and Mr. Nitesh
Rana, Advocate

Amicus curie: Mr. Mayur R. S. Khandeparkar, Advocate.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The Applicant is the resolution Professional of Sterling SEZ and Infrastructure Ltd. (hereinafter called "Corporate Debtor") and has sought the following reliefs

- a. To direct the Enforcement Directorate to release the provisional (or final, if confirmed) attachment on all the assets and properties of the company and hand over the charge to the Resolution Professional
- b. To direct the sub-registrar at Jambusar to register and hand over the two Original lease deeds entered into between Sterling SEZ and Infrastructure Ltd. and P. I. Industries Ltd. on 28.08.2018 in respect of the following:
 - i. All the piece and parcel of the land having Plot No. SPM-29/1 admeasuring 42,200 sqm. (10.43 acres) situated in Notified Sterling Multi Product SEZ comprising the survey no."938 Paiki 1" at Sarod Village, Jambusar Taluka, Bharaj District; and
 - ii. All the piece and parcel of the land having Plot No. SPM-29/2 admeasuring 87,300 sqm. (21.57 acres) situated in Notified Sterling Multi Product SEZ comprising the survey no."938 Paiki 1" at Sarod Village, Jambusar Taluka, Bharaj District;

2. FACTS OF THE CASE:

- a. This Tribunal admitted a Section 7 petition against the Corporate Debtor on 16.07.2018 and appointed the Applicant herein as the Interim Resolution Professional who was subsequently confirmed as Resolution Professional.
- b. The office of the Enforcement Directorate has provisionally attached the assets belonging to the Corporate Debtor vide order/notice dated 29.05.2018 and corrigendum dated 14.06.2018 as part of certain proceedings initiated by the office of the Enforcement Directorate against the Corporate Debtor.
- c. On 05.09.2018, the Applicant intimated the Directorate of Enforcement about the initiation of CIRP and imposition of moratorium as mentioned in this Tribunal's order. The Applicant also requested the Directorate of Enforcement to withdraw the

attachment, if any, on the properties and assets of the company as the IRP is required to take charge and custody of the same under the provisions of the Code. Now the applicant came before this Tribunal for the above said reliefs.

3. THE APPLICANT RAISED THE FOLLOWING ARGUMENTS:
- a. As per the provisions of the Code, the entire management of the Corporate Debtor and the responsibility of running the business as a going concern vests with the Resolution Professional. Under Section 18 of the Code, an IRP is required to take control and custody of all the assets of the Corporate Debtor including those assets which may not be in the possession of the Corporate Debtor.
 - b. After admission of the petition under Section 7 of the Code a moratorium is imposed under Section 14 of the Code prohibiting institution of suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order of any court of law, tribunal or any other authority. The Applicant also referred to Section 238 of the Code which stipulates that the provisions of the Code shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force. The Applicant cited these sections to draw home the point that during CIRP, the Resolution Professional should decide how the properties and assets of the Corporate Debtor can be appropriated.
 - c. Further, the Applicant cited a judgment pronounced by the Hon'ble NCLT, Kolkata bench in *Surendra Kumar Joshi v. REI Agro Limited*, C.A (IB) No. 453/KB/2018 in C.P (IB) No. 73/KB/2017 wherein a liquidator had filed an application under Section 35(1) (n) of the Code seeking orders against the Directorate of Enforcement, New Delhi to release the attachment on the assets of the Corporate Debtor which was allowed.
 - d. The Hon'ble Supreme Court in *Solidaire India Ltd v. Fairgrowth Financial Services Pvt. Ltd.*, (2001) 3 SCC 71 held that 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.

- e. The Applicant further contended that the Tribunal established under the Prevention of Money Laundering Act, 2002 (PMLA) being a criminal court can only decide whether the properties attached during investigation from the possession of the Corporate Debtor could be said to be the properties acquired by them by using the proceeds of crime. It is for the NCLT to decide how the properties and assets of the Corporate Debtor under liquidation can be appropriated and held that the liquidator must get possession of the properties attached by the Enforcement Directorate.
- f. The Applicant further contended that the properties attached cannot be said to be acquired by using proceeds of crime or by diversion of funds. All the properties which were attached were in the name of the company and they should be available for legitimate distribution to the various creditors for settlement, resolution or recovery of their claims.
- g. The Applicant submits that unless the attachment is withdrawn and properties are set free, he cannot proceed with the CIRP process.

