



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 808 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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AM MINING INDIA PRIVATE LIMITED

Versus

UNION OF INDIA

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Appearance:

MR RASHESH SANJANWALA, SENIOR ADVOCATE with MR KEYUR GANDHI, MR RAHEEL PATEL, MS ANANYA GHOSHI AND MR AALAY SHAH for GANDHI LAW ASSOCIATES(12275) for the Petitioner(s) No. 1
 MR KSHITIJ AMIN, MR DEVANG VYAS(2794) for the Respondent(s) No. 1
 MR SN SOPARKAR, SENIOR COUNSEL with MR MONAAL J DAVAWALA(6514) for the Respondent(s) No. 2,3
 MR. PARTH H BHATT(6381) for the Respondent(s) No. 1

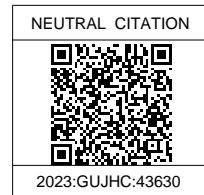
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CORAM: HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 24/08/2023

ORAL JUDGMENT

1. The writ-applicant herein has approached this Court



invoking the Article 226 of the Constitution of India seeking the following reliefs :-

“(i) Quash / set aside the Impugned Order dated 21.09.2022 passed by Respondent No.1 to the extent the same is qua the Subject Land and the Petitioner;

(ii) Quash/set aside all actions consequential to the Impugned Order, including the Complaint, Show Cause Notice and Final Order dated 14.03.2023 passed by the Adjudicating Authority;

(iii) Pending admission, hearing and final disposal of the present Special Civil. Application, stay the effect, operation and implementation of the Impugned Order Notice qua the Subject Land and the Petitioner, and all actions consequential to the Impugned Order, including the Complaint and Show Cause Notice, qua the Subject Land and the Petitioner;

(iv) Grant ex-parte ad-interim relief in terms of prayer (iii) above; and

(v) Pass any other orders that this Hon'ble Court deems fit



in the interest of justice.

2. Brief facts leading to the adjudication of the present writ-application read thus :-

2.1 The writ-applicant herein, AM Mining India Private Limited ("AMMIPL") is a private company incorporated on 31.10.2019 under the provisions of Companies Act, 2013. The writ-applicant herein is a part of the Arcelor Mittal Nippon Steel Group, which has caused successful resolution of stressed assets, including the successful resolution and revival of the erstwhile Essar Steel India Limited.

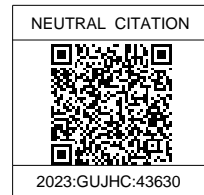
2.2 The Respondent No. 2 is ABG Shipyard Limited, a company incorporated on 15 March 1985 under the provisions of Companies Act, 1956 ("ABG Shipyard") which is under liquidation in terms of Section 33 of the Insolvency and Bankruptcy Code (for short 'IBC') in view of the Order dated 25.04.2019 in CP(IB) No.53/NCLT/AHM/2017 ("Liquidation Order") passed by the Hon'ble National Company Law



Tribunal, Ahmedabad ("NCLT").

2.3 Pursuant to an application filed by ICICI Bank Ltd ., Corporate Insolvency Resolution Process ("CIRP") was initiated against ABG Shipyard by the Hon'ble NCLT on 01.08.2017 in CP(IB) No.53/NCLT/AHM/2017. Since no resolution of ABG Shipyard could take place in terms of the IBC, vide the Liquidation Order, the Hon'ble NCLT initiated liquidation proceedings against ABG Shipyard and Shri Sundaresh Bhat, was appointed as the Liquidator in terms of Section 33 of IBC by the NCLT vide Order dated 09.11.2022, to carry out the liquidation process of the company in terms of the IBC by order dated 09.11.2022.

2.4 Thereafter, advertisements were issued on 14.12.2021, 24.12.2021, 07.01.2022 and 18.01.2022 in accordance with the regulatory framework governing the liquidation process, for initiating a bid process for inter alia sale of the Subject Land admeasuring approximately 2,03,000 square metres, situated near village Gaviar, Taluka Choryas, District Surat, Gujarat,



referred to as ABG Shipyard 1 and 2.

2.5 The writ-applicant herein, on 25.01.2022, submitted a bid for an amount of INR 189,50,00,000/- (Rupees One Hundred Eighty-Nine Crore Fifty Lakhs only), for the purchase of the Subject Land ("Sale Consideration") and was adjudged the "Successful Bidder". Further, in accordance with proviso to Section 35(1)(f) of IBC, the writ-applicant herein submitted an affidavit to the Liquidator, declaring its eligibility in terms of Section 29A of IBC ("29A Affidavit").

2.6 Pursuant to this, an Agreement to Sell dated 21.03.2022 was executed between ABG Shipyard (through Sh. Sundaresh Bhat in his capacity as the Liquidator) and the writ-applicant herein for sale and purchase of the Subject Land, which was registered vide document no. 5867 on 21.03.2022 at Surat ("Agreement to Sell").

2.7 At the time of execution of the Agreement to Sell, the writ-applicant herein had already remitted INR 68,22,00,000



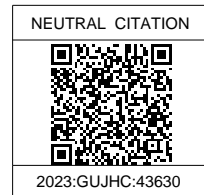
(Rupees Sixty-Eight Crores and Twenty-Two Lakhs only) towards acquisition of the Subject Land.

2.8 Towards the balance of the Sale Consideration, the Agreement to Sell, provided the following payment schedule :-

Particulars	Time Period	Amount
....
Tranche 1	At the end of 7 months of being declared as successful bidder (i.e. August 25, 2022)	INR 18,95,00,000.00 (Rupees Eighteen Crores Ninety-Five Lakhs Only)
Tranche 2	At the end of 8 months of being declared as successful bidder (i.e. September 25, 2022)	INR 18,95,00,000.00 (Rupees Eighteen Crores Ninety-Five Lakhs Only)
Tranche 3	At the end of 9 months of being declared as successful bidder (i.e. October 25, 2022)	INR 83,38,00,000.00 (Rupees Eighty Three Crores Thirty Eight Lakhs Only)

2.9 Accordingly, under UTR: HSBGR22022082517255864, the writ-applicant herein on 25.08.2022 remitted an amount of INR 18,95,00,000.00 (Rupees Eighteen Crores, Ninety-Five Lakhs only).

2.10 The writ-applicant herein was ready and willing to remit



the balance amounts, in terms of the aforesaid payment schedule set out in the Agreement to Sell. The writ-applicant herein had, and continues to have, necessary wherewithal to make the balance payments.

2.11 Subsequent to the aforesaid proceedings undertaken before the NCLT wherein the writ-applicant herein was declared as the highest bidder as referred above and having remitted the amount of INR 18,95,00,000.00 the respondent No.1 by order dated 21.9.2022 provisionally attached the subject land under Section 5 of the Prevention of Money Laundering Act (for short 'PMLA') against ABG Shipyard.

3. Being aggrieved by the impugned order passed by the respondent No.1 herein, the writ-applicant herein approached this Court by preferring the present petition challenging the impugned order dated 21.9.2022 duly produced at page-30 Annex.P/1.

4. Notice came to be issued on 19.1.2023. Pending the



present petition the respondent No.1 filed the complaint before the adjudicating authority which in turn issued show cause notice to the writ-applicant herein. The adjudicating authority by an order dated 14.3.2023 passed final order under the provisions of Section 8 of the PMLA confirming the order of attachment of property made under Sub-section (1) of Section 5 of the PMLA. After issuance of notice Rule came to be issued wherein the following order came to be passed :-

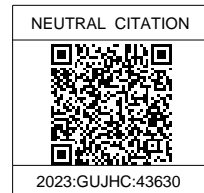
“1. Heard Mr. R.S. Sanjanwala, learned Senior Counsel, appearing for Gandhi Law Associate for the petitioner and Mr. Devang Vyas, learned Additional Solicitor General appearing for respondent No.1 and Mr. Monaal Davawala, learned advocate appearing for the respondent Nos.2 and 3.

