IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA

Company Petition (IB) No. 130/KB/2022

An Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

State Bank of India

... Applicant/ Financial Creditor.

Verses

Shree Mahalaxmi Corporation Pvt. Ltd.

... Respondent/ Corporate Debtor.

Date of pronouncement: February 23, 2024.

CORAM:
SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Financial Creditor:	**Mr. Mainak Bose, Adv.** **Mr. Santosh Kumar Ray, Adv.** **Ms. Zeba Khan, Adv.** **Ms. Muskan Saha, Adv.**
For the Corporate Debtor:	**Mr. Joy Saha, Sr. Adv.** **Ms. Urmila Chakraborty, Adv.** **Mr. Snehasish Chakraborty, Adv.**

ORDER

Per D. Arvind, Member (Technical):

1. The Court assembled through a blended mode.

2. Heard the Learned Counsel/ Learned Senior Counsels for both parties.

3. The instant application has been filed by the **State Bank of India (SBI)** hereinafter referred to as "Financial Creditor"/ "Applicant" under Section 7 of the Insolvency and Bankruptcy Code (for brevity "I&B Code"/ "Code") against **Shri Mahalaxmi Corporation Private Limited**, (CIN: U51909WB2001PTC093540), hereinafter referred to as Corporate Debtor/Respondent, seeking the direction from this Adjudicating Authority to commence the Corporate Insolvency Resolution Process (for brevity "CIRP") in respect of the Corporate Debtor under Section 7 of the Code.

4. The total amount claimed to be in default is Rs. 92,99,50,260.19/- as on 29.12.2012 and the amount outstanding as on 31.03.2022 is Rs. 563,44,58,294.26/-, including uncharged and accrued interest. The date of Default of the Loan Account is on 29.12.2012 and the loan account was classified as Non-Performing Assets (NPA) on 30.06.2013 as per the RBI Guideline.

Factual Aspects in a nutshell:

5. The applicant has advanced initially Credit Facilities to an aggregate limit of Rs. 103.9 Crore out of which a Cash Credit Limit of Rs. 70 Crore, Term Loan-1 limit of Rs. 0.8 Crore, Term Loan-2 a limit of Rs. 0.48 Crore, Term Loan-3 a limit of Rs. 0.43 Crore, Term Loan-4 a limit of Rs. 0.37 Crore, Corporate Loan amount of Rs. 1.2 Crore, Term Loan Limit of Rs. 1.25 Crore, LC Power Limit of Rs. 1.3 Crore, LC-Inland of Rs. 2.5 Crore, and a Forward Contract Limit of Rs. 1 Crore, totalling an overall amount of Rs. 103.9 Crore.

6. These limits and Credit Facilities have been made based on Sanction Letter No. IFB/RM-III/09-10/148 dated 16.12.2009. The said credit facilities were enhanced to Rs. 106.34 Crore from Rs. 103.9 Crore vide sanction letter dated 29.11.2010 and it was further enhanced to Rs. 121.34 Crore vide letter dated 02.02.2011 and was further enhanced to Rs. 142.89 Crore vide sanction letter dated 22.03.2013.

7. The Applicant contends that the date of default is 29.12.2012 and the said loan accounts were classified as NPA on 30.06.2013 as per RBI Guidelines.

8. The applicant claims that this application has been filed within the time limit prescribed and thus, merit admission under Section 7 of the I&B Code.

Applicant's submissions:

9. The Ld. Counsel for the applicant submits that via several sanction letters from 16.12.2009 to 22.03.2013, credit facilities were made by the applicant to the respondent. The account was classified as NPA on 30.06.2013.

10. Further, the Learned Counsel for the Applicant submits that on 02.12.2013, action was taken under the SARFAESI Act by issuing notice under Section 13(2) of the said Act which was withdrawn by the bank and a fresh 13(2) notice was issued on 20.11.2016. The applicant claims that the letter exchanged between the parties on

29.12.2014, 20.02.2017, 27.03.2017, 15.11.2019 and 18.11.2019. On 20.11.2019 all of which are attached as annexures in the application are acknowledgement of debt.

11. Further, Learned Counsel submits that on 19.06.2018, the Corporate Debtor wrote to the bank offering full and final settlement under a compromise offer with the bank. This is in page No. 402 and 403 of the application which is also a clear admission of debt.

12. Further, it is contended that on 12.10.2020, a letter was issued by one Mr Gopal Kumar Agarwal, the authorised representative of the Corporate Debtor acknowledging the dues of the corporate debtor and offering repayment of dues under compromise for out of court settlement.

13. It is asserted that defence taken by the Corporate Debtor is on the point of limitation whereas, letters exchanged between the parties from 29.12.2014 to 20.11.2019, clearly establishes the acknowledgement of debt by the Corporate Debtor. On the other point raised with reference to attachment of properties of Corporate Debtor by the PMLA Authorities, he made detailed submissions which have been captured in para 34 & 35 of this order.

Respondent's submissions per contra:

14. The Learned Senior Counsel, Shri Joy Saha appearing on behalf of the Respondent submits that pleadings have to be read as a

whole asserting the true merit, its substance for constructing the pleadings. The communication of the party needs to be gathered from the tenure and terms of the pleadings taken as a whole. Thus, he submits in the context of letter written by Financial Creditor on 29.12.2024 which are annexed at pages 367 - 373 to the Company petition, it cannot be said as acknowledgement of debt.

15. The Learned Senior Counsel, Shri Joy Saha submits that the entire tenor of that letter is not for acknowledging any debt but to communicate their grievances on service levels, irregularity, unwarranted charges deficiency in adhering to the terms and conditions of the loan agreement etc.