4. THE ENFORCEMENT DIRECTORATE IN ITS DEFENSE RAISED THE FOLLOWING ARGUMENTS:

- a. That Sterling Biotech Limited (SBL) is a Baroda based public limited company listed in BSE/NSE and is engaged in manufacturing of gelatin. The SBL group consist of Sterling International Enterprise Limited, PMT Machines Limited, Sterling SEZ and Infrastructure Limited, Sterling Oil Resources Limited, Sterling Port Limited etc.
- b. The SBL group obtained credit facilities of more than 5000 Crores from Banks and Financial Institutions and those loan turned into Non Performing Assets.
- c. The Banks/Financial Institutions conducted forensic audit to ascertain the end use of loans availed by SBL Group.
- d. The Enforcement Directorate received forensic audit report from Andhra Bank and State Bank of India which shows the use of loan

- funds for non mandated purposes, payments made to non existant parties and non justificatory payments to Directors, etc.
- e. As on date, credit facilities availed by the SBL group to the extent of Rs.8100 Crores was declared as fraud account by the concerned Banks.
 - f. CBI, BS&FC, New Delhi registered an FIR RCBD1/2017/E/007 dated 25.10.2017 u/s 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, 1988 and 120-B r/w 420, 467, 468, 471 and 469 of IPC against various accused persons including the promoters of SBL group, on the basis of which the Enforcement Directorate, Headquarters Investigation Unit recorded an ECIR bearing number ECIR/HQ/17/2017 to investigate into the offences under PMLA. As the investigation kept unfolding the role of different accused persons and determination of various assets which are proceeds of crime/laundered money led to attachment of properties involved in money laundering which were nothing but proceeds of crime to the tune of Rs.4274 Crores and filing of different prosecution complaints, the last being filed on 23.10.2018 before special PMLA Court, Patiala House, New Delhi. On the said Court taking cognizance of the matter, issued non-bailable warrants against the accused persons/promoters of SBL group on 25.10.2018.
 - g. The Promoters of SBL group left the country under suspicious circumstances and evaded the process of law to face criminal prosecution.
 - h. The property in question constitute the value of proceeds of the crime as defined u/s 2(1)(u) of PMLA which provides that even if the direct link between the crime proceeds and the property is not available/determinable the value thereof (equivalent value of such proceeds of crimes) can be attached.
 - i. The properties provisionally attached constitute the value of such proceeds of crime. The PMLA is a special act and have overriding effects in terms of section 71 of the PMLA. The main object of Insolvency and Bankruptcy Code, 2016 (Code) and PMLA are different from each other. The Code being a civil law cannot be given precedence over PMLA, 2002 and hence NCLT lacks jurisdiction in the matter.
 - j. The moratorium declared by this adjudicating authority is not applicable to the criminal case initiated under the PMLA by the

enforcement directorate and to the criminal case initiated by the CBI.

5. SUBMISSIONS OF AMICUS-CURIAE:

The learned amicus-curiae filed his written submissions highlighting the following:-

- a. Writ Petition no. 1238/2018 was filed on behalf of the Corporate Debtor challenging the virus of the PMLA as well as provisional attachment and the corrigendum dated 29th and 14th June, 2018. The Writ Petition appears to have been filed and affirmed by the erstwhile directors and does not indicate any authority, either of the RP or the CoC, to institute any such Petition for and on behalf of the Corporate Debtor after initiation of CIRP. The Petition does not disclose the fact that the NCLT has already admitted the Petition and initiated CIRP.
- b. Overriding effect of IBC:- Section 238 of the Code provides for non obstante clause to the effect that "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 such law". The Hon'ble Supreme Court in the case of *Solidaire India Ltd. Vs. Fairgrowth Financial Services Pvt. Ltd.* has held that where two statues contains non-obstante clause, latest statue would prevail. The aforesaid judgment of the Hon'ble Supreme Court has been followed in context of the Code having an overriding effect over the provisions of PMLA by NCLT, Kolkata Bench in the case of "*Surender Kumar Joshi Vs. REI Agro Ltd.*" and Code having an overriding effect over the provisions of UP Electricity Supply Code, 2005/UP Government Electrical Undertaking (Dues Recovery) Act, 1956 by NCLT, Allahabad in case of "*Raman Ispat Pvt. Ltd. Vs Executive Engineer, Pashimanchal Vidyut Vitran Nigam Ltd.*"

In the case of *Surender Kumar Joshi (supra)*, NCLT, Kolkata has directed ED to hand over the possession of the attached properties of the Corporate Debtor under liquidation to the liquidator along with the title deeds thereof. It is, however, clarified by the NCLT that the Court established under PMLA could decide whether the properties attached could said to be properties acquired out of proceeds of crime.