2. The petitioner herein approached this Court under Article 226 of the Constitution of India, being aggrieved by the Provisional Attachment Order dated 21.9.2022 wherein "Surat Shipyard 1 & 2" (subject land) (acquired by the Petitioner in the liquidation process of ABG Shipyard Limited ("ABGSL" or "Corporate Debtor")) was provisionally attached by the Enforcement Directorate, ("respondent No.1" or "ED") under Section 5(1) of Prevention of Money Laundering Act ("PMLA") and a subsequent complaint has been filed under



Section 5(5) of the PMLA. Pending the present petition, the respondent No.1, by order dated 14.3.2023, passed final order of confirmation, which is also subject matter of challenge, by way of draft amendment, which came to be allowed by this Court by order dated 11.4.2023. A Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtor was initiated by Hon'ble National Company Law Tribunal, Ahmedabad ("NCLT") on 1.8.2017 in CP(IB) No. 53/NCLT/AHM/2017. Since the CIRP of the Corporate Debtor remained unsuccessful, the Hon'ble NCLT initiated the liquidation proceedings on 25.4.2019. Pursuant to the order, Mr. Sundaresh Bhat was appointed as the liquidator. In furtherance of the advertisement for sale of assets of ABGSL issued by the Liquidator under the liquidation process, the petitioner submitted its bid for the subject land. Upon being adjudged as the successful bidder and making necessary payments, an agreement to sell was drawn on 21.3.2022. On 21.9.2022, by way of the impugned order, the subject land was provisionally attached under the PMLA, thereby enjoining the parties from completion of the sale process and causing handing over of the subject land to the petitioner, which came to be confirmed by the impugned order passed by the adjudicating authority dated 14.3.2023.

2.1 Mr. Sanjanwala, learned Senior Counsel vehemently submitted that the petitioner herein is a successful bidder, pursuant to the permission granted by the NCLT to the

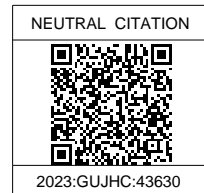


liquidator to sell the assets of ABG Shipyard by way of private sale by order dated 2.12.2020. The petitioner on 25.01.2022, submitted a bid for an amount of INR 189,50,00,000/- for the purchase of the Subject Land ("Sale Consideration") and was adjudged the "Successful Bidder". The aforesaid culminated into agreement to sell dated 21.3.2022 , which came to be executed between ABG Shipyard (through Mr. Sundaresh Bhat in his capacity as the Liquidator) and the petitioner for sale and purchase of the subject land, which was registered vide document No. 5867 on 21.3.2022 at Surat. On execution of the agreement to sell, the petitioner has already remitted INR 68,22,00,000 towards acquisition fo the subject land.

2.2 Mr. Sanjanwala, learned Senior Counsel submitted that the subject land was provisionally attached by the respondent No.1 under Section 5 of the PMLA in connection with allegations of money laundering against ABG Shipyard.

2.3 It was submitted that the aforesaid initiation of proceedings under the PMLA by the respondent No.1, is in clear breach of Section 33(5) of Insolvency & Bankruptcy Code (IBC), wherein respondent No.1 initiated proceedings qua the subject land under Section 5 of the PMLA post the Liquidation Order i.e. after 25.4.2019 by :-

- (i) passing the impugned order on 21.9.2022;*
- (ii) provisionally attaching the subject property for 180 days*



w.e.f 21.9.2022;

(iii) initiating the attachment proceedings against the subject property vide complaint dated 20.10.2022 under Section 5(5) of PMLA; and

(iv) causing issuance of the Show Cause Notice dated 25.10.2022.

(v) Final Order of Confirmation passed by the Respondent No.1 dated 14.3.2023.

2.4 Placing reliance on the aforesaid submission, Mr. Sanjanwala, the learned Senior Counsel submitted that the aforesaid orders are passed in breach of Section 32A(2), 33(5) and 238 of IBC.

3. Mr. Sanjanwala, learned Senior Counsel, to substantiate the aforesaid submission, placed reliance on the order passed in Special Civil Application No. 19387/2022 dated 17.2.2023 wherein facts of the dispute being identical to the present petition, the said petition came to be allowed, quashing aside the provisional attachment order passed by the respondent authority.

4. Further, reliance was placed on 2022 SCC OnLine Del 3703 in case of Rajiv Chakraborty Resolution Professional of EIEL v. Directorate of Enforcement. Mr. Sanjanwala, learned Senior Counsel appearing for the petitioner submitted on the merits of the matter. The contentions raised by Mr.



Sanjanwala, the learned Senior Counsel, require consideration.

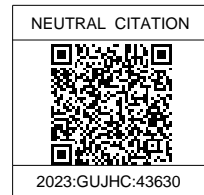
5. In view of the above, Issue Rule, returnable on 5.7.2023.

Mr. Devang Vyas, learned ASG waives service of notice of Rule for and on behalf of respondent No.1. Mr. Monaal Davawala, learned advocate waives service of notice of rule for respondent Nos. 2 and 3.”

5. Heard Mr. R. S. Sanjanwala, the learned Senior Counsel assisted by Mr. Raheel Patel, the learned advocate appearing for Gandhi Law Associates, the learned advocate appearing for the writ-applicant, Mr. Kshitij Amin, the learned advocate appearing for the respondent No.1 and Mr. S.N. Soparkar, the learned Senior Counsel assisted by Mr. Monaal Davawala, the learned advocate appearing for the respondent No.2 and 3.

Submissions on behalf of the writ-applicant herein :-

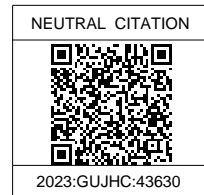
6 Mr. R. S. Sanjanwala, the learned Senior Counsel vehemently submitted that the final order dated 14.3.2023 passed by the respondent No.1 is in teeth of Section 33(5) of the IBC.



(a) Placing reliance on the aforesaid submission Mr. Sanjanwala, the learned Senior Counsel submitted that the order impugned is in clear breach of provisions of Section 33(5) of the Indian IBC, the respondent No.1 having initiated proceedings qua the subject land under Section 5 of the PMLA post the liquidation order i.e. after 25.4.2019 i.e. by

- (i) passing the impugned order on 21.9.2022
- (ii) provisionally attaching the subject property for 180 days with effect from 21.9.2022
- (iii) initiating attachment proceedings against the subject property vide complaint dated 20.10.2022 under Section 5(5) of the PMLA and
- (iv) causing issuance of show cause notice dated 25.10.2022.

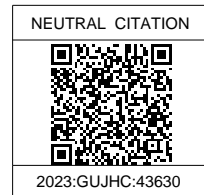
(b) It was submitted that the aforesaid order is in clear breach of Section 33(5) of the IBC and in view thereof after liquidation order having been passed on 21.9.2022 all the consequential actions are void ab initio.



(c) It was submitted that the order impugned dated 14.3.2023 passed by the respondent No.1 is in gross violation of Section 32A(2) of IBC. Placing reliance on the aforesaid submissions it was submitted that the order impugned could have been validly passed by the respondent No.1 after the liquidation order. It was submitted that no criminal proceedings can be initiated qua assets acquired under the liquidation process by the writ-applicant herein under under Section 32A(2) of the IBC.

(d) It was submitted that the writ-applicant herein satisfies all the three conditions as enumerated under the provisions of Section 32A(2) of the IBC and in view thereof the subject land in the hands of the writ-applicant herein is protected from attachment by virtue of Section 32A(2) of the IBC. This is because :-

(i) Under the Liquidation Process of ABG Shipyard, the writ-applicant herein has been declared the Successful Bidder qua the Subject Land, has entered into the Agreement to Sell for



acquisition of the Subject Land, and has paid substantial part of the Purchase Consideration, acquiring an equitable interest in the Subject Land;

(ii) The writ-applicant herein was not a promoter, manager or related party of ABG Shipyard (the Corporate Debtor); and

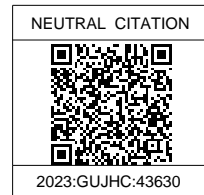
(iii) There are no allegations in the Complaint of abetment or conspiracy qua the writ-applicant herein for commission of any offence with ABG Shipyard (the Corporate Debtor).

(e) Placing reliance on the aforesaid submissions Mr. Sanjanwala, the learned Senior Counsel submitted that the protection granted under Section 33(5) and 32A(2) of the IBC override the respondent No.1 power to attach properties under Section 5 of the PMLA, since (i) Section 238 of the IBC provides that the provisions of IBC will override anything inconsistent with any other law in force and (iii) PMLA, despite containing a similar overriding provision under Section 71, is subservient to the provisions of IBC, since IBC was



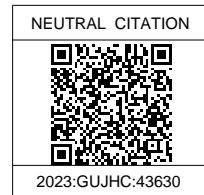
enacted after PMLA. It was submitted that when there is two enactments of non-obstante clauses (like the present one), the enactment which is subsequent in time overrides the other. Reliance was placed on the decision in the case of **Bank of India vs. Ketan Parekh and Ors., reported in (2008) 8 SCC 148** to substantiate the aforesaid contention.