16. Further, it is submitted that the said letter has been written with the word "without prejudice" and, therefore, this letter can no means be regarded as an acknowledgement of debt by the Corporate Debtor to the Financial Creditor. He has argued that pleadings must be gone through as a whole to ascertain the true import. To substantiate his argument, he refers judgement rendered by the Hon'ble Supreme Court judgment in ***Mahendra Pal v. Ram Dass Malanger***, reported in **(2000) 1 SCC 261: 1999 SCC OnLine SC 1122 at page 271**, wherein it has been held that:

> **"***32. Our perusal of various paragraphs of the election petition and particularly of the averments contained in paras 10 to 13, 16 and 20, go to show that sufficient material facts, to provide a cause of action, for trial of the election petition have been provided in the election petition. In various sub-paras of para 11 of the election petition, particulars of irregularities have also been spelt out. The non-mention of serial numbers of the improperly counted ballot papers, keeping in view the*

averments made in para 16 of the petition, could not be a ground to non-suit the election petitioner at the threshold, without trial more particularly because of the discrepancy between Ex. P-2 and Ex. P-3. ***Pleadings have to be read as a whole to ascertain their true import. It is the substance and not merely the form, which is required to be looked into for construing the pleadings. The intention of the party needs to be gathered from the tenor and terms of his pleadings taken as a whole.*** *These well-settled principles appear to have been lost sight of by the learned Designated Judge. Construed reasonably, the averments in the election petition, in our opinion, do make out a case for the petition proceeding to trial. Whether or not a case is eventually made out to justify re-count/inspection would depend upon the evidence led by the parties in support of their pleadings at the trial***."**

(Emphasis Added)

17. He further relies on the judgment of Hon'ble Supreme Court rendered in ***Udhav Singh v. Madhav Rao Scindia*****,** reported in **(1977) 1 SCC 511 at page 520** that:

"*33. We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which,* ***a pleading has to be read as a whole to ascertain its true import****. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation.*
*Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole***."**

(Emphasis Added)

18. He further submits that any admission must be unequivocal, unambiguous and unconditional. It is claimed that in the letter

dated 29.12.2014, the admission of debt was not unequivocal or unconditional. The letter written by Corporate Debtor brings on record his grievances against the bank on various counts and, therefore, the question of treating that letter as admission of debt cannot and does not arise.

19. To substantiate his argument, he further relies on two Supreme Court judgments.

i. ***Saranpal Kaur Anand v. Praduman Singh Chandhok***, reported in **(2022) 8 SCC 401: (2022) 4 SCC (Civ) 366: 2022 SCC OnLine SC 379 at page 436-437 that:**

> ***54.*** *Now, so far as pronouncing a judgment on admission under Order 12 Rule 6 is concerned, again* ***the law is well settled that for an admission to qualify as a valid admission, it necessarily has to be an unequivocal, unambiguous and unconditional.*** *Considering the Objects and Reasons for amending Order 12Rule 6, it has been held in Uttam Singh Duggal & Co. Ltd. v. United Bank of India [Uttam Singh Duggal & Co. Ltd. v. United Bank of India, (2000) 7 SCC 120] that : (SCC p. 126, para 12)*
>
> *"12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that* ***'where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim****. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the* ***admission of the defendant, the plaintiff is entitled****.' We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment.*

Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed."

(emphasis supplied)

55. *In Himani Alloys Ltd. v. Tata Steel Ltd. [Himani Alloys Ltd. v. Tata Steel Ltd., (2011) 15 SCC 273 : (2014) 2 SCC (Civ) 376 : (2011) 3 Civil Court Cases 721] , it has been categorically observed that the* ***admission made by the party should be clear, unambiguous and unconditional and the court should exercise its judicial discretion on examination of facts and circumstances of the case****. Para 11 thereof reads as under : (SCC pp. 276-77)*

"11. It is true that a judgment can be given on an ***"admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it****. Order 12 Rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant, by way of an appeal on merits.* ***Therefore, unless the admission is clear, unambiguous and unconditional****, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim. In short, the discretion should be used only when there is a clear "admission" which can be acted upon. (See also Uttam Singh Duggal & Co. Ltd. v. United Bank of India [Uttam Singh Duggal & Co. Ltd. v. United Bank of India, (2000) 7 SCC 120] , Karam Kapahi v. Lal Chand Public Charitable Trust [Karam Kapahi v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262] and Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha [Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha, (2010) 6 SCC 601 : (2010) 2 SCC (Civ) 745] ."*

(emphasis supplied)

> ***56.*** *Though the learned Senior Advocate Mr Patwalia for the respondents has placed heavy reliance on the decision in Karam Kapahi v. Lal Chand Public Charitable Trust [Karam Kapahi v. Lal Chand Public Charitable Trust, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262] and in Charanjit Lal Mehra v. Kamal Saroj Mahajan [Charanjit Lal Mehra v. Kamal Saroj Mahajan, (2005) 11 SCC 279] , they are hardly helpful to the respondents. There cannot be any disagreement to the proposition of law laid down in the said judgments that the principle behind Order 12 Rule 6 is to give the plaintiff a right to speedy judgment. As such, under this Rule, either party may get rid of so much of the rival claims about which there is no controversy. Even the admissions made by the parties to the interrogatories and recorded by the court as contemplated in Order 10CPC also could be taken into consideration, nonetheless Order 12 Rule 6 could be resorted to only when there is clear and unambiguous admission of facts, and not otherwise. The said Rule 6 also could not be invoked by the appellate court suo motu in the appeal, when the trial court had not dealt with such issue, and had rejected the plaint under Order 7 Rule 11(d)CPC.*"
>
> **(Emphasis Added)**

ii. ***State Bank of India Vs Krishidhan Seeds Pvt. Ltd*** reported in **(2022) SCC Online SC 632 at page 213 that:**

