

**APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS & PBPT ACT
AT NEW DELHI**

Date of Decision: 16.09.2019

**MP-PMLA-5460/DLI/2019 (Exem.)
MP-PMLA-5461/DLI/2019 (Stay)
FPA-PMLA-2792/DLI/2019**

M/s. PMT Machines Ltd. ... Appellant

Versus

The Deputy Director
Directorate of Enforcement, Delhi ... Respondent

Advocates/Authorized Representatives who appeared

For the appellant : Shri Rajshekhar Rao, Advocate
Shri Pallav Saxena, Rajendra
Beniwal & Shri Rakesh Kumar,
Advocates

For the respondent : Shri Nitesh Rana, Advocate

CORAM

JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

FPA-PMLA-2792/DLI/2019

1. The abovementioned Appeal has been filed by the Resolution Professional of M/s. PMT Machines Limited under section 26 of Prevention of Money Laundering Act, 2002 against the Impugned Order dated 20.11.2018 passed by the Adjudicating Authority under Prevention of Money Laundering Act 2002, New Delhi in O.C No. 989 of 2018 in case of '*Shri Prem Malik, Deputy Director, Directorate Of Enforcement Vs. M/s. Sterling Biotech Limited & Ors.*'.

2. Before passing the impugned order, the National Company Law Tribunal, Mumbai vide Order dated 22.10.2018 initiated Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') under the Insolvency and Bankruptcy Code, 2016, which is under process.

3. During the pendency of appeal, Intervener Application which is filed by the Committee of Creditors / Consortium of Banks through UCO Bank, Leader of Consortium of Banks. UCO Bank is a member of the Committee of Creditors (CoC) and it has total 33.97% voting rights in the CoC was allowed. CoC consortium of Banks have authorized and given consent to the UCO Bank Limited on behalf of Committee of Creditors / Consortium of Banks has been impleaded as appellant no. 2.

4. There are the following members of the committee of creditors;
(Amount in Crore)

Sr No.	Bank / Financial Creditor	Claimed Amount INR	Admitted Amount INR	% Voting
1	UCO Bank –Pimpri – WC	121.28	121.28	25.80%
2	UCO Bank - Hong Kong – ECB	33.40	30.23	6.43%
3	UCO Bank - Singapore – ECB	10.81	8.18	1.74%
4	Indian Bank – Pune – WC	7.36	7.36	1.57%
5	Indian Bank – Singapore – ECB	35.63	35.63	7.58%
6	JM Financial ARC (assigned by OBC) – WC	26.04	26.04	5.54%
7	HDFC Bank – WC	6.20	6.20	1.32%
8	L&T Financial Services Ltd – Corporate Loan	51.28	51.28	10.91%
9	Canara Bank – ECB	32.00	31.88	6.78%
10	Hua Nan Commercial Bank – ECB	31.44	31.44	6.69%
11	Krung Thai Bank Public Co. Ltd. – ECB	53.33	53.33	11.35%
12	Taiwan Co-operative Bank – ECB	26.28	26.28	5.59%
13	Allahabad Bank – WC	1,144.32	15.62	3.32%
14	State Bank of India – Mumbai – Corporate Loan	1,732.82	14.78	3.14%
15	The Shanghai Commercial & Saving Bank Ltd – ECB	10.66	10.48	2.23%
	TOTAL	3,322.84	470.00	100.00%

5. The appellant no. 1 was incorporated in the year 1961. The current promoters / Sandesara group acquired the company as a going concern in the year 1993. The Company has two manufacturing units situated at Pimpri Whaghery, Nehru Nagar, Pune (MH) and second unit at Halol, Panchmahal (Gul.). The appellant has availed the following financial facilities from various financial institutions in the year 2005 and 2006.