(f) Mr. Sanjanwala, the learned Senior Counsel submitted that the writ-applicant herein is bonafide purchaser of the subject land and has no involvement into unlawful activities allegedly carried out by the ABG Shipyard. The writ-applicant herein is a successful bidder and pursuant to the liquidation process undertaken by the respondent No.3 after the orders came to be passed by the Hon'ble NCLT, the writ-applicant herein having found, not to be "a related party" to ABG Shipyard in terms of Section 29A of the IBC. It was submitted that in view thereof, the subject land is being acquired by the writ-applicant herein in terms of the legislatively sanctioned procedure under the IBC and the writ-applicant herein is



nothing but bonafide third party purchaser of liquidation asset. Placing reliance on the aforesaid submissions, it was submitted that all protections to such a purchaser under IBC, especially the immunity under Section 32A, must be afforded to the writ-applicant herein and its interest in the subject land be protected.

(g) Mr. Sanjanwala, the learned Senior Counsel submitted that the order impugned passed by the respondent No.1 is wholly without jurisdiction as (i) the same is passed in contravention of the procedural mandates and safeguards under Section 5 of PMLA; (ii) in breach of Sections 32A(2), 33(5) and 238 of IBC, as explained in detail above; (iii) it interdicts and seeks to override the Hon'ble Supreme Court's Order dated 26.08.2022 in Civil Appeal No.7667 of 2021 Sundaresh Bhat, Liquidator Of ABG Shipyard V. Central Board Of Indirect Taxes And Customs which directs the Liquidator to complete the sale of assets of ABG Shipyard within a time bound period of four weeks; and (iv) the Respondent No.1 does not have any right,



power or authority to attach ABG Shipyard's assets that are under the process of acquisition by third parties under the liquidation process.

(h) It is submitted that the order impugned passed by the respondent No.1 under Section 5 of the PMLA has failed to give any reason for attachment of subject land as mandated under Section 5 of the PMLA and the said order fails to demonstrate how the subject land is proceeds of crime in the hands of the writ-applicant herein. It was submitted that the final order passed by the adjudicating authority is silent as regard reasons of the adjudicating authority for confirmation of the order passed of the PAO qua the subject land. The impugned order is a non-speaking order as regards the reasons contemplated under Section 8(3) of the PMLA for confirmation of attachment of the subject land. The contents of paragraphs XXI and XXII neither contain any findings as to how the subject land is involved in money laundering nor how in exercise of powers under Section 8(3), the adjudicating authority has the authority to attach such assets.



(i) Mr. Sanjanwala, the learned Senior Counsel placed reliance on the order passed in the Special Civil Application No.19387 of 2022 dated 17.2.2023 in case of Welspun Steel Resources Pvt. Ltd., vs. Union of India, which set aside the provisional attachment of similarly placed assets, holding that the same could not have been attached in the first place under the PAO, not being the proceeds of crime. Despite the same having been brought to the notice of the adjudicating authority, no reference is made by the adjudicating authority while passing the final order dated 14.3.2023.

(j) It was submitted that the adjudicating authority was bound by the order passed in the Special Civil Application No.19387 of 2022 dated 17.2.2023 as referred above and in view thereof also the present petition is required to be allowed considering the fact that in an identical fact and situation with respect to Welspun Steel Resources Pvt. Ltd., by exercising extraordinary jurisdiction the respondent authority has quashed the order of provisional attachment.



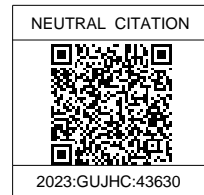
(k) Placing reliance on the aforesaid submissions, it was submitted that the order impugned is required to be quashed and set aside on the aforesaid ground alone.

(l) Mr. Sanjanwala, the learned Senior Counsel submitted that the final order being wholly without jurisdiction on account of breach of provisions under the IBC the alternative remedy is not a bar to exercise powers under Article 226 of the Constitution of India.

(m) Placing reliance on the aforesaid submissions Mr. Sanjanwala, the learned Senior Counsel submitted that the order impugned passed by the respondent No.1 is required to be quashed and set aside.

(n) Mr. Sanjanwala, the learned Senior Counsel placed reliance on the following decisions to substantiate his submissions :-

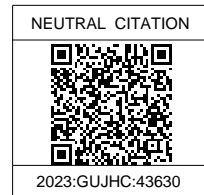
(i) (1998) 8 SCC 1, Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai (para-15)



- (ii) (2009) 14 SCC 338 (para-13)
- (2021) 5 SCC page-1, Manishkumar vs. Union of India.
- (iii) 2021 SCC OnLine SC 801, Magadh Sugar & Energy Ltd., vs. State of Bihar and Ors., (para-25, 26, 27 and 32)
- (iv) (2021) 6 SCC 771, Radha Krishan Industries vs. State of Himachal Pradesh and Ors. (Para 27)
- (v) 2022 SCC OnLine Del 3703, Rajiv Chakraborty Resolution Professional of EIEL vs. Directorate of Enforcement. (para 6, 7 and 12)
- (vi) Special Civil Application No.19387 of 2022 dated 17.2.2023.

Submissions on behalf of the respondent No.1 :-

7. Per contra, Mr. Kshitij Amin, the learned advocate appearing for the respondent No.1 at the outset submitted that the order impugned is passed by the adjudicating authority under Section 8 of the PMLA Act. It was submitted that the order impugned is an appealable order wherein the writ-applicant herein be relegated to avail alternative remedy by



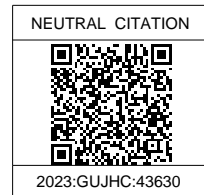
filing an appeal. It was submitted that no interference is called for in the order impugned passed by the adjudicating authority wherein the adjudicating authority has considered the facts of the dispute in question and passed an order allowing the provisional attachment under Section 5 of the Act.

7.1 It was submitted that when the statutory remedy available, this Court were to relegate the writ-applicant herein to avail the same in accordance with law. Reliance was placed on the ratio as laid down by the Hon'ble Apex Court in the case of

(a) Kelkar & Kelkar Vs. Hotel Pride Executive Pvt Ltd., reported in MANU/SC/0580/2022 and AIR 2004 SC 1467.

(b) Civil Appeal No.5121 of 2021 arising out of SLP (C) No.13639 of 2021 @ D No.11555 of 2020

7.2 It was submitted that the same could not have been said to be final until the sale deed is executed between the parties. It was submitted that in the facts of the present case at the stage of agreement to sell in view thereof this Court may not



interfere with the order impugned passed by the respondent authority.

7.3 Mr. Amin, the learned advocate submitted that the orders impugned passed by the respondent authorities are in due compliance of the Act and the reasons are recorded in accordance with the provisions of law.

7.4 It was submitted that on the complaint being lodged before the enforcement authority, investigation was carried out, forensic audit was also carried out and it was found that there was divergence in the fund and for the same, attachment was held to be necessary.

8. Heard Mr. S. N. Soparkar, the learned Senior Counsel appearing for the respondent No.2 Official Liquidator. Mr. Soparkar, the learned Senior Counsel supported the submissions made by the learned advocate appearing for the writ-applicant herein. Mr. Soparkar, the learned Senior Counsel submitted that the orders impugned are in violation of the provisions of

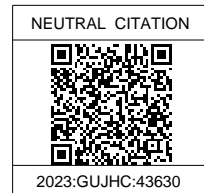


Section 33(5) of the IBC. Mr. Soparkar, the learned Senior Counsel also submitted that the findings recorded by the respondent No.1 authority while passing the final order are devoid of any reasons and the order impugned fails the test of Section 8 of the PMLA wherein the basic ingredients of Section 8, the reason to believe for coming to a conclusion, that the properties are proceeds of crime.

8.1 Mr. Soparkar, the learned Senior Counsel placed reliance on (1993) 1 SCC page-78 wherein it was held that recording of reasons is deterrent against the arbitrary action. It was submitted that the order impugned is also in violation of the provisions of the Section 33(5) and 32A of the IBC. The properties were purchased by the writ-applicant herein in sale process conducted in accordance with law and in compliance with the orders passed by the Hon'ble Apex Court.