> "***11. An acknowledgment in a balance sheet without a qualification can be relied upon for the purpose of the proceedings under the IBC.***"
>
> **(Emphasis added)**

20. He also submits that their communication with the word "without prejudice" does not tantamount admission. To substantiate his argument, he relies on the judgment of Allahabad High Court in

Shibcharan Das v. (Firm) Gulabchand Chhotey Lal as reported in **(1936) SCC Online All 290.**

21. In the said judgment, negotiations for settlement were conducted "without prejudice". In that case, the judgment held that it is not open for one of the parties to give evidence of an admission made by another, in that document.

22. He submits that all letters subsequent to the letter of 29.12.2014 will not come to the rescue of the Financial Creditor as acknowledgement of debt must be before the expiration of the specific period of limitation including extension of fresh period of limitation out of acknowledgement of the debt subsequently from time to time. In the given case, the date of declaration of NPA of the Corporate Debtor account is 30.06.2013 and therefore, unequivocal, unambiguous and unconditional acknowledgement of debt must be before 30.06.2016.

23. If the grievance letter of the Corporate Debtor dated 29.12.2014 is not considered as acknowledgement of debt then the next letter is 20.02.2017 which is a well beyond 30.06.2016, the date on which 3 years period of limitation expires and hence three years from the date of declaration of NPA which is on 30-6-2013.

24. He further submits letter alleged to have been issued by Mr Gopal Kumar Agarwal on behalf of the Corporate Debtor is not in his personal capacity and he is not an authorised signatory of the Corporate Debtor. There is no resolution of the Board authorising

Mr Gopal Kumar Agarwal to write such letters to the Financial Creditor and therefore, this letter has no legal standing.

25. He also brought to our attention to the provisions under Section 23 of the Indian Evidence Act to state that no admission is relevant if it is made either upon express condition that evidence of it is not to be given or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

26. He further submits that there is a PMLA attachment of the assets of the Corporate Debtor and, therefore, even if the corporate debtor is put into CIRP, the same cannot be resolved as all the assets of the Corporate Debtor are under attachment of enforcement directorate functioning under PMLA Act.

Counter Submissions by Applicant:

27. The Learned Counsel for the applicant submits that the respondent's Senior Counsel has put two major challenges for counter.

28. The letter dated 29.12.2014 which was contended by the Respondent as not an acknowledgement of debt but only a letter of grievance and complaint against the Financial Creditor and consequently, all subsequent letters will not extend the period of limitation once the letter of 29.10.2014 cannot be considered as acknowledgement of debt. This is because the three-year limitation

period expires on 30.06.2016 which is three years from the date of declaration of NPA.

29. Apart from this, letter of 29.12.2014, all other letters from the Corporate Debtor are from the year 2017 onwards and hence no other letter prior to the expiry of the limitation period.

30. He submits that this challenge is not legally tenable just because the letter uses the word "without prejudice" or made some complaints against the Applicant.

31. He asserts that the word "without prejudice" used in the letter will not come to the rescue of the Corporate Debtor while dealing with the aspect of limitation. The Ld. Counsel brought to our attention the judgment of Hon'ble Supreme Court rendered in ***ITC Limited Vs Blue Coast Hotels Limited and Ors.*** reported in **(2018) 15 SCC 99.**

32. He brought to our attention para 33 of the judgment which is reproduced in verbatim.

> **"***Much was sought to be made of the words "without prejudice" in the letter containing the undertaking that if the debt was not paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the*

undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer case as pointed out by Mr Harish Salve,

"as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure". (AC p. 536)"

It was argued in a subsequent case that an acknowledgement made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House Lords observed as follows: (WLR p. 2072, para 16)

"16. … But when a statement is used as an acknowledgement for the purpose of Section 29(5), it is not being used as evidence of anything. The statement is not evidence of an acknowledgement. It is the acknowledgement."

Therefore, the "without prejudice" rule could have no application. It said: (WLR p. 2091),

"83. Here, the [respondent], Mr Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an officer of payment nor actual payment.

*We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up.***"**

33. With reference to the argument on attachment of PMLA, of the assets of the Corporate Debtor, he relied on the resent judgment of Hon'ble High Court of Delhi in ***Rajiv Chakraborty Resolution***

Professional of EIEL vs. Directorate of Enforcement reported in **(2022) SCC Online Del 3703.**

34. He brought to our attention internal sub-para 163, 164 and 165 of para 170 of the judgment apart from the relevant paras are reproduced verbatim as under.

35. In view of above, he submits that the two principal challenges posed by the Ld. Senior Counsel for the respondent are legally dealt with and consequently the application filed under Section 7 of the I&B Code, be allowed.

Analysis and Findings:

36. In the case in hand, there is no dispute about sanction and subsequent disbursement of various credit facilities to the tune of Rs.142.89 crores as per the final sanction letter IFB/RM-III/12-13/610. The entire dispute revolves around limitation and PMLA attachments of the assets of Corporate Debtor.

37. We would note that the notice under Section 13(2) of the SARFAESI Act, 2002, has been issued on 02.12.2013 and subsequently, the same was withdrawn on 28.11.2016 and a fresh notice was issued. Therefore, we would infer that notice under Section 13(2) of the SARFAESI Act, 2002, issued on 02.12.2013 was in force till 27.11.2016.