6. There are charges and rights created with respect to the assets attached by the Respondent in favour of the Applicant Banks and Financial Creditors. The details of the same are provided below:

Sr. No.	Details of charges with respect of assets
1.	<p>Working Capital Consortium Agreement dated 01.02.2005 executed between consortium of Banks comprising of UCO Bank, Indian Bank, Oreintal Bank of Commerce (later assigned to JM Financial ARC). HDFC Bank Limited, Allahabad Bank for availing working capital of Rs.104.27 crores.</p> <p><u>Annexure - C:</u> Copy of the Working Capital Agreement dated 02.02.2005.</p> <p><u>Annexure-D:</u> Copy of Deed of Hypothecation dated 30.03.2005. (Page 49-Para 7: Survey No.152/1B & 152/2, City Survey no.5761)</p>
2.	<p>The Facility Agreement dated 07.08.2006 executed between PMT Machines with consortium of banks comprising UCO Bank-Hong Kong, UCO Bank Singapore, Canara Bank, State Bank of India, Hua Nan Commercial Bank, Krung Thai Bank Public Co. Ltd, Taiwan Co-operative Bank, The Shanghai</p>

	<p>Commercial & Savings Bank Limited to the tune of USD 50 million.</p> <p>PMT Machines executed Deed of Mortgage, Registration No.2350 dated 20.03.2007</p> <p><u>Annexure-E:</u> Copy of Facility Agreement dated 07.08.2006.</p> <p><u>Annexure-F:</u> Copy of Deed of Mortgage dated 20.03.2007.(Page No.149-150, Survey No.152, Hissa No 1B, village Pimpri Waghare, Nehru Nagar within PCMC Limits, District Pune; Survey No.153, Hissa 1B, village village Pimpri Waghare, Nehru Nagar within PCMC Limits, District Pune)</p>
<p>3.</p>	<p>PMT Machines availed corporate loan of Rs.30 crores from L&T Financial Services Ltd vide Corporate Loan Agreement dated 21.04.2011 dated 15.04.2011. The Deed of Hypothecation dated 21.04.2011.</p> <p><u>Annexure-G:</u> Copy of Corporate Loan Agreement dated 15.04.2011.</p> <p><u>Annexure-H:</u> Copy of Hypothecation Deed dated 21.04.2011.[Page No.163-Schedule I- Hypothecated assets: All moveable fixed and current assets (Subservient Charge)]</p>
<p>4.</p>	<p>Property No.2 land admeasuring 26.67 Acres was mortgaged in favor of the SREI Infrastructure Finance Limited vide Declaration dated 25.05.2012. The Rupee Term Loan Agreement dated 09.01.2015 was executed by the PMT Machines Limited and pursuant to which Deed of Mortgage dated 23.01.2017 and 20.02.2017 was executed.</p> <p><u>Annexure-I</u> Copy of Declaration dated 25.05.2012.(Page 170: First Schedule- Land admeasuring about 26.79 acres situated</p>

	<p>at Kadachala, Taluk-Halol, District-Panchmahal, Gujarat)</p> <p><u>Annexure-J</u> Copy of Rupee Term Loan Agreement dated 23.02.2017.</p> <p><u>Annexure-K</u> Copy of Deed of Mortgage dated 23.01.2017 & 20.02.2017.(Page No.251:Schedule II- All the pieces and parcels of land property bearing Land/Block/Survey No.177P1, 177P2, 178,179,175P2, 182, 180 and 174 Paiki 1, admeasuring 124661 sq. meters at village kadachala, Taluka Halol, District Panchmahal, Gujarat) (Page No.296-Schedule II: All the pieces and parcels of land property bearing Survey No.152, Hissa No.1B, admeasuring 01 Hectare 82 Acres of village Pimpri Waghere, Nehru Nagar within PCMC Limits, District Pune</p>
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7. It is submitted that the financial documents establish that the Banks have granted the financial facilities to M/s. PMT Machines Limited from the year 2005 – 2006 onwards and PMT Machines Limited had created charge / mortgage in favour of the Banks. The allegations of the money laundering in the Original Complaint pertains to period much thereafter. The assets were acquired prior to the alleged commission of offences and charges were created prior to the date of alleged offences.

8. Following are the assets of the PMT Machines, which are attached by the Respondent Enforcement Directorate and further attachment have been confirmed vide the Impugned Order;

- (a) Sl. No. 1 :** Survey no. 153, Hissa No. 2 Pimpri whaghery, Nehru Nagar, Pune. (Land & Building & Plant machinery) admeasuring 7 acres & 24 Gunthas.

The Sl.No.1 asset was acquired by the company in the year 1993.

(b) Sl. No. 2: Village Kadachala, Taluka Halol, District Panchmahal, Guj. (Land & Building & Plant machinery) admeasuring 1,24,661 Sq. Mtrs.

The Sr. No.2 asset was purchased by PMT Machines Limited vide Sale Deed dated 03.08.2007 executed between M/s. PMT Machines Limited and Official Liquidator, High Court of Gujarat representing M/s, ELB Schliff (India) Limited. The remaining part of the asset was purchased in the year 2009 as stated by the appellant.