In the present MA, the Resolution Professional have sought release of attachments as well as handing over possession of the

assets. However, there is nothing on record to indicate that the possession of these assets in question have been taken over by the ED under PMLA. In absence of such material, it is obligation/duty of the Resolution Professional to take control and custody of assets of the Corporate Debtor in terms of Section 18(1)(f) of the Code. However, it is required to be noted that the provisions of PMLA permit possession to be taken by the ED under Section 8(4) of the PMLA only after confirmation of the provisional order of attachment under Sub-Section 3 thereof. There is nothing on record to indicate that ED has taken any such steps after passing of the order of confirmation of attachment dated 20.11.2018.

It is pertinent to note that the order dated 20.11.2018 passed by the Adjudicating Authority (under PMLA) has been passed after the order of admission of the Petition against the Corporate Debtor and during CIRP as well as moratorium. The issue as to whether the proceedings before the Adjudicating Authority under the PMLA would be stayed by virtue of Section 14 of the IBC has already been considered by the Appellate Tribunal under the PMLA Act in two recent judgments, one in the case of "*Bank of India Vs Deputy Director, Enforcement Directorate*" and another in the case of "*Punjab National Bank Vs Deputy Director, Directorate of Enforcement, Raipur*". Hon'ble Justice Manmohan Singh speaking for the Appellate Tribunal in both the above cases has held as below:

- i. *In view of the non-obstante clause contained in Section 238 of IBC, the Adjudicating Authority under the PMLA could not have continued with the attachment after declaration of moratorium.*
- ii. *The non-obstante clause contained in IBC, which is a later statute shall prevail over the non-obstante clause contained in Section 71 of PMLA.*
- iii. *The proceedings before the Adjudicating Authority under PMLA is civil in nature and hence, in view of Section 14 of IBC, the proceedings before the Adjudicating Authority of PMLA cannot continue.*

iv. *In the case of Punjab National bank (supra), the Secured Creditor being lead Banker of Consortium of Banks had applied for raising of the attachment which was granted by the Appellate Tribunal. The facts of that case are similar to the case on hand except that the Secured Creditors in the present case have not filed any such application before the Adjudicating Authority under PMLA for raising attachment.*

c. Provisional attachment under PMLA:- It is submitted that attachment under the provisions of PMLA cannot be raised by NCLT under the provisions of IBC. The attachment can only be raised in accordance with the procedures laid down in the concerned statute under which it was levied. The only exception to this is the constitutional courts i.e. the Hon'ble Supreme Court and High Court in exercise of power under Article 32 and 226 of the Constitution of India. However, there is precedent where NCLT, Allahabad in the case of *Raman Ispat Pvt. Ltd. (Supra)* has in exercise of power u/s 35(1)(n) of IBC directed the District Magistrate and Tehsildar, Muzaffarnagar to release the attached properties in favour of liquidator. However, in the present case the provisional attachments were levied prior to the commencement of CIRP. Also, Section 35(1) of the Code only applied in the case of liquidation and hence such recourse cannot be applied in the present case. The only other provisions which may be applicable for considering raising of attachment would be section 60 (5) of IBC where under NCLAT would have jurisdiction to pass appropriate orders and decide all such issues relating to the Corporate Debtor or as regards any claim against the same. It was further submitted that the Resolution Professional to take out an appropriate application before the adjudicating authority under PMLA for raising the attachment. However, in the interregnum the Resolution Professional can take physical possession of the properties attached in terms of Section 18(1)(f) of the Code. The Hon'ble Supreme Court and several High Courts have consistently held that an order of attachment is passed for achieving a limited purpose. The attachment is used for two purposes (1) to compel the appearance of the Defendant and (2) to cease and hold his property for the payment of debt. The Hon'ble High Court of Andhra Pradesh in W.P. No. 8560 of 2018

by an order dated 26.07.2018 held that a prior attachment under the Income tax Act long before the commencement of proceedings under IBC before NCLT would yield to the provisions of IBC.