38. We would further note that in none of the replies to Section 13(2) notice, the Corporate Debtor has taken a plea on time bar. There

are several correspondences exchanged between the parties post issue of Notice dated 28.11.2016 which are placed on record.

39. Further, it is not in dispute that the date of declaration of the Corporate Debtor as NPA is 30.06.2013 and, therefore, the three years period of limitation expires on 30.06.2016. Before this date, there should be evidence of acknowledgement of debt by the Corporate Debtor and the acknowledgement should have been extended from time to time through fresh acknowledgements till the date of filing this application.

40. That takes us to the letter dated 29.12.2014, which is well within 30.06.2016 to see whether Corporate Debtor has indeed acknowledged his debts. The said letter is in page 367 to 373 of Company Petition.

41. It is evident that this letter uses the word "without prejudice" and questions the Financial Creditor on various counts including raising false liabilities on the Corporate Debtor and variances on outstanding balances between the books of the Respondent and Applicant.

42. It also questioned the need for restructuring the loan account when there was no request from the Corporate Debtor for such restructuring. However, the said letter dated 29.12.2014 states that the company accepted restructuring under duress as it did not want any disruption in funding its operation and agreed to sign blank documents served upon the corporate debtor. A table

contained in page 3 of the letter brings out the differences in the cash credit account between the books of bank and the Corporate Debtor. The same is reproduced for ready reference.

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Shree Mahalaxmi Corporation Pvt. Ltd.
(Formerly Shree Mahalaxmi Vinimay Pvt. Ltd.)

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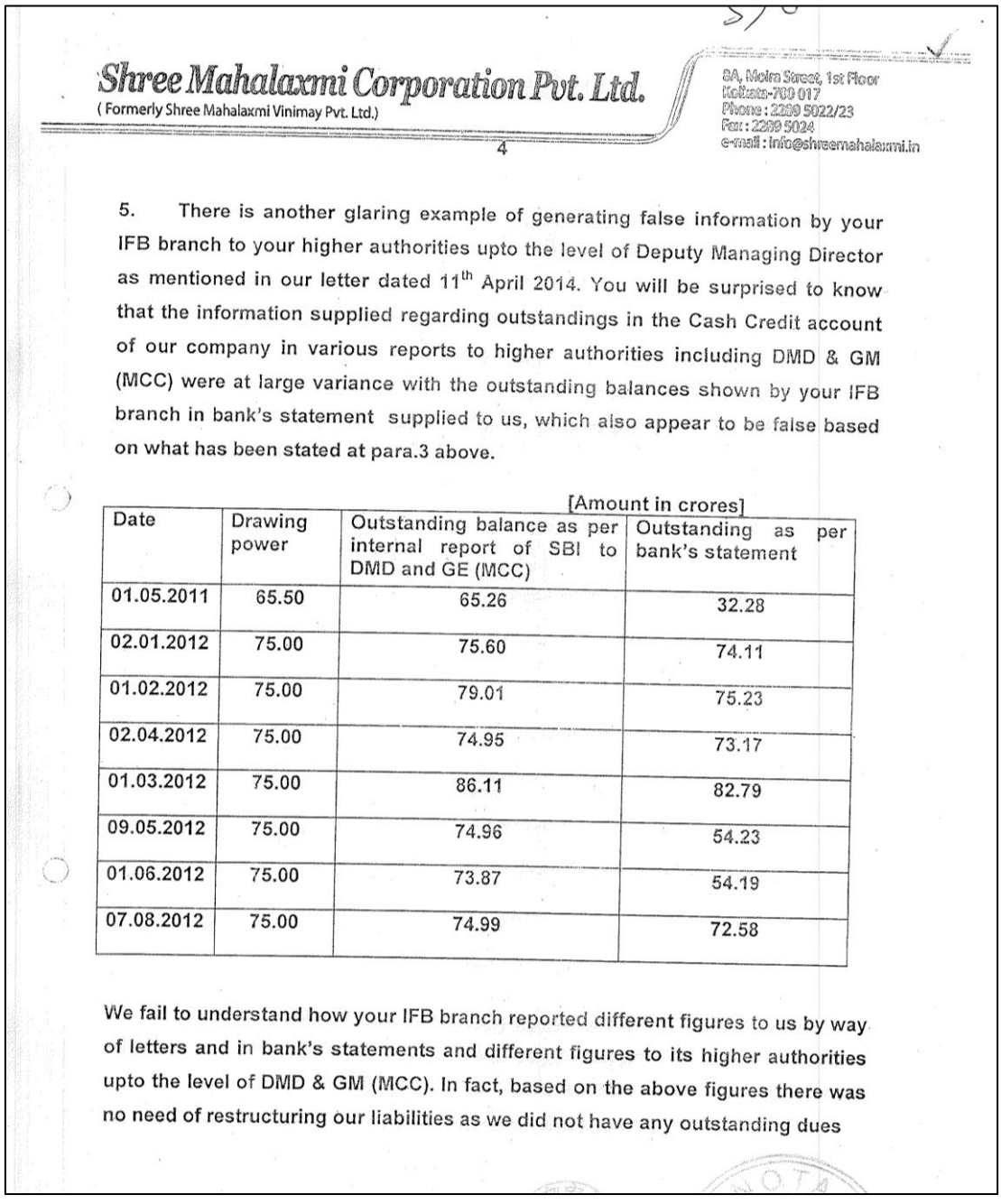
Group) as also other member banks of the consortium and Burma and Burma & Co. which conducted the viability study of our company at the behest of your IFB branch.