9. At this stage, it is apposite to refer to Section 32A, 33(5) and Section 238 of the IBC.

“Section 32A. Liability for prior offences, etc .- (1) Notwithstanding



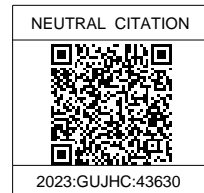
anything to the contrary contained in this Code or any other law for the time being in force, the liability a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not prosecuted for such an offence from the date the resolution plan has been approved the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or



indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution of the corporate debtor, where such property is covered under a resolution plan by the Adjudicating Authority under section 31, which results in the change of control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not-

(i) a promoter or a person in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation .- For the purposes of this sub-section, it is hereby clarified that ,

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action



against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”

“Section 33 (5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

“Section 238 : Provisions of this Code to override other laws

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

10. Sections 5 and 8 of the PMLA Act;



“Section 5 : Attachment of property involved in money-laundering

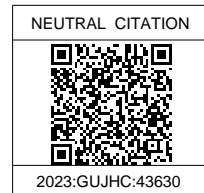
(1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that -

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

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report complaint has been made or filed under the corresponding law of any other country:

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.

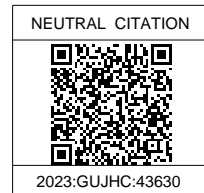
(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the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

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



such attachment before the Adjudicating Authority.”

“Section 8 : Adjudication

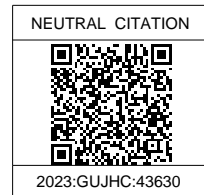
(1) On receipt of a complaint under sub-section (5) of section 5 , or applications made under sub-section (4) of section 17 or under sub- section (10) of section 18 , if the Adjudicating Authority has reason to believe that any person has committed an offence under Section 3 or is in possession of proceeds of crime , he may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5 , or, seized 15 "or frozen" under section 17 or section 18 , the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money- laundering and confiscated by the Central Government:

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

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

(2) The Adjudicating Authority shall, after-

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



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

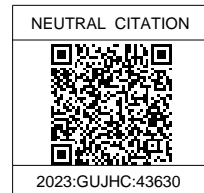
(c) taking into account all relevant materials placed on record before him, by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

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

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under section (1) of section 5 or retention of property or [16](#) "record seized or frozen under Section 17 or Section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property" or record shall-

(a) continue during the pendency of the proceedings relating to any "offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and"

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



Adjudicating Authority.

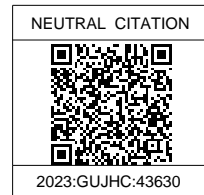
(4) Where the provisional order of attachment made under sub-section (1) of section 5 had been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under Section 5 or frozen under sub-section (1-A)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

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

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

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

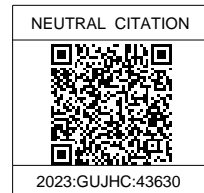
(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be



entitled to possession of a property in respect of which an order has been passed under sub-section (3) of Section 8, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offences of money-laundering after having regard to the material before it.”

11. At this stage, it is also apposite to refer to the position of law as held in the case of Rajiv Chakraborty Resolution Professional of EIEL v. Directorate of Enforcement, reported in 2022 SCC OnLine Del 3703, paragraphs 8, 12, 20, 104, 107, 114 and 115.

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



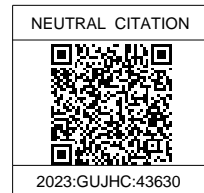
formed subject matter of I.A. No _____/2020 (placed at page 343 of the paper book) in which Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 too, the petitioners had sought issuance of directions requiring the respondents to desist from proceeding further with the conformation of the PAO. It was lastly urged that the orders in terms of the which the PAO came to be confirmed by the Adjudicating Authority have also not been assailed in the writ petition.

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



effect. Learned counsel also invited the attention of the Court to the 2021 SCC OnLine NCLAT 121 Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 conflicting views which had been expressed in [Varrsana Ispat Limited vs. Deputy Director of Enforcement](#)¹⁴ as well as [Andhra Bank vs. Sterling Biotech Limited](#)¹⁵, [Rotomac Global Private Limited vs. Deputy Director, Directorate of Enforcement](#)¹⁶ on the one hand and [Manoj Kumar Agarwal](#) on the other and contended that in light of the flux in the legal position, it would but be appropriate for this Court to effectively rule upon the questions which arise. The attention of the Court was also drawn to the judgement rendered by a larger bench of the National Company Law Appellate Tribunal¹⁷ in [Kiran Shah v. Enforcement Directorate](#)¹⁸ which had taken a view diametrically opposed to what was held in [Manoj Kumar Agarwal](#). In view of the aforesaid, it was urged that the Court should render an authoritative pronouncement on the questions which arise for determination.

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



and relate Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 to ill gotten assets derived or obtained from the commission of a scheduled offence. In view of the aforesaid, learned counsel would submit that it would be wholly incorrect to proceed on the basis that orders of attachment made in respect of properties which constitute proceeds of crime is akin to an action taken by a creditor against the assets of a debtor. Learned counsel submitted that while proceeding to attach and confiscate proceeds of crime, the action of the ED is essentially aimed at taking away from a person or an entity all that may have been illegitimately secured by indulging in prescribed criminal activity. In support of the aforesaid submissions, Mr. Hossain, firstly, placed reliance upon the following passages as appearing in the decision of this Court in [Deputy Director of Enforcement, Delhi v. Axis Bank & Ors](#) 22:-

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

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141. This court finds it difficult to accept the proposition that the

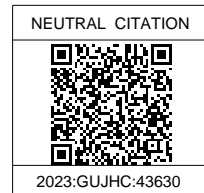


jurisdiction conferred on the State by PMLA to confiscate the "proceeds of crime" concerns a property the value whereof is "debt" 2019 SCC OnLine Del 7854 Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739 due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by prescribed criminal activity.

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143. The proceeds of crime, there is no doubt, are not even remotely covered by the expressions "revenues, taxes, cesses" or other "rates." The word "revenue" is the controlling word, the expressions following (taxes, cesses, rates) taking the colour from the same. The word revenue, in the context of Government is to be understood to be conveying taxation [[Gopi Pershad v. State of Punjab](#), AIR 1957 Punjab 45 (DB)]. This is how the expression is defined by Black's Law Dictionary, Eighth Edition as also by Cambridge English Dictionary (accessible online). The reliance by the respondents on the use of the expression "non-tax revenue" with reference to PMLA under major accounting head "0047 Other Fiscal Services" in the list of Heads of Accounts of Union and States issued by Controller General of Accounts, Department of Expenditure in the Ministry of Finance, Government of India under the Government of India (Allocation of Business) Rules, 1961 is misplaced. The use of the expression for accounting purposes - to take care of receipts flowing into the Consolidated Fund - cannot give to the value of proceeds of crime realised by sale of properties confiscated under PMLA the colour of taxation."

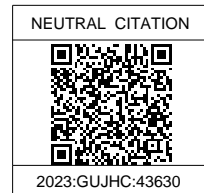
104. [Section 5\(2\)](#) enjoins the Director to forward a copy of the order of provisional attachment along with all other materials in his possession to the Adjudicating Authority for such purpose. On the receipt of the aforesaid order and the accompanying material,



the Adjudicating Authority is enjoined by law to place persons who are alleged to have committed an offence under [Section 3](#) to appear and show cause why the properties so attached under [Section 5](#) be not declared to be properties involved in money laundering and confiscated by the Union Government. On a culmination of the aforesaid proceedings, the Adjudicating Authority would ultimately either pass an order of confirmation or is in case he differs with the conclusions arrived at by the Director and after considering any response that may be received, annul the provisional attachment.

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

114. 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.