Under the provisions of PMLA, there are three stages of attachment. Initially a provisional attachment is levied under Section 5(1), which is then confirmed after enquiry under Section 8(3). However, this attachment attains finality only after proceedings before Special Court are proved as per Section 8(5) thereof. Furthermore, Section 4 of PMLA provides for punishment of imprisonment and fine for money laundering. If charges of ED are proved, then, the Corporate Debtor being an artificial person would be awarded an appropriate fine, whereas Directors of the Corporate Debtor would be liable for imprisonment as well as fine. Assuming any such fine is imposed on the Corporate Debtor, the same can be recovered in accordance with Section 69 of PMLA which contemplates recovery in the manner as prescribed under Schedule 2 of the Income Tax Act. In case the Corporate Debtor is in CIRP/liquidation, ED be entitled to make necessary claims in before RP or the liquidator in case of liquidation.

- d. Proceeds of Crime:- It is submitted that if it is found by the Special Court under PMLA that any such property is involved in Money Laundering are the proceeds of crime and such is liable to be confiscated by and vested in the Central Government u/s 8 (5) and 9 of the PMLA and this aspect has to be born in mind by the Resolution Professional and appropriate disclosures have to be made to the Resolution Applicant in relation to the said properties. The finding and decision by the Special Court under PMLA that an asset is a proceeds of crime erodes the very title of the Corporate Debtor and the Resolution Applicant will not be entitled to claim a higher right on the basis of approval of resolution plan by NCLT or sale of assets in liquidation under IBC. It is also required to be clarified that non-obstante clause contained in IBC will not apply to pending proceedings against other group companies of Corporate Debtors and Directors of all concerned companies.

e. Secured Creditors beneficiaries under both statutes:- It is submitted that the ultimate beneficiaries under both statutes are the secured Creditors/ Financial Institutions who have filed claim before the Resolution Professional. Section 31 of IBC provides for Resolution Plan in CIRP whereas Section 53 of PMLA provides for distribution in case of liquidation. Similarly, under Section 8(8) of PMLA the Special Court may direct the Central Government to restore the confiscated property or part thereof to the claimant with legitimate interest therein. Thus in both situations the ultimate beneficiaries are financial creditors/secured creditors. The object of IBC is to expedite the insolvency process and to secure maximization of value of assets of Corporate Debtor for distribution to all stake holders. PMLA contemplates restoration of confiscated property to the claimants who have legitimate interest. The Appellate Tribunal for PMLA in the case of *Punjab National Bank (supra)* held as below:-

"The Adjudicating authority is bound by the law laid down by the higher courts. No authority has any justification to ignore the law laid down by the Supreme Court and various High Courts and this Tribunal, who on the basis of decisions of the Hon'ble Supreme Court and various High Courts has delivered orders. Unless each and every judgment is distinguished or are on different facts and legal issues are almost same and the Adjudicating Authority has incorrectly passed by impugned order by saying that "it cannot "Concur" with the law laid down by this Tribunal. The appellate is a public Sector Bank. The money must come to the public forthwith not after the trial of criminal case against the borrowers which may take may years. The banks are in crisis, no attempt should be made to block the loan amount in order to avoid worsen positions in the commercial market. The trial may continue against the borrowers. One is failed to understand why the Bank loan amount be blocked in view of settled law."

6. It is to be noted that the Appellate Tribunal for PMLA in the case of *Bank of India v. The Deputy Directorate of Enforcement of Mumbai* MANU/ML/0040/2018 held in Para 43 and 44 as below:

"43. The proceedings under PML Act before the Adjudicating Authority are civil in nature and not criminal. The provisions of Section 11 and Section 42 of the PMLA specifically confirms the said position and therefore the reliance placed by ED on the judgment passed by NCLT, Ahmadabad to contend non-applicability of moratorium on the proceedings before Adjudicating Authority is wholly misplaced. Rather the said judgment reinforces the correct position.

44. In view of aforesaid facts and circumstances and for reasons referred above, we set aside the Impugned Order dated 20.12.2017 and the Provisional Attachment Order dated 29.06.2017. The mortgaged properties attached under the PAO 05/2017, so far as, properties concern in this appeal are released from attachment forth with"

7. The Hon'ble Supreme Court in case of *"Jaipur Metals & Electricals Employees Organization through General Secretary Mr. Tej Ram Meena Vs. Jaipur Metals & Electricals Ltd. through its Managing Director & Ors"* held as below:

"17. However, this does not end the matter. It is clear that Respondent No. 3 has filed a Section 7 application under the Code on 11.01.2018, on which an order has been passed admitting such application by the NCLT on 13.04.2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding up proceedings before the High Court. It was open for Respondent No. 3 at any time before a winding up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:

*"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."

18. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule of the Code, the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule of the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act.

This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that the NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before the NCLT were without jurisdiction. On this score, therefore, the High Court judgment has to be set aside.

The NCLT proceedings will now continue from the stage at which they have been left off. Obviously, the company petition pending before the High Court cannot be proceeded with further in view of Section 238 of the Code. The writ petitions that are pending before the High Court have also to be disposed of in light of the fact that proceedings under the Code must run their entire course. We, therefore, allow the appeal and set aside the High Court's judgment".

8. This Bench has given serious consideration to the submissions made by the applicant, respondent and amicus curiae and gone through the pleadings and the judgements and is of the considered view that:-
- a. The purpose and object of IBC is for resolution of the Corporate Debtor by maximizing the value that can be received by the Creditors and stake holders. The IBC provides for timelines within which the resolution has to be arrived at. The PMLA's object is also to recover the property from wrong

doers and compensate the affected parties by confiscation and sale of the assets of the wrong doer apart from imposing punishment. Here the beneficiaries are the creditors of the Corporate Debtor. The criminal proceedings before PMLA will take a longer time and by the time there will be an erosion in the value of assets. However, considering the overriding provisions of Section 238 of IBC which is the later legislation, when compared to the earlier legislation of PMLA, the provisions of IBC will prevail and hence considering the economic interest of the beneficiaries, the IBC will provide solution at the earliest to the Corporate Debtor as well as to the Creditors. The case laws cited above also favours a resolution by IBC instead of waiting for a long period to get the benefit under the PMLA. Further, the quantum of amount locked in the assets of the Corporate Debtor can be released at the earliest when resolution is found through IBC instead of taking a long route under PMLA. This is the economic aspect of the case.

- b. As per the provisions of Section 14(1)(a) of IBC, where moratorium on any kind of proceedings is imposed by the Adjudicating Authority, particularly this attachment is a legal proceedings which squarely falls under the ambit of the said Sections of IBC. Since, the attachment order passed by the PMLA court is hit by the provisions of Section 14 of the Code and considering the overriding effect of IBC under Section 238 of the Code, this Tribunal is of the considered view that the attachment order under PMLA Act is a nullity and non-est in law and hence it will not have any binding force.
- c. Section 63 of the IBC provides that, no Civil Court or Authority shall have jurisdiction to entertain any suit or proceeding in respect of any matter on which NCLT or NCLAT has jurisdiction under this Code. In view of the ruling by the Appellate Authority under PMLA in "*Bank of India vs Deputy Directorate Enforcement, Mumbai*" supra, that the proceedings before Adjudicating Authority under PMLA in respect of attached properties is a civil proceedings, the Adjudicating Authority under PMLA does not have jurisdiction to attach the properties of the Corporate Debtor undergoing Corporate Insolvency Resolution Process.

d. The suggestion made by the amicus curiae that the resolution professional or other creditors can approach the adjudicating authority under PMLA for raising the attachment though seems plausible but will definitely further delay the CIRP which will be against the spirit of the Code. If that route is followed it may take a considerable time and the assets were to be locked in the proceedings. Considering the economic factors associated with the case and the object of both legislations, it is advisable to take a route where assets can be utilized in a speedy manner rather waiting and lose the value of assets over a period of time.

9. In view of the above discussion the attachment order dated 29.05.2018 and the Corrigendum dated 14.06.2018 issued by Respondent and as confirmed Adjudicating Authority under PMLA Court is a nullity and nonest in law in view of Sections 14(1)(a), 63 and 238 of IBC and the Resolution Professional can proceed to take charge of the properties and deal with them under IBC as if there is no attachment order. The concerned sub-registrars are directed to give effect to this order and remove their notings of attachment, if any, in their file in respect of properties belonging to the Corporate Debtor. It is needless to mention that the attachments in respect of the properties of the Corporate Debtor only are covered in this order.

10. Consequently, the sub-registrar at Jambusar is directed to register and hand over the two Original lease deeds entered into between Sterling SEZ and Infrastructure Ltd. and P. I. Industries Ltd. on 28.08.2018, as prayed for in this application.

11. Accordingly, the application is ordered in above terms, but no cost.

12. We express our gratitude to Mr. Mayur R. S. Khandeparkar Amicus-curie for spending his valuable time in effectively assisting us in this matter.

SD/-

V. Nallasenapathy
Member (T)

SD/-

Bhaskara Pantula Mohan
Member (J)