4. As mentioned in our letter dated 10th February 2014 under reference, your IFB Branch issued to us a number of letters advising the position of our outstanding dues for different dates. Copies of these letters were enclosed with our letter of December 28, 2013 under reference. You will be surprised to know that the information supplied to us regarding outstandings in the Cash Credit account by way of these letters were at large variance with the transactions carried out in the accounts till next dates as under.

(Amt. in crore)

Date	Overdraft as per letter	Transaction till next date		
		Payment made (CC & BD)	Amount withdrawn along with int. (CC & BD)	Difference
30.11.2011	68,700,000	34.97	21.15	
29.12.2011	115,500,000	83.29	69.92	
13.03.2012	115,500,000	1.02	2.14	
26.03.2012	117,900,000	70.28	67.57	
25.06.2012	51,100,000	11.60	12.90	
02.08.2012	170,900,000	15.56	14.69	
	Total	216.72	188.37	28.35

It may please be observed from the above table that our account with you had a credit balance of Rs.21.48 crore as on August 2, 2012 taking into cognizance the overdraft reported in your letter of November 30, 2011. We fail to understand how your IFB branch reported an irregularity of Rs. 21.95 crore in our CC/BD account as on August 31, 2012 which formed the basis of restructuring package drawn by the branch.



Shree Mahalaxmi Corporation Pvt. Ltd.
(Formerly Shree Mahalaxmi Vinimay Pvt. Ltd.)

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5. There is another glaring example of generating false information by your IFB branch to your higher authorities upto the level of Deputy Managing Director as mentioned in our letter dated 11th April 2014. You will be surprised to know that the information supplied regarding outstandings in the Cash Credit account of our company in various reports to higher authorities including DMD & GM (MCC) were at large variance with the outstanding balances shown by your IFB branch in bank's statement supplied to us, which also appear to be false based on what has been stated at para.3 above.

[Amount in crores]

Date	Drawing power	Outstanding balance as per internal report of SBI to DMD and GE (MCC)	Outstanding as per bank's statement
01.05.2011	65.50	65.26	32.28
02.01.2012	75.00	75.60	74.11
01.02.2012	75.00	79.01	75.23
02.04.2012	75.00	74.95	73.17
01.03.2012	75.00	86.11	82.79
09.05.2012	75.00	74.96	54.23
01.06.2012	75.00	73.87	54.19
07.08.2012	75.00	74.99	72.58

We fail to understand how your IFB branch reported different figures to us by way of letters and in bank's statements and different figures to its higher authorities upto the level of DMD & GM (MCC). In fact, based on the above figures there was no need of restructuring our liabilities as we did not have any outstanding dues

43. Further at Page 6 of the said letter dated 29.12.2014 contends that "*In fact, the company asked the bank to merely renew the existing*

credit facilities granted to it. SBI has not been able to deny that the actual liability of the company to SBI as on 30th November 2011 as per its letter/notice issued by the bank to the company was only Rs. 81.87 Crore and on this basis as also in the basis of subsequent transactions in the account the actual liability of the company worked out to Rs. 55.34 Crore as on 30th June 2013."

44. On careful examination of the letter, we find that the main allegation on the Corporate Debtor in that letter is that the account never became NPA and whatever drawls that were made were within the overall limit sanctioned by the bank.

45. While this letter is more in the nature of complaint against the bank for various alleged irregularities**, it does admit liability of Rs.55.34 crores as on 30.06.2013**. There is nothing placed on record that this amount has been repaid by the Corporate Debtor. It is not the case of the Corporate Debtor through this letter that no due was payable. The letter contains allegations about additional liabilities not agreed by the Corporate Debtor and classification of the account of the corporate debtor as NPA when the company account could not have been classified as NPA and the drawings were within the limit sanctioned. Though the complaints were made, suits filed claiming compensations and damages from the financial creditor which is still pending before the Civil Court, the fact remains that Corporate Debtor owes Rs.55.34 crores plus interest and other charges as on 29.12.2014 which is more than the threshold limit prescribed under IBC for admission under Section 7 of the Code. When the Account was

declared as NPA on 30-6-2013, it cannot be said that the outstanding amount admitted in that letter is not due for payment.

46. Disputes and proceedings between parties in other forums cannot take away the fact the corporate debtor has not paid the admitted debt mentioned in the letter dated 29-12-2014 till date. In case of "Financial debt", it is well settled legal position that the Adjudicating Authority need not get in to the aspect of "pre-existing disputes" between the parties. In this regard we wish to rely on the Hon'ble Apex Court Judgement rendered in ***Sesh Nath Singh & Anr vs. Baidyabati Sheoraphuli Co-operative Bank and ANR.*** in **Civil Appeal No 9198 of 2019**.

47. As long as debt and default are established, only three other aspects need to be seen which are:

(a) Debt is in excess of threshold limit of Rs. One Crore**;**
(b) Application under Section 7 of IBC has been filed within the time limit; and
(c) The application is complete in all respects.

48. Further, it is claimed by the Ld. Counsel for the Respondent that there has been an no acknowledgement of debt on the part of the Respondent in any letters referred by the Applicant. This in our view is without any basis.