*115. 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 *Signature Not Verified Digitally Signed By:NEHA Signing Date:11.11.2022 15:55:22 Neutral Citation Number: 2022/DHC/004739* impact far greater than that envisaged in [Section 32A](#). The aforesaid issue stands answered accordingly.”*

12. The present writ-applicant herein i.e. AM Mining India Pvt. Ltd., is identically placed with the writ-applicant herein of the Special Civil Application No.19387 of 2022 i.e. Welspun



Steel Resources Pvt. Ltd., vs. Union of India having approached this Court challenging provisional attachment order dated 21.9.2022. In the said application Welspun Steel Resources Pvt. Ltd., was held to be the highest successful bidder and paid the entire sale consideration as the writ-applicant herein for specified assets on 21.9.2022. The respondent No.1 passed an impugned order in respect of assets that were sold to the writ-applicant herein by order dated 21.9.2022. The facts of the present case being identical to the facts of the said case, the relevant paragraphs of the said order passed in the Special Civil Application No.19387 of 2022 dated 17.2.2023 read thus :-

“6. Having considered the submissions made by the learned advocates for the respective parties, the legality of the order under challenge has to be addressed from the point of view whether the assets acquired by the petitioners can at all be said to be ‘proceeds of crime’. This is not only in light of the manner and the method in which the specified assets have been acquired by the petitioners but also in light of the provisions of the IBC. From the chain of events narrated in the earlier part of this judgement what is evident is that ABG



Shipyard Limited went into liquidation. Assets of the company ‘corporate debtor’ were offered for sale pursuant to an auction held under the directions of the Apex Court. The petitioners were successful bidders and had after depositing the entire sale consideration received sale certificates. Certainly can it not be said that the assets which are ‘specified assets’ which the petitioners have acquired are those assets which are acquired as a result of criminal activity and therefore can be said to be ‘proceeds of crime’. In the decision in the case of Manish Kumar (supra), the Apex Court while considering the constitutionality of Section 32(A) of IBC held as under:

“320. Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the Resolution Plan. The further requirement is that a Resolution Plan must be approved by the Adjudicating Authority and, finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in subSection (1). In other words, the requirements for invoking the bar against proceeding against the property of the corporate debtor in relation to an offence committed before the commencement of the CIRP, are as follows:

320.1 There must be Resolution Plan, which is approved by the Adjudication Authority under Section 31 of the Code;

320.2 The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control



of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence;

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

322. Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person. 323. Thus, reading sub-Section (1) and subSection(2) together, two results emerge:

323.1 Subject to the requirements embedded in sub- Section (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease.

323.2 The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated.



323.3 The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in sub- Section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

324. The last segment of Section 32A makes it obligatory on the part of the corporate debtor or any person, to whom immunity is provided under Section 32A, to provide all assistance to the Investigating Officer qua any offence committed prior to the commencement of the CIRP.

325. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, the PMLA) are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a Resolution Plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stake holders.

326. We are of the clear view that no case whatsoever is



made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.”

6.4 Therefore, what is clear is that it is only such property which is derived or obtained directly or indirectly as a result of a criminal activity can be regarded as proceeds of crime. In the facts of the case, obviously apparent it is that the only allegation and the gist that had been discussed is that the corporate debtor used the credit raised from the bank for purposes other than intended purposes to carry out circular



transactions with various group companies and making overseas investments. There is no explanation as to how the properties standing in the name of corporate debtor and which form part of the assets sold to the petitioners are proceeds of crime especially since these assets are neither overseas assets or that of the group companies.

7. Sine qua non to arrive at a determination that the assets are proceeds of crime, the foremost requirement is that the author has to have 'reason to believe' on the basis of material in his possession. 'Reason to believe' cannot arise from mere suspicion, gossip or rumour. Merely because the impugned order records alleged fraudulent transactions and diversion of funds, it cannot automatically lead to a conclusion that the properties acquired by the petitioners are proceeds of crime. In order to arrive at a conclusion that 'reason to believe' exists, there must be some material to suggest such formation of opinion. The decisions in the cases of Madhya Pradesh Industries Ltd.(supra), S. Ganga Saran and Sons (Pvt.) Ltd. (supra), Sheo Nath Singh (supra), Radha Krishan Industries (supra), Calcutta Discount Co. Ltd. (supra) and Lakhmani Mewal Das (supra) have set out principles where the courts have held that reason to believe must be founded on sufficient material. It cannot be founded on mere suspicion but based on evidence. It must be held in good faith, cannot be merely a pretense. It is always open for the court to examine whether the reason to believe has a rational connection or a relevant bearing to the

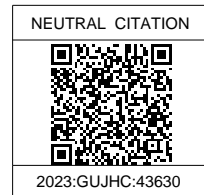


formation of the belief and the reasons are not extraneous or irrelevant to the purpose. Reading the contents of the order indicates that such observations are based on only on suspicion and are such which one that cannot be arrived at by an honest and a reasonable person but are based on mere suspicion, gossip or rumour.

8. As far as the aspect of alternative remedy is concerned, which is vehemently pressed into service by the learned ASG Mr. Vyas, as discussed hereinabove, when the assumption of jurisdiction by the authorities itself is non-existent and the respondent proceeds on facts which have no nexus to the objects sought to be achieved, and the opinion is not based on any tangible material, 'reason to believe' is a jurisdictional fact and in absence of such 'reason to believe' arrived at by the authorities, the bar of alternative remedy cannot oust the jurisdiction of this court.

9. As far as section 8 of the PMLA is concerned, what is evident on reading the provision is that the onus shifts on the petitioners once the adjudicating authority decides to take action and therefore section 8 cannot be a ground on which the petitioner can be ousted from securing a relief in exercise of powers under Article 226 of the Constitution of India.

10. For the aforesaid reasons therefore, the petition is allowed. The order dated 21.09.2022 insofar as it attaches the specified



assets of the petitioners as shown in para 12 of the impugned order in the schedule of properties at Sr. Nos. 13, 14, 15, 17, 18, 19 and 20 shall be treated as assets not falling within the purview of and having acquired from ‘proceeds of crime’. The order holding so is without jurisdiction and the assets are directed to be released from such attachment. Order accordingly. Rule is made absolute. No costs.”

Analysis :-

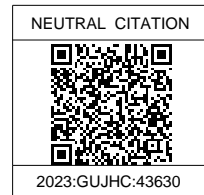
13. The following emerge for the consideration of the present dispute in question;

Whether the respondent authority under the PMLA Act, 2002 would retain jurisdiction or authority to proceed against the properties of a corporate debtor once liquidation measures have been approved in accordance with the provisions of IBC Act, 2016 ?

14(A) Pursuant to an application filed by the ICICI Bank Ltd., Corporate Insolvency Resolution Process (CIRP) was initiated against the ABG Shipyard by the Hon’ble NCLT on 1.8.2017 CP(IB) No.53/NCLT/AHM/2017. Since there was no



resolution of ABG Shipyard to take place in terms of the IBC, vide the Liquidation Order, the Hon'ble NCLT initiated liquidation proceedings against ABG Shipyard and Shri Sundaresh Bhat was appointed as the Liquidator in terms of Section 33 of IBC. The Liquidator conducted five public auctions for the sale of assets of ABG Shipyard which were unsuccessful. Consequent to the unsuccessful public auction, Shri Sundaresh Bhat (being the Liquidator) approached the Hon'ble NCLT seeking permission to sell the assets of ABG Shipyard by way of private sale in terms of Regulation 33(2) read with Schedule I, Clause 2 of IBBI (Liquidation Process) Regulations, 2016. The Hon'ble NCLT, vide its order dated 02.12.2020, permitted Respondent No. 2 to sell the assets of ABG Shipyard through private sale. The said order is duly attached at Annexure-P6. The advertisements were issued on 14.12.2021, 24.12.2021, 07.01.2022 and 18.01.2022 in accordance with the regulatory framework governing the liquidation process, for initiating a bid process for sale of the Subject Land admeasuring approximately 2,03,000 square



metres, situated near village Gaviar, Taluka Choryasi, District Surat, Gujarat, referred to as ABG Shipyard 1 and 2. The advertisements are duly produced at Annexure P-7 and details of subject land are duly produced at Annexure P-8.

(B) The writ-applicant herein on 25.01.2022 submitted a bid for an amount of INR 189,50,00,000/- (Rupees One Hundred Eighty-Nine Crore Fifty Lakhs only), for the purchase of the subject land ("Sale Consideration") and was adjudged the "Successful Bidder". Further, in accordance with proviso to Section 35(1)(f) of IBC, the writ-applicant herein submitted an affidavit to the Liquidator, declaring its eligibility in terms of Section 29A of IBC ("29A Affidavit"). The copy of the bid submitted and the affidavit submitted by the writ-applicant herein are duly produced at Annexure P-9 and Annexure P-10 respectively. A copy of the communication informing declaration of "Successful Bidder" is duly produced at Annexure P-11.

(C) Pursuant to the aforesaid, an Agreement to Sell dated



21.03.2022 was executed between ABG Shipyard (through Shri Sundaresh Bhat in his capacity as the Liquidator) and the writ-applicant herein for sale and purchase of the Subject Land, which was registered vide document No.5867 on 21.03.2022 at Surat ("Agreement to Sell").