(c) Sl. No. 3 : Flat No. 2, 9 and 12 of B-wing and Flat No. 3 and 5 of A-wing at Roop Niwas Co- operative Housing Society, Bandra west, Mumbai. Each Flat Admeasuring 1080 Sq. Feet. Totally 5 Nos. of Flats = 1080 sq. feet each = 5400 sq. feet.

The Sr. No.3 asset was purchased in the year 2006 to 2007 stated by the appellant.

(d) Sl. No. 4 : Flat No. 501 and 502 in wing M-2 at Empire Estate, Chinchwad, Pune admeasuring 1410 sq. feet & 1280 sq. feet totally 2690 sq. feet. Currently in the possession of SICOM Limited.

The Sr. No.4 asset was purchased in the year 2007 vide Registered Agreement dated 17.02.2007 executed between M/s.Galaxy Developers, PMT Machines Limited and Premier City Sahakari Gruhrachna Sanstha Maryadit, registered under Serial No.HVL-18/1332/2007 in respect of Flat No.502 @ Index-II and Serial No.HVL-18/2999/2007 in respect of Flat No.501 @ Index-II.

(e) **Sl. No. 5** : 3rd and 4th Floor, Permesh Corporate Tower, Karkardooma, Community Centre, Delhi.

Vehicles :

(f) **Sl. No. 12** : dated 19-12-2007, Honda Civic DL-13-C-0764 having value of Rs.12,60,364.

It is submitted that the assets were acquired by the PMT Machines Limited much before the commission of the alleged offences and the assets are mortgaged with consortium of banks.

9. The Account of the PMT Machines Limited become NPA in the year 2011-12. The Consortium of Banks of ECB Facility filed Recovery Suit before the Debt Recovery Tribunal against the PMT Machines Limited On 17.06.2013.

10. On 05.08.2017, the Enforcement Directorate ('ED') conducted search and seizure under the provisions of FEMA and Income Tax Act at Mumbai, Vadodara premises of Sterling Group, its Promoters and Promoters' Companies. On 30.08.2017, CBI registered FIR bearing number RC 8(A)/AC-III/2017 under Sections 13(2) read with 13(1)(d) PC Act. An ECIR bearing number ECIR/HQ/15/2017 was registered by the Respondent ED under the provisions of PMLA.

11. On 25.10.2017, CBI BS and FC New Delhi registered FIR bearing number RC/BD1/2017/E/0007 under Sections 13(2) read with 13(1)(d) PC Act; 120-B read with 420/467/468/471 IPC. ECIR bearing number ECIR/HQ/17/2017 was registered on the basis of RC No.0007 registered on 27.10.2017. On 29.05.2018 the Enforcement Directorate passed

Provisional Attachment Order No. 04/2018 in ECIR/HQ/17/2017 under Section 5(1) of the Prevention of Money Laundering Act, 2002 (PMLA). Thereafter Corrigendum dated 14.06.2018 in addition to the Provisional Attachment Order No. 04/2018 dated 29.05.2018 was issued by the Enforcement Directorate in ECIR/HQ/17/2017. It is submitted that 5 immovable properties and other movables, vehicles etc. belonging to the PMT Machines Ltd. were provisionally attached.

12. On 25.6.2018 the Respondent No.1/Directorate of Enforcement filed an Original Complaint under Section 5(5) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "PMLA, 2002") bearing O.C No.989 of 2018, before the Learned Adjudicating Authority, PMLA.

13. The Enforcement Directorate did not make the consortium of Banks or any member of the consortium of bank as party Respondent to the proceedings before the Adjudicating Authority despite knowing well that the assets are charged / mortgaged with the consortium of banks. It is essential and mandatory in view of the Section 8(1) of the Act.

14. It is informed that currently the PMT Machines Limited is undergoing Corporate Insolvency Resolution Process ('CIRP'). The Committee of Creditors / consortium of banks are taking every possible effort to get viable Resolution Plan for the company, however, due to the attachment of the assets the objective of the CIRP is getting delayed.