49. It his submission that since, the purported acknowledgement letters are issued "<u>without prejudice</u>" to pending or future

litigations, they are not to be treated as an acknowledgement in law. We are not in agreement with this contention. We are conscious of legal position explained and enumerated in the judgment rendered in the ***ITC Ltd. v. Blue Coast Hotels Ltd.***, reported in **(2018) 15 SCC 99: (2018) 4 SCC (Civ) 793: 2018 SCC OnLine SC 237 at page 119 that:**

> ***"Letter of undertaking "Without prejudice"***
>
> ***33.*** *Much was sought to be made of the words "without prejudice" in the letter [Dated 25-11-2013] containing the undertaking that if the debt was not paid, the creditor could take over the secured assets.* ***The submission on behalf of the debtor that the letter of undertaking was given in the course of negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor****, apart from being untenable in law, reiterates the attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a letter that fell for consideration in Spencer case [Spencer v. Hemmerde, (1922) 2 AC 507 (HL)] as pointed out by Mr Harish Salve,*
>
> *"as a rule the debtor who writes such letters has no intention to bind himself further than he is bound already, no intention of paying so long as he can avoid payment, and nothing before his mind but a desire, somehow or other, to gain time and avert pressure".(AC p. 526)*
>
> *It was argued in a subsequent case [Bradford & Bingley Plc v. Rashid, (2006) 1 WLR 2066 (HL)] that an acknowledgment made "without prejudice" in the case of negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows: (WLR p. 2072, para 16)*
>
> *"16. … But when a statement is used as an acknowledgment for the purposes of Section 29(5), it is not*

being used as evidence of anything. ***The statement is not evidence of an acknowledgment. It is the acknowledgement****."*

(emphasis in original)

Therefore, the "without prejudice" rule could have no application*. It said: (WLR p. 2091, para 83)*

"83. Here, the [respondent], Mr Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an offer of payment nor actual payment…."

(emphasis in original)

We, thus, find that the mere introduction of the words "without prejudice" have no significance and the debtor clearly acknowledged the debt even after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up*."*

(Emphasis Added)

50. Once this letter is accepted as acknowledgement of debt then the limitation gets extended by way of two letters in 2017, one letter in 2018, two letters in 2019 and another in 2020. Thus, the submission of the Corporate Debtor that the said letter of 29-12-2014 cannot be treated as evidence of the acknowledgement of liability is only a feeble attempt to evade liability to the Financial Creditor and therefore, the same deserves to be rejected.

51. We are to bound by the Hon'ble Supreme Court judgment rendered in the case of ***ITC Ltd. (Supra)*** as relied by the Ld. Counsel for the applicant and state that the letter written with the words "without prejudice" by the corporate debtor to be treated as acknowledgement at least to the extent of amount mentioned as outstanding by the Applicant themselves. When the date of NPA

was 30-6-2013, the outstanding amount mentioned in that letter cannot be said to be as not due for payment yet.

52. We also find that there were OTS settlement letters from Corporate Debtor offering full and final settlement under compromise which also substantiates the acknowledgement of debt as on 12.10.2020.

53. The suit filed by the Corporate Debtor against the Financial Creditor claiming damages compensation for irregularities committed in the account is a separate dispute between the parties and if the Corporate Debtor succeeds, the Financial Creditor will have to deal with that separately and that will have no bearing on the application made under Section 7 of IBC. The admission of debt made in the suit filed by the Corporate Debtor against the Financial Creditor, in our view cannot be straight away taken as acknowledgement of debt but lends support to the letter dated 29-12-2014.

PMLA and IBC:

54. On the aspect of PMLA attachment of assets of Corporate Debtors prior to the commencement of CIRP, we are bound by the various judgments of the Hon'ble NCLAT and the Hon'ble High Court of Delhi relied by the Ld. Counsel for the applicant.

55. We would note that after the introduction of section 32A to the I&B Code, the Hon'ble NCLAT in ***Directorate of Enforcement, New Delhi v Manoj Kumar Agarwal,*** reported in **2021 SCC OnLine NCLAT 121: MANU/NL/0144/2021,** has taken view that in cases

where there existed an attachment order under PMLA prior to the commencement of CIRP the provisions of the IBC would override those of PMLA, 2002, and the attachment proceedings would be suspended during the moratorium. The Hon'ble NCLAT interpreted the Section 32A purposively by relying upon the object and scheme of the IBC, which aims at achieving effective revival of the corporate debtor, which would not be possible if the resolution professional is not given charge of the properties of the debtor. The Hon'ble NCLAT would hold that:

> **"***40. In Judgment in the matter of "P. Mohanraj & Ors. Vs. Shah Brothers Ispat Pvt. Ltd.", 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."*

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.

41. 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.

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.**"*
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.

42. ***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 fulfill objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.*****"**

(Emphasis Added)

56. A three-judge Bench of the NCLAT considering the issue in ***Kiran Shah, RP of KSL and Industries Ltd v Enforcement Directorate, Kolkata***, in **Company Appeal (AT) (Insolvency) No.**

817 of 2021, reported in **(2022) ibclaw.in 10 NCLAT** and observed as follows:

> "*95. Although, Section 14 of I & B Code deals with 'moratorium', it is not a hindrance for the 'Authority' and the Officers under the 'Prevention of Money Laundering Act, 2002' to deny a person of the tainted 'Proceeds of Crime'. Suffice it for this 'Tribunal' to point out that a person who is involved in 'Money Laundering' is not to be allowed to enjoy the fruits of 'Proceeds of Crime' with a view to ward off is Civil indebtedness, in respect of his Creditors.*
> *96. As seen from the 'Prevention of Money Laundering Act, 2002', the purpose of the Act is to prevent 'Money Laundering' and it deals with confiscation of property derived from or concerned with 'Money Laundering' etc. In fact, 'The Prevention of Money Laundering Act, 2002' is to fulfill our Country's obligation in adhering to the United Nations Resolutions and in regard to Assets/Properties being the 'Proceeds of Crime', it takes a 'primacy and precedence' over the 'Insolvency and Bankruptcy Code, 2016' which promotes "Resolution' as its objective over Liquidation in the considered opinion of this 'Tribunal'.*
> *97. In the instant case, there is no 'Resolution Plan' as approved by the 'Tribunal' and further no Liquidation Proceedings had ended in the sale of Liquidation Assets of the 'Corporate Debtor'.*
> *98.* ***Besides this, the objective, purpose of two enactments (1) 'I & B Code' and (2) 'PMLA' even though at the first blush appear to be at logger heads, there is no repugnancy and inconsistency between them, in lieu of the fact the text, shape and its colour are conspicuously distinct and different, operating in their respective spheres. More importantly, when confiscation of the 'Proceeds of Crime' takes place, the said Act is performed by the Government not in its status/capacity/role as Creditor****."*
>
> **(Emphasis Added)**