(D) At the time of execution of the Agreement to Sell, the writ-applicant herein had already remitted INR 68,22,00,000 (Rupees Sixty-Eight Crores and Twenty-Two Lakhs only) towards acquisition of the Subject Land.

(E) Towards the balance of the Sale Consideration, the Agreement to Sell, provided the following payment schedule :-

Particulars	Time Period	Amount
....
Tranche 1	At the end of 7 months of being declared as successful bidder (i.e. August 25, 2022)	INR 18,95,00,000.00 (Rupees Eighteen Crores Ninety-Five Lakhs Only)
Tranche 2	At the end of 8 months of being declared as successful bidder (i.e. September 25, 2022)	INR 18,95,00,000.00 (Rupees Eighteen Crores Ninety-Five Lakhs Only)
Tranche 3	At the end of 9 months of being declared as successful bidder (i.e. October 25, 2022)	INR 83,38,00,000.00 (Rupees Eighty Three Crores Thirty Eight Lakhs)



		Only)
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(F) Accordingly, under UTR: HSBCR22022082517255864, the writ-applicant herein on 25.08.2022 remitted an amount of INR 18,95,00,000.00 (Rupees Eighteen Crores Ninety-Five Lakhs only). The bank statement to the said effect is duly produced at Annexure P-13.

(G) The writ-applicant herein was ready and willing to remit the balance amounts, in terms of the aforesaid payment schedule set out in the Agreement to Sell.

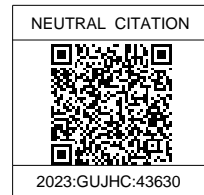
(H) Despite acquisition of the subject land by the writ-applicant herein, the terms of the aforesaid, on 21.9.2022, by way of an impugned order, the subject land came to be provisionally attached by the respondent No.1 under Section 5 of the Prevention of Money Laundering Act (for short 'PMLA') in connection with the allegation of money laundering against ABG Shipyard. The said provisional attachment resulted in passing of the final order by the adjudicating authority dated



14.3.2023 under Section 8 of the PMLA Act.

15. Having considered the aforesaid submissions advanced by the learned advocates appearing for the respective parties and the ratio as referred above the following emerge:-

- (i) Under the liquidation process of ABG Shipyard, the writ-applicant herein has been declared as successful bidder qua the subject asset, has entered into agreement to sell for acquisition of subject asset, and has paid substantial part of purchase consideration, acquiring an equitable interest in the subject asset and on depositing the entire sale consideration received the sale certificate.
- (ii) The writ-applicant herein was neither a promoter, manager or related party to the ABG Shipyard (corporate debtor) and an appropriate affidavit under Section 29A was submitted by the writ-applicant herein which is duly produced at Annexure P-10 page-551.
- (iii) The writ-applicant herein is a bonafide purchaser of the subject land.

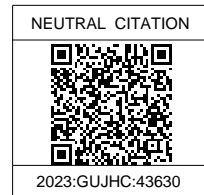


(iv) There are no allegations in the complaint with respect to abatement or conspiracy qua the writ-applicant herein for commission of any offence with ABG Shipyard, the corporate debtor.

(v) No steps have been taken by the respondent No.1 for setting aside the process of sale before the adjudicating authority. In terms of Section 60 of the IBC, any challenge to process of sale in course of liquidation, must necessarily lie before the NCLT. Further in view of Section 63, the jurisdiction of civil court and all other authorities, to entertain any suit or proceeding as regards the same, stands ousted.

16. The respondent authority proceeded to attach the properties in question acquired by the writ-applicant herein after following due procedure under the IBC invoking the provisions of PMLA Act.

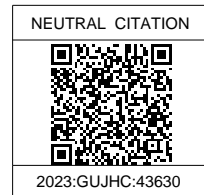
17. In the opinion of this Court, confirmation of attachment interdicts and interferes with the consummation of the sale process which is part of liquidation of ABG Shipyard. The



aforesaid interjection by the respondent No.1, in the opinion of this Court, is in teeth of the provisions of Sections 32A, 33(5) and 238 of the IBC.

18. In the facts of the present case, by an order dated 17.2.2023 passed in the Special Civil Application No.19387 of 2022 the order of provisional attachment dated 21.9.2022 passed under Section 5(1) PMLA Act, 2002, wherein the writ-applicant in the said petition i.e. Welspun Steel Resources Pvt. Ltd., was identically placed at Serial No.3 as that of the present writ-applicant herein in the said schedule, wherein the writ-applicant herein figures at Serial No.12 in the schedule of property duly produced at page-214 para-12 wherein the order of provisional attachment dated 21.9.2022 passed under Section 5(1) of the PMLA Act, 2002 has been quashed and set aside by the said judgment.

18.1 While quashing the order of provisional attachment under Section 5(1) of the PMLA Act by order dated 17.2.2023 passed in the Special Civil Application No.19387 of 2022 it was



held that the “reason to believe” has been arrived by the respondent authority without any basis and in absence of any material and evidence. It was further held that the property which is derived or obtained directly or indirectly as a result of criminal activity can be regard as proceeds of crime. It is further held that, the only allegation and the gist that has been discussed is that the corporate debtor used the credit used from the Bank for the purposes other then intended purposes to carry out circular transaction with various group companies and making overseas investment. It was further held that no explanation as to how the properties standing in the name of corporate debtor and which form part of assets sold to the writ-applicant herein are proceeds of crime, especially since the assets are neither overseas assets or that the group of companies. As discussed in para-6.4 to 9 of the said order, wherein the Court proceeded to pass the final order in para-10 quashing and setting aside the provisional attachment order of the properties duly annexed at Serial Nos.13, 14, 15, 17 to 20. The writ-applicant herein is placed



at Serial No.12 and is identically placed as the writ-applicant in the Special Civil Application No.19387 of 2022.

19. While passing the impugned order under Section 8 the respondent authority proceeded to confirm the order of provisional attachment passed under Section 5(1) of the Act as referred above. No separate finding or independent adjudication has been undertaken by the adjudicating authority. Without considering the submissions advanced by the writ-applicant herein and the written submissions that were placed on record by the writ-applicant herein the adjudicating authority proceeded to pass final order and has also failed to take into consideration the order passed in the Special Civil Application No.19387 of 2022 and proceeded to pass final order dated 14.3.2023 which reads thus :-

"I have carefully considered the written replies filed by the Defendants to the notice to show cause under section 8(1). I have also considered the rejoinders filed by the Complainant to the written replies. The role of the Defendants with reference to property attached and its involvement in money laundering has also been brought on Para 3 page 24 to 27 of this order. I have also heard the



Counsels for the Complainant and defendants. The written submissions subsequent to the final argument filed by the Defendants and the Complainant have been gone through. I have considered all the relevant materials placed on record before me. Considering the material in O.C ., the written replies and rejoinders, I find that the immovable/movable properties provisionally attached by PAO No. 08/2022 dated 21.09.2022 i.e ., movable/immovable properties mentioned on page no. 185 to 190 of PAO and at page no. 09 to 15 of OC of the instant order, mentioned in the name of Defendants are proceeds of crime in terms of section 2(1)(u) of the PMLA, 2002, and therefore, involved in money laundering.

Further, there is failure on part of the Defendants to discharge the burden as required to be discharged under the provisions of section 8 of PMLA and in view of the presumption under section 24 of PMLA as herein above referred, which is not rebutted.

a. *I, therefore, hereby confirm the attachment of the property made under sub-section (1) of Section 5 of PMLA. I, therefore, order that the said Attachment shall continue during pendency of the proceedings relating to anywwwoffence under the prevention of Money-Laundering Act, 2002 before the Special Court; and become final after an order of confiscation is passed under Subsection (5) or sub-section (7) of section 8 of PMLA by the Special court.*

b. *PAO No. 08/2022 dated 21.09.2022 is hereby confirmed subject to the order dated 17.02.2023 of the Hon'ble High Court of Gujarat as mentioned at page of this order.*



c. Hence OC no. 1824/2022 is allowed subject to the order dated 17.02.2023 of the Hon'ble High Court of Gujarat as mentioned at page of this order.

Order is pronounced on 14.03.2023 through video conference.

*Vinodanand Jha
Chairperson*

An appeal against this order lies to The Hon'ble Appellate Tribunal, PMLA, New Delhi under section 26 of the PMLA Act. The Appeal may be filed within a period of 45 days from the date of receipt of the order.