15. M/s. PMT Machines Limited company has two manufacturing units, first is situated at Pimpri Whaghery, Nehru Nagar, Pune, Maharashtra and second is situated at Taluka Halol, District Panchmahal, Gujarat respectively It is pertinent to note that PMT

Machines Limited a leading company in the field of manufactures specialized and customized machines and tools. Currently there are around 1000 employees and workmen working in the company. The monthly turnover is around Rs. 10 - 15 crore. PMT Machines Ltd. caters to various PSUs i.e. DRDO, ISRO, HAL, Ordnance Factory, BHEL, BEL, Mazagon Dock, BEML, Indian Railways, Bombardier (world's biggest train manufacturer), NTPC, L&T Defense, Mahindra & Mahindra Defense, Jaguar, Mercedes, Mahindra & Mahindra, Hero Honda, Ford, Bajaj etc. The above customers are regular customer of the Company and there are many on-going orders. The Company manufactures various customized machines, tools and parts of machines having national security and national importance i.e. tanks, nuclear reactor parts, tools for manufacturing ammunition, navy ship parts, machines/ tools for DRDO, ISRO etc. It takes several months to manufacture and deliver customized machines and tools after obtaining the Purchase Order.

16. It is informed that there are more than 1000 employees and workmen working with the Company. The fate of 1000 employees is hanging in a lurch as the due to the attachment Banks and Financial Creditors are unable to achieve objective under IBC.

17. The Appellant no. 2 Banks and Financial Creditors are pressing relief claimed in the appeal filed by the Resolution Professional and release the assets of the PMT Machines Limited to enable Banks and Financial Creditors to maximise the value of assets and made maximum recovery of public funds under the Corporate Insolvency Resolution Process in order to recover the debts.

18. It is submitted that by virtue of attachment of the assets of the PMT Machines Limited including both the factory units and by the Impugned Order the same have been confirmed by the Adjudicating Authority, the Corporate Insolvency Resolution Process of PMT Machines Limited is getting affected on account of the attachment.

19. It is evident that the members of the CoC have huge financial stakes in PMT Machines and looking at the current operational status the CoC is hopeful of a resolution of the insolvency of PMT Machines, provided the attachment of the assets under Prevention of Money Laundering is set aside.

20. It is not dispute that the Resolution Professional had filed the Appeal seeking release of the assets of the PMT Machines Limited and there is moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016, the CoC had supported the Appeal filed by the Resolution Professional and had in fact in the meeting of the CoC held on 5th July, 2019 deliberated upon it and authorized the Resolution Professional to pursue the Appeal as being filing on behalf of the all the lenders. Each member of CoC had submitted affidavit authorizing the Resolution Professional to seek release of the attached assets in order to proceed further in the CIRP.

Copy of the minutes of the 7th CoC meeting held on 5th July 2019 are filed.

21. The prayer is strongly opposed by Mr. Nitesh Rana learned counsel appearing on behalf of respondent. He has supported the P.A.O as well

as the impugned order. He has referred his case set up by the respondent.

22. However, it is not denied by him that the banks are victim and innocent parties and are entitled to recover the amount. It is stated by him that the bank should approach the Special Court by filing the petition under Section 8(8) of the Act by claiming their law right before the Special Court.

23. He has referred the decision of Hon'ble High Court in the case of Axis Bank vs. ED in his support.

24. It is evident that the mortgaged properties were acquired much prior to the date of alleged offence.

25. The date of charge of properties are also much prior to the date of alleged offence committed. Counsel appearing on banks and financial institution has informed that on the basis of their complaint an action was taken against the borrowers.

26. It is imperative to bear in mind that the intention and objective of the legislature while legislating the Prevention of Money Laundering Act, 2002 (**"PMLA"**) was to deprive the offender (of money-laundering), the enjoyment of *"illegally acquired"* fruits of crime by taking away his right over property acquired through such means, and to obviate the threat of money laundering to the financial system of the country. The IBC on the other hand, has been enacted with the objective of consolidating and amending the laws *"relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound*

manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all the stake holders including alteration in the order of priority of payment of government dues."

27. Section 5 of the PMLA prescribes for the attachment of the assets acquired by means of tainted money, and the same is reproduced as under:

Section 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 him 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;

(b) such person has been charged of having committed a scheduled offence; and

(c) 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 9 [one hundred and fifty days] from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule:

10 [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 (2 of 1974), or a complaint has been filed by a person, authorised to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be: Provided further that, notwithstanding anything contained in clause (b), 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.]***

(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, in 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 (2) 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.