57. Further, the Hon'ble Delhi High Court in ***Deputy Director Deputy Director of Enforcement, Delhi v. Axis Bank & Ors.*** reported

in **2019 SCC OnLine Del 7854** has discussed with the objective of the PMLA such as:

> **"***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**
>
> *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 illgotten 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.*
>
> **xxx xxx xxx**
>
> *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 moneylaundering 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.*

THE RIGHTS OF THIRD PARTY ACTING BONA FIDE

148. In view of the conclusions reached as above, rejecting the argument of prevalence of RDBA, SARFAESI Act and Insolvency Code over PMLA, the said laws (or similar other laws, some referred to above) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other, with regard to 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" rendering the same "proceeds of crime", within the mischief of PMLA. The PMLA, declares, by virtue of Section 71, that it has over-riding effect over other existing laws, such provision containing non-obstante clause with regard to inconsistency apparently to be construed as referable to the dealings in "money-laundering" and "proceeds of crime" relating thereto.

xxx **xxx** **xxx**

SUMMARISING THE CONCLUSIONS

171. It will be advantageous to summarise the conclusions reached by the above discussion, as under: -

xxx xxx xxx

(vi). ***The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and Insolvency Code, the latter three legislations do not prevail over the former****.*

(vii). The PMLA, by virtue of section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto.

(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****."***

(Emphasis Added)

58. From the enumeration as laid down in both ***Kiran Shah (Supra)*** and ***Axis Bank (Supra),*** it would be evident that IBC and PMLA are conspicuously distinct and different, operating in their respective spheres. When confiscation of the 'Proceeds of Crime' takes place, PMLA is performed by the Government not in its status/capacity/role as Creditor. the legislative intent of the PMLA is to prevent a person engaged in criminal activity intending to convert the "proceeds of crime" into assets intending to be projected as legitimate or untainted and to prohibit a person indulging in money laundering 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.

59. Whereas, the IBC was enacted with an object to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons in a time bound manner, for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of the interests of all stakeholders.

60. In a very recent decision rendered by the Hon'ble High Court of Delhi, in the case of ***Rajiv Chakraborty Resolution Professional of EIEL vs. Directorate of Enforcement*** reported in **2022/DHC/004739: MANU/DE/4428/2022: (2022) ibclaw.in 257 HC** deserves mention. It is extracted to the extent relevant and germane to the lis:

> **"***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 SAFEGUARDS

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.

xxx

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-à-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-à-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.***"**

(Emphasis added)

61. We would observe the principles as laid down by the Hon'ble Delhi High Court in ***Rajiv Chakraborty*** **(Supra)** to culminate the tussle between PMLA and IBC as under:

a. The 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.

b. PMLA does not result in the corporate debtor or the Resolution Professional facing a *fait accompli*.

c. The statutes provide adequate means and avenues for redressal of claims and grievances.

d. 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.

e. A Provisional Attachment Order made by the ED under the PMLA does not invest in that authority a superior or overriding right in property.

f. 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.

62. Thus, the enumerations and decisions cited above, we are of the considered opinion that any attachment of a tainted assets of the Corporate Debtor prior to the commencement of CIRP would always be available to fulfil the object and achieve the goal of IBC. The Provisional Attachment Order under PMLA will not bar the admission of insolvency proceedings against the Corporate Debtor under IBC.

63. In this context, it would be very relevant to refer the decision passed by this Adjudicating Authority in the case of ***State Bank of India v. R.P. Info Systems Ltd.*** in **C.P. (IB) No. 652/KB/2019** decided on **19.02.2024,** reported at **(2024) ibclaw.in 211 NCLT** which is identical to the instant case and we have adopted the similar view as:

> **"*54.*** […] *we are of the view that PMLA and I&B Code subserve completely different, divergent and distinct purpose. The rights of the Enforcement Directorate over the properties subject to attachment would stand restricted to the extent as recognised in the judgments rendered in* ***Axis Bank (Supra)*** *and later in* ***Rajiv Chakraborty (Supra).***
>
> ***55.*** *Coming to the issue that has cropped up for determination, in this matter, i.e.,* ***whether that property which already stands attached by the Enforcement Directorate under the PMLA prior to the filing of an application under Section 7 of the I&B Code for the initiation of the CIRP, would bar admission of the application bearing the present claim of Financial Creditor****.*
>
> ***56.*** […] *in* ***Axis Bank (Supra)*** *and the Hon'ble Delhi High Court in* ***Rajiv Chakrabarty (Supra)*** *have elaborately dealt with the* ***interplay of the PMLA and I&B Code*** *and have clearly and categorically held that PMLA is a legislation on money laundering, independent of the I&B Code, 2016 and*