*Vinodanand Jha
Chairperson*

The soft copy of the order will be uploaded on email of the Defendant (wherever available) within 48 hours from the pronouncement of the order. One hard copy of the order is also dispatched simultaneously on the address available with the Adjudicating Authority. Further, the certified copy of the order will be made available within seven working days after the deposit of required fee with the Registrar of Adjudicating Authority, PMLA.

*Registrar/AO
AA-PMLA”*

19.1 Without assigning any reasons, without any independent finding on “reason to believe” the order of provisional attachment under Section 5 of the PMLA has been confirmed. In the opinion of this Court, the order of provisional attachment dated 21.9.2022 came to be quashed by



order passed in the Special Civil Application No.19387 of 2022 dated 17.2.2023. In view thereof, the respondent authority has erred in not arriving at an independent finding considering the fact that the case of the writ-applicant stands at identical footing to that of the writ-applicant in the Special Civil Application No.19387 of 2022. Though the order under Section 5 is quashed and set aside, the respondent authority has proceeded to confirm the order of provisional attachment passed under Section 5(1) which can be said to be an order passed without any application of mind.

While passing the impugned order pursuant to the show cause notice wherein a detailed reply came to be filed by the petitioner and written submissions came to be filed after personal hearing for release of the subject land for attachment. The impugned order is passed by the adjudicating authority without considering the submissions advanced by the petitioner herein and has proceeded to conclude that the properties attached are proceeds of crime and, therefore, involved in



money laundering.

19.2 It is apposite to refer to the ratio as laid down in the case of Assistant Commissioner, Commercial Tax Department, Works Contract And Leasing, Kota Versus Shukla And Brothers, reported in (2010) 4 SCC 785, paragraphs 13 to 19

“13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. In the case of Siemens Engineering and Manufacturing Co. of India Ltd. V/ s. Union of India and Anr. [AIR 1976 SC 1785], the Supreme Court held as under:-

- *"6.If courts of law are to be replaced by administrative*



authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ..."

14. *In the case of Mc Dermott International Inc. V/s. Burn Standard Co. Ltd. and Ors. (2006) SLT 345, the Supreme Court clarified the rationality behind providing of reasons and stated the principle as follows:-*

- *"... Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration in Re, 'proper adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. Contradictory reasons are equal to lack of reasons. ..."*

15. *In Gurdial Singh Fijji V/s. State of Punjab [(1979) 2 SCC 368], while dealing with the matter of selection of candidates who could be under review, if not found suitable otherwise, the Court explained the reasons being a link between the materials on which certain conclusions are based and the actual conclusions and held, that where providing reasons for proposed supersession were*



essential, then it could not be held to be a valid reason that the concerned officer's record was not such as to justify his selection was not contemplated and thus was not legal. In this context, the Court held -

- "... "Reasons" are the links between the materials on which certain conclusions are based and the actual conclusions. The Court accordingly held that the mandatory provisions of Regulation 5(5) were not complied with by the Selection Committee. That an officer was "not found suitable" is the conclusion and not a reason in support of the decision to supersede him. True, that it is not expected that the Selection Committee should give anything approaching the judgment of a Court, but it must at least state, as briefly as it may, why it came to the conclusion that the officer concerned was found to be not suitable for inclusion in the Select List."*

16. This principle has been extended to administrative actions on the premise that it applies with greater rigor to the judgments of the Courts. In State of Maharashtra V/s. Vithal Rao Pritirao Chawan [(1981) 4 SCC 129], while remanding the matter to the High Court for examination of certain issues raised, this Court observed:

- ". . . It would be for the benefit of this Court that a speaking judgment is given".*

17. In the cases where the Courts have not recorded reasons in the judgment, legality, propriety and correctness of the orders by the Court of competent jurisdiction are challenged in absence of proper discussion. The requirement of recording reasons is applicable with greater rigor to the judicial proceedings. The orders of the Court must reflect what weighed with the Court in granting or declining the relief claimed by the applicant. In this regard we may refer to certain judgments of this Court.



18. A Bench of Bombay High Court in the case of M/s. Pipe Arts India Pvt. Ltd. V. Gangadhar Nathuji Golamare [2008 (6) Maharashtra Law Journal 280], wherein the Bench was concerned with an appeal against an order, where prayer for an interim relief was rejected without stating any reasons in a writ petition challenging the order of the Labour Court noticed, that legality, propriety and correctness of the order was challenged on the ground that no reason was recorded by the learned Single Judge while rejecting the prayer and this has seriously prejudiced the interest of justice. After a detailed discussion on the subject, the Court held:-

"The Supreme Court and different High Courts have taken the view that it is always desirable to record reasons in support of the Government actions whether administrative or quasi judicial. Even if the statutory rules do not impose an obligation upon the authorities still it is expected of the authorities concerned to act fairly and in consonance with basic rule of law. These concepts would require that any order, particularly, the order which can be subject matter of judicial review, is reasoned one. Even in the case of Chabungbambohal Singh V/s. Union of India and Ors. 1995 (Suppl) 2 SCC 83, the Court held as under:

"His assessment was, however, recorded as "very good" whereas qua the appellants it had been stated unfit. As the appellants were being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated unfit, and then to recommend the name of one of his juniors. No reason for unfitness, is reflected in the proceedings, as against what earlier Selection Committees had done to which reference has already been made."

In the case of Jawahar Lal Singh V/s. Naresh Singh and Ors. (1987) 2 SCC 222, accepting the plea that absence of examination of reasons by the High Court on the basis of which the trial Court discarded prosecution evidence and recorded the finding of an acquittal in favour of all the



accused was not appropriate, the Supreme Court held that the order should record reasons. Recording of proper reasons would be essential, so that the Appellate Court would have advantage of considering the considered opinion of the High Court on the reasons which had weighed with the trial Court.

In the case of State of Punjab and Ors. V/s. Surinder Kumar and Ors. [(1992) 1 SCC 489], while noticing the jurisdictional distinction between Article 142 and Article 226 of the Constitution of India, the Supreme Court stated that powers of the Supreme Court under Article 142 are much wider and the Supreme Court would pass orders to do complete justice. The Supreme Court further reiterated the principle with approval that the High Court has the jurisdiction to dismiss petitions or criminal revisions in limini or grant leave asked for by the petitioner but for adequate reasons which should be recorded in the order. The High Court may not pass cryptic order in relation to regularisation of service of the respondents in view of certain directions passed by the Supreme Court under Article 142 of the Constitution of India. Absence of reasoning did not find favour with the Supreme Court. The Supreme Court also stated the principle that powers of the High Court were circumscribed by limitations discussed and declared by judicial decision and it cannot transgress the limits on the basis of whims or subjective opinion varying from Judge to Judge.

In the case of Hindustan Times Ltd. V/s. Union of India and Ors. [(1998) 2 SCC 242], the Supreme Court while dealing with the cases under the Labour Laws and Employees' Provident Funds and Miscellaneous Provisions Act, 1952 observed that even when the petition under Article 226 is dismissed in limini, it is expected of the High Court to pass a speaking order, may be briefly.

Consistent with the view expressed by the Supreme Court in the afore-referred cases, in the case of State of U.P. V/s. Battan and Ors. [(2001) 10 SCC 607], the Supreme Court held as under:

"The High Court has not given any reasons for refusing to



grant leave to file appeal against acquittal. The manner in which appeal against acquittal has been dealt with by the High Court leaves much to be desired. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order. The absence of reasons has rendered the High Court order not sustainable."

Similar view was also taken by the Supreme Court in the case of Raj Kishore Jha V/s. State of Bihar and Ors. JT 2003 (Supp.2) SC 354.

In a very recent judgment, the Supreme Court in the case of State of Orissa V/s. Dhaniram Luhar (2004) 5 SCC 568 while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R. In Breen V/s. Amalgamated Engg. Union observed:

"The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. V/s. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the



sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

Following this very view, the Supreme Court in another very recent judgment delivered on 22nd February, 2008, in the case of State of Rajasthan V/s. Rajendra Prasad Jain Criminal Appeal No. 360/2008 (Arising out of SLP (Crl.) No. 904/2007) stated that "reason is the heartbeat of every conclusion, and without the same it becomes lifeless." Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, Blackrobed Bureaucracy Or Collegiality Under Challenge, (42 MD.L. REV. 766, 782 (1983), observed as under:-

"My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the



Court that a bare signal of affirmance, dismissal, or reversal does not."