28. Section 5 demonstrates that the objective of the attachment is to prevent the **likelihood** of concealment, transfer or dealing with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime. The Appellant no. 1 Company is undergoing CIRP under the provisions IBC and the aegis of the RP, who has filed the present Appeal on behalf of the creditors of the Appellant Company, who has inter alia sought the reliefs that the Order of attachment confirmed by the Adjudicating Authority be set aside, and that the assets attached thereby are released so as to be able to take steps to resolve the insolvency of the Appellant Company. As held by the

Hon'ble Delhi High Court in Deputy Directorate of Enforcement Vs. Axis Bank & Ors., "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 with him certain responsibility under the said law."

29. Therefore, in the event of the attachment being lifted, the RP would take steps to get a viable Resolution Plan. A Resolution Plan is a scheme and provides for payment of debts owed to various creditors of the company. The Committee of Creditors ("CoC") is vested with the power to take a decision to approve, or reject a Resolution Plan. In the event that the CoC approves a particular Resolution Plan, it requires confirmation and approval by the Adjudicating Authority (National Company Law Tribunal). After approval of the Resolution Plan, the enterprise as a going concern would be handed over to the Resolution Applicant, under the supervision of the Monitoring Committee, which would oversee the implementation of the Resolution Plan.

30. The relief sought by both appellants are covered by the judgment of the Hon'ble Delhi High Court in Directorate of Enforcement v. Axis Bank & Ors., wherein, it has been observed as under:-

"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.

...

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.**

171. ...

(viii) The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been **“derived or obtained” as a result of “criminal activity relating to a scheduled offence” and consequently being “proceeds of crime”, within the mischief of PMLA.**”

31. This tribunal has already decided the issues in various appeals, one set of appeal in the case of Punjab National Bank V/s. The Deputy Director, Directorate of Enforcement, Delhi decided on 6th August, 2019 wherein it was held as under:

“8. It is submitted on behalf of the appellants that in view of the recent judgment passed by the Hon’ble Delhi High Court in the matter of Deputy Directorate of Enforcement Delhi and Ors. v/s Axis Bank

("Judgment"), the impugned order is liable to be set aside.

9. The Hon'ble High Court in its Judgment has held that "the charge or encumbrance of third party in property attached under PMLA cannot be treated or declared void unless material is available to show that it was created to defeat the PMLA, such declaration rendering such properties available for attachment and confiscation under PMLA, free from encumbrance." The Hon'ble High Court further held that "a party in order to be considered as a bonafide third party claimant for its claim in a property being subjected to attachment under PMLA to be entertained must show, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, the party itself not being privy to, or complacent in, the offence of money laundering, and that it had made all compliances with the existing law including, if so required, by having said security interest registered"

10. In view of the fact that the appellant being the secured creditor has initiated proceedings/ taken actions against DPIL in accordance with the law much before the initiation of proceeding under the PMLA Act, it is submitted that the attachment in respect of the aforementioned property is to be quashed.

11. Since the action taken by the Punjab National Bank of India was in accordance with law and was prior to the proceedings initiated under PMLA Act, the proceedings initiated by the Bank of India under the Code is ought to be given precedence over the proceedings initiated under PMLA Act in respect of the aforementioned properties. The said position has been clarified by the Hon'ble High Court of Delhi in the matter of **Deputy Directorate of Enforcement Delhi and Ors. vs Axis Bank in CRL.A. 143/ 2018 & Crl.M.A. 2262 of 2018** dated April 02, 2019 wherein in Paragraph 171, the court held that:

" (xv): If the bona fide third party claimant (as aforesaid) is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of

such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.”

12. The rights of Appellant Bank being the secured creditor would survive in spite of the order of the attachment under PMLA remains operative. Therefore, the Appellant being the lawful mortgagee/transferee of the interest in the Subject Properties are entitled to recover its dues with the sale of the Subject Properties as the Hon’ble High Court in the Judgment has also held that mere issuance of an attachment order does not ispo facto render illegal prior charge of encumbrance of secured creditor, the claim of the latter of release (or restoration) from PMLA attachment being dependent on its bonafides. the court further held “if it is shown by the cogent evidence by bonafide third party claimant (as aforesaid), staking interest in an alternate attachable property (or deemed tainted property), claiming that it had acquired the same at a time around or after the commission of prescribed criminal activity, in order to establish a legitimate claim for its release from attachment it must additionally prove that it had taken “due diligence” (eg taking reasonable precautions and after due enquiry) to ensure that it was not a tainted asset and the transactions indulged in where legitimate at the time of acquisitions of such interest”

13. The Hon’ble High Court further held that “if it is shown by the cogent evidence by the bonafide third party claimant (as aforesaid), staking interest in an alternative attachable property (or deemed tainted property) claiming that it had acquired the same at a time anterior to the commission of proscribed criminal activity, the property to the extent of such interest of third party will not be subjected to confiscation so long as the charge or encumbrance of such third party subsists, the attachment under PMLA being valid or operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as in is excess of the claim of the said third party.