Section 8(8) of the PMLA explicates that a person aggrieved by an attachment order under PMLA can always seek its "release" and "restoration" by showing that his interest in the property was acquired bona fide, and PMLA then takes a back seat. Thus, there is no conflict between the two provisions. The subject property which stands attached under the ***PMLA can be released in the event a Corporate Debtor is admitted by the competent authority in CIRP and a creditor's right of secured interest over the property remains secured, it would still have the right to enforce its secured interest over the property in question****.*

57. Thus, we can safely conclude that irrespective of the prior attachment order under the PMLA, the tainted properties of the Corporate Debtor would always be available to fulfil the object and achieve the goal of IBC. Attachment order under PMLA will not bar admission under IBC*.*

58. In our considered opinion that since the PMLA attachment order is in regard to the assets of the Corporate Debtor, whereas the debts are almost admitted there is no escape from the conclusion that the application needs to be admitted**."***

(Emphasis Added)

64. In the case at hand, it would be crystalized that the debt is disbursed by the Financial Creditor against the consideration for the time value of money and the default has made on the part of the Corporate Debtor in repayment of the debt. The amount in default is in excess of threshold limit of Rs. One Crore as prescribed under Section 4 of the IBC. The Application filed by the Financial Creditor is complete in all respect and the application has been filed within the time limit.

Conclusions:

65. In terms of the foregoing discussion, we are of the view that this instant application under Section 7 of the IBC is squarely maintainable and therefore, we **ALLOW** the application bearing **Company Petition (IB) No. 130/KB/2022** filed under **Section 7 of the I&B Code**, and accordingly, we order the initiation of **Corporate Insolvency Resolution Process (CIRP)** in respect of the Corporate Debtor by the following **Orders**:

i. The Application filed by **State Bank of India (Financial Creditors),** under Section 7 of the Insolvency & Bankruptcy Code, 2016, is hereby, **ADMITTED** for initiating the **Corporate Insolvency Resolution Process** in respect of **Shree Mahalaxmi Corporation Pvt. Ltd. (Corporate Debtor).**

ii. As a consequence of this Application being admitted in terms of Section 7 of the I&B Code, moratorium as envisaged under the provisions of Section 14(1) of the Code, shall follow in relation to the Respondent/(CD) as per clauses (a) to (d) of Section 14(1) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(3) of the Code shall come into force.

iii. Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016, prohibits the following, as:

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 asset 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 Securitization 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 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 the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

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

v. The provisions of sub-section (1) of the Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

vi. The Applicant has proposed the name of **"Mr. Avishek Gupta",** Address: CK 104, Sector-2, Salt Lake City, Kolkata – 700 091, email ID: avishek@optimusresolution.net, Registration No. IBBI/IPA-003/IP-N000135/2017-2018/11499, as the "IRP". We have perused that there is a written communication and consent of IRP in Form 2 with Affidavit, annexed at Page 22-**,** to this Application as per the requirement of Rule 9(l) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that there are no disciplinary proceedings pending against him with the Board or Insolvency Professional Agency of The Institute of Cost Accountants of India. In addition, further necessary disclosures have been made by **"Mr. Avishek Gupta"** as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7(3)(b) of the code. Hence, we appoint **"Mr. Avishek Gupta"** as the **Interim Resolution Professional** (IRP) of the Corporate Debtor to carry out the functions as per the I&B Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the I&B Code.

vii. In pursuance of Section 13 (2) of the Code, we direct the IRP or the RP, as the case shall cause a public announcement immediately with regard to the admission of this application under Section 7 of the Code and **call for the submission of claims** under Section 15 of the Code. The public announcement referred to in Clause (b) of sub-section (1) of Section 15 of the Insolvency & Bankruptcy Code, 2016, shall be made immediately. The expression immediately means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

viii. During the CIR Process period, the management of affairs of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of Section 17 of the I&B Code. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. There shall be no future opportunities in this regard.

ix. The Interim Resolution Professional is also free to take police assistance to take full charge of the Corporate Debtor, its assets and its documents without any delay, and this Court hereby directs the concerned **Police Authorities** and/or the **Officer-in-Charge** of Local Police Station(s) to render all assistance as may be required by the Interim Resolution Professional in this regard.

x. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIR Process in respect of the Corporate Debtor.

xi. The Financial Creditors shall be liable to pay to IRP a sum of **Rs. 3,00,000/-** (Rupees Three Lakh Only) as payment of his fees as advance, as per Regulation 33(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which amount shall be adjusted at the time of final payment. The expenses relating to the CIRP are subject to the approval of the Committee of Creditors (CoC).

xii. In terms of sections 7(5) and 7(7) of the Code, the **Registry of this Adjudicating Authority** is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the Interim Resolution Professional by Speed Post and through email immediately, and in any case, not later than two days from the date of this Order.

xiii. Additionally, the **Registry of this Adjudicating Authority** shall serve a copy of this Order upon the Insolvency and Bankruptcy Board of India (IBBI) for their record and also upon the Registrar of Companies (RoC), West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court

within seven days from the date of receipt of a copy of this order.

xiv. The Resolution Professional shall conduct CIRP in a time-bound manner as per Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

xv. The IRP/RP shall be liable to submit the periodical report including the minutes of the CoC of the Corporate Debtor, with regard to the progress of the CIR Process in respect of the Corporate Debtor to this Adjudicating Authority from time to time.

xvi. The order of moratorium shall cease to have effect as per Section 14(4) of the I&B Code.

66. Certified copies of this order, if applied for with the Registry of this Adjudicating Authority, be supplied to the parties upon compliance with all requisite formalities.

67. Post the Company Petition on **08/04/2024** for filing the Periodical Progress Report by the IRP/RP as appointed herein.

D. Arvind
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 23rd Day of February, 2024.

Bose, R. K. [LRA]/ Pradipto, H. [PS]