14. The acquisition of such interest cannot be presumed to have been created with mala fide intent to defeat and/ or frustrate the proceeding under the PML Act and hence the said properties can be held to be “tainted property”. Since in the present case, the bona fide third party claimant, secured creditor, had initiated action in accordance with law for enforcement of interest prior to the order of attachment under PMLA, the PMLA attachment takes a back seat allowing the secured creditor to enforce its claim and only the remainder to be made available for purposes of PMLA. The properties in the present case are thus not liable to

be attached even as “alternative attachable property”, as held in **Para 165** of the judgment of Hon`ble Delhi High Court in the case of **Deputy Directorate of Enforcement Delhi and Ors. vs Axis Bank in CRL.A. 143/ 2018 & Crl.M.A. 2262 of 2018** dated April 02, 2019.

15. As already mentioned in the present case, it has come on record that the that the security interest in respect of the of the aforesaid properties were created much before the date or period of the alleged criminal activity in respect of which the attachment order was passed.

16. The Hon`ble Delhi High Court on the Axis Bank Judgement (*supra*) had observed that

“...the charge or encumbrance of third party in property attached under PMLA cannot be treated or declared void unless material is available to show that it was created to defeat the PMLA, such declaration rendering such properties available for attachment and confiscation under PMLA, free from encumbrance...”

The Hon`ble Delhi High Court further observed that

“a party in order to be considered as a bonafide third party claimant for its claim in a property being subjected to attachment under PMLA to be entertained must show, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, the party itself not being privy to, or complacent in, the offence of money laundering, and that it had made all compliances with the existing law including, if so required, by having said security interest registered”

26. The Respondent has failed to consider that the Respondent has attached all the Property without examining the case of the banks. The mortgaged Property of the Appellant Bank cannot be attached or confiscated unless link and nexus directly or indirectly established and there is no illegality or unlawfulness in the title of the Appellant Bank and there is no charge of money laundering against the Appellant. The mortgage of property is the transfer under the Transfer of Property Act as there is no dispute as regards the origin of funds or the title of the Property.

27. The Respondent does not have any lien over the said Property as the Appellant bank is now the Legal transferee of said Property. The Respondent cannot retain the property over which they have no legal title and the property is to returned to the persons lawfully entitled as the bank is the victim and even after trial.

28. It has come on record that by the second Amended & Restated Common Agreement dated 15-12-2011, borrowers have been permitted in all terms Loan Facility of Rs 373.00 CR and Bank Guarantees of Rs 28.84 Crores, which includes the Additional Term Loan of Rs 25 Crores sanctioned by the Lead Bank and the restructuring of the Repayment schedule of Original Term Loan of Rs 275.00 Crores has also been permitted to the Borrower. The said relevant facts have not been denied on behalf of respondent.

30. As such, in the present case once it has been showed by the Bank of India that proper due diligence was conducted before the properties/ assets were mortgaged to them, the properties thus cannot be attached, neither as a 'tainted property' nor as 'alternative attachable property' since it is nobody's case that the secured creditor had not done the due diligence and/or the transactions were not legitimate.

32. The attachment of the encumbered property by Respondent No. 1 treating to be tainted is not valid argument if the bonafide third party claimant (as aforesaid) is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party. In the situations covered by the preceding, the bonafide third party claimant shall be accountable to the enforcement authorities for the "excess" value of the property subjected to PMLA attachment. Counsel for the appellant is agreeable to deposit the excess value with the respondent no. 1.

Therefore, it is not possible to hold that the mortgaged properties claimed by the Appellant in no way can be considered to be "Proceed of Crime" under Section 2(u) of PMLA. The impugned order does not disclose any reasoning. There is no application of mind whatsoever and it is assumed that the properties in question are the proceeds of the crime. There is no reasoning to show as to how the attached properties

mortgaged prior to the date of alleged offence are the subject matter of proceeds of crime. The Adjudicating Authority has not analysed the facts at all. The order suffers from a fundamental error. There is no understanding by the Adjudicating Authority of the contents of the statute, much less its application to the facts of the case.

33. Section-3 of the Act provides that only a person who is knowingly a party to any activity or is involved in such activity connected with proceeds of crime and projects or claims it as untainted property can be guilty of the offence. S.5(1) shows that before any property can be provisionally attached there must be material prima facie to show any person is in possession of any proceeds of crime which are likely to be concealed, transferred or dealt with in a manner which may frustrate the confiscation proceedings thereof. The primary requirement for invoking S.5(1) is that there must be material to show that some proceeds of crime are in possession of any person. The requirement is that material must indicate that any property of whatever description in possession of any known person is "proceeds of crime" as defined in S. 2 (u). Finally adjudication proceedings are under S.8. Perusal of S.8 (1) shows that if any person has committed an offence under S. 3 or is in possession of proceeds of crime **he may be served notice to indicate the sources of his income etc. out of which or by means of which he has acquired the attached property.** This obviously means that **if in response to the notice, the person in possession discloses legitimate means for having acquired the property in question, the property cannot be deemed to be involved in money laundering. Therefore, the attachment thereof cannot be confirmed.**

34. The legal implication of a mortgage must be understood by both authorities. When a property is mortgaged, the only right which is left in the mortgagor is that of the equity of redemption. Otherwise the entire corpus of the property passes to the mortgagee i.e. the appellant Bank in this case. The mortgagee has a right to take over the possession of the property and to realise it whereas the mortgagor who is left only with the equity of redemption has only the right to make full payment of the dues of the mortgagee and then redeem the property. Otherwise the mortgagor is not left with any vested right. In other words the mortgaged assets are essentially assets of the appellant Bank and not of the mortgager.

35. **B. RAMA RAJU V. UOI AND ORS.** Reported in (2011) 164 company case 149(AP)(DB) who has dealt

with the aspect of bonafide acquisition of property in para-103. The same read as under:-

“103. Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence, where a person satisfies the adjudicating authority by relevant material and evidence having a probative value that his acquisition is bona fide, legitimate and for fair market value paid therefor, the adjudicating authority must carefully consider the material and evidence on record (including the Reply furnished by a noticee in response to a notice issue under Section 8(1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in the acquisition of the property); and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional attachment by declining to pass an order of confirmation of the provisional attachment; either in respect of the whole or such part of the property provisionally attached in respect whereof bona fide acquisition by a person is established, at the stage of the section 8(2) process...”

36. The Appellant undertakes to deposit any amount realized, which is in excess of its outstanding dues, with the ED if such situation would arise.

*37. The Adjudicating Authority failed to apply its mind at the time of issuance of the Show Cause Notice (“**SCN**”). No reason to believe can be discerned from the SCN, or the provisional attachment order accompanying the SCN under Section 8 of the PMLA, as to how there was reason to believe that the Appellant was in possession of ‘proceeds of crime’. Adjudicating Authority, in its discussions, did not even consider the reply of the Appellants.*

38. 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 Hon’ble Supreme Court and various High Courts, has delivered orders. Unless each and every judgment is distinguished or are on different facts, the different conclusion cannot be arrived. The facts and legal issues are almost same and the Adjudicating Authority has incorrectly passed the impugned order by not following the orders passed by this Tribunal. The appellant 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 many 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.”

32. This order is being passed in relation to mortgage properties in favour of banks which are not purchased from proceeds of crime. The same were purchased and mortgage with the banks prior to the of crime period. ED is not precluded to attach other private properties and all other assets of the alleged accused.

33. It is clarified that this order shall have no bearing in any proceedings initiated against the alleged accused including extradition proceedings pending or proposed to be initiated in any part of the world. Those are to be considered as per law and without any influence of this order which is being passed in the interest of public as bank money is a public money. Most of the banks are public sector banks. Their valid and legal recovery cannot be blocked for years without valid reasons. Therefore, the issue in hand is being decided only for limited purposes

34. In view of the above, the impugned order is pertaining to the appellant is set-aside. Consequently, the provisional attachment order also quashed by allowing the appeal.

35. No costs.

**(Justice Manmohan Singh)
Chairman**

**New Delhi,
16th September, 2019**

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