The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant. Another facet of providing reasoning is to give it a value of precedent which can help in reduction of frivolous litigation. Paul D. Carrington, Daniel J Meador and Maurice Rosenberg, Justice on Appeal 10 (West 1976), observed as under:-

"When reasons are announced and can be weighed, the public can have assurance that the correcting process is working. Announcing reasons can also provide public understanding of how the numerous decisions of the system are integrated. In a busy Court, the reasons are an essential demonstration that the Court did in fact fix its mind on the case at hand. An unreasoned decision has very little claim to acceptance by the defeated party, and is difficult or impossible to accept as an act reflecting systematic application of legal principles. Moreover, the necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid."

The reasoning in the opinion of the Court, thus, can effectively be analysed or scrutinized by the Appellate Court. The reasons indicated by the Court could be accepted by the Appellate Court without presuming what weighed with the Court while coming to the impugned decision. The cause of expeditious and effective disposal would be furthered by such an approach. A right of appeal could be created by a special statute or under the provisions of the Code governing the procedure. In either of them, absence of reasoning may have the effect of negating the purpose or right of appeal and, thus, may not achieve the



ends of justice. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on September 13, 2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said,

"The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written: -

- (1) to clarify your own thoughts;*
- (2) to explain your decision to the parties;*
- (3) to communicate the reasons for the decision to the public;*
and
- (4) to provide reasons for an appeal Court to consider."*

Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. V/s. Crabtree 1974 ICR 120, the Court went to the extent of observing that "Failure to give reasons amounts to denial of justice". Reasons are really linchpin to administration of justice. They are link between the mind of the decision taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher Court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher Courts but is even of great utility for providing public understanding of law and imposing self-discipline in the Judge as their discretion is controlled by well established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and



issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement. It cannot be disputed that the order in question substantially affect the rights of the parties. There is an award in favour of the workmen and the management had prayed for stay of the operation of the award. The Court has to consider such a plea keeping in view the provisions of Section 17-B of the Industrial Disputes Act, where such a prayer is neither impermissible nor improper. The contentions raised by the parties in support of their respective claims are expected to be dealt with by reasoned orders. We are not intentionally expressing any opinion on the merits of the contentions alleged to have been raised by respective parties before the learned single Judge. Suffice it to note that the impugned order is silent in this regard. According to the learned Counsel appearing for the appellant, various contentions were raised in support of the reliefs claimed but all apparently, have found no favour with the learned Judge and that too for no reasons, as is demonstrated from the order impugned in the present appeals."

19. The principles stated by this Court, as noticed supra, have been reiterated with approval by a Bench of this Court in a very recent judgment, in State of Uttaranchal V/s. Sunil Kumar Singh Negi [(2008) 11 SCC 205], where the Court noticed the order of the High Court which is reproduced hereunder:-

- "I have perused the order dated 27.5.2005 passed by Respondent 2 and I do not find any illegality in the order so as to interfere under Article 226/227 of the Constitution of India. The writ petition lacks merit and is liable to be dismissed."*

and the Court concluded as under:-

- "In view of the specific stand taken by the Department in the*

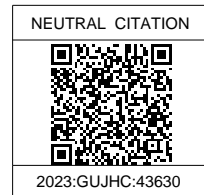


affidavit which we have referred to above, the cryptic order passed by the High Court cannot be sustained. The absence of reasons has rendered the High Court order not sustainable. Similar view was expressed in State of U.P. V/s. Battan¹. About two decades back in State of Maharashtra V/s. Vithal Rao Pritirao Chawan² the desirability of a speaking order was highlighted. The requirement of indicating reasons has been judicially recognised as imperative. The view was reiterated in Jawahar Lal Singh V/s. Naresh Singh³. In Raj Kishore Jha V/s. State of Bihar⁴ this Court has held that reason is the heartbeat of every conclusion and without the same, it becomes lifeless.

"8. ... Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;..."

As observed in State of Orissa vs. Dhaniram Lunar (2004) 5 SCC 568 In the light of the factual details particularly with reference to the stand taken by the Horticulture Department at length in the writ petition and in the light of the principles enunciated by this Court, namely, right to reason is an indispensable part of sound judicial system and reflect the application of mind on the part of the court, we are satisfied that the impugned order of the High Court cannot be sustained."

19.1 Besides referring to the above well-established principles, it will also be useful to refer to some text on the subject. H.W.R.



Wade in the book "Administrative Law, 7th Edition, stated that the flavour of said reasons is violative of a statutory duty to waive reasons which are normally mandatory. Supporting a view that reasons for decision are essential, it was stated:-

".....A right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice... ..Reasoned decisions are not only vital for the purposes of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself....."

Considering the aforesaid ratio as laid down by the Hon'ble Apex Court it was incumbent for the respondent authority to pass a reasoned order which in the opinion of this Court is indispensable. The reasoning reflects application of mind on the part of the respondent authority.

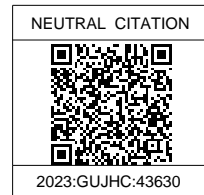
19.3 Section 8 requires the adjudicating authority to record "reason to believe" before issuance of show cause notice. At para-9 sub-para 22 at page-657/130 the adjudicating authority records as under :-

"It is evident from perusal of records including reasons recorded under Section 8 (1) by the undersigned that in this case the alleged criminal activity falling under scheduled



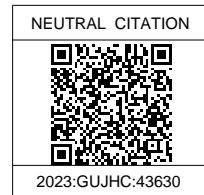
offence as enumerated under the PMLA, 2022, resulted in generation of proceeds of crime. Out of this generation of proceeds of crime the ED could not lay hands on the direct deployment of proceeds of crime and hence it has gone for attachment of property as value of the proceeds of crime. As evident from the contents of the Original Complaint the following properties attached under section 5(1) as mentioned on page 09 to 15 of OC and at page 185 to 190 of PAO have been stated to be properties attached as value of the proceeds of crime”.

No reasons are recorded by the adjudicating authority while issuing show cause notice in terms of Section 8(1). Having failed to record “reasons to believe” in terms of Section 8(1), in the opinion of this Court, the adjudicating authority has passed the impugned confirmation order dated 14.3.2023 which is liable to be quashed and set aside by exercising extraordinary jurisdiction under Article 226 of the Constitution of India.



20. At this stage, it is apposite to refer to position of law wherein the Hon'ble Supreme Court has consistently laid down the ratio that it is always open for the Court to exercise its extraordinary jurisdiction where there has been violation of principles of natural justice or where the order or proceedings are wholly without jurisdiction or vires of an Act are challenged. Considering the aforesaid, in the facts of the present case, the proceedings initiated by the respondent No.1, in the opinion of this Court are without jurisdiction considering the fact that once the proceedings under IBC were initiated prior to the proceeding initiated under PMLA there is a bar under Section 32A of the IBC Act and Section 33(5) of the IBC Act as also Section 238 of the IBC .

Further considering the orders passed by the competent authorities wherein the order under Section 5 of the PMLA wherein order of provisional attachment passed, has been quashed in the Special Civil Application No.19387 of 2022 by order dated 17.2.2023. While passing the impugned order



under Section Section 8 of the PMLA as referred above, the same is without assigning any independent reasoning and in view thereof the orders impugned dated 21.9.2022 and 14.3.2023 are required to be quashed and set aside and the same is quashed and set aside.

20.1 It is apposite to refer to (1998) 8 SCC 1, Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai para-15 read thus :-

“15. Under Art. 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”



20.2 Civil Appeal No.5121 of 2021 arising out of SLP (C) No.13639 of 2021 @ D No.11555 of 2020. The aforesaid judgment relied upon by Mr. Kshitij Amin, the learned advocate wherein the Hon'ble Supreme Court held that wherein efficacious alternative remedy is available, the parties are relegated to avail the said remedy. Reliance was placed on page-8 of the said judgment. However, in the same judgment para-11 wherein exception are carved out, para-11 reads thus :-

“11. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

- (i) a breach of fundamental rights;*
- (ii) a violation of the principles of natural justice;*
- (iii) an excess of jurisdiction; or*
- (iv) a challenge to the vires of the statute or delegated legislation.”*

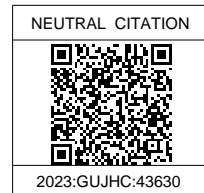
The case of the present writ-applicant herein, in the opinion of this Court falls under Clause (iii) of para-11 wherein



the order passed is in excess of jurisdiction.

20.3 In the case of State of Maharashtra and Ors. vs. Greatship (India) Ltd., reported in 2022 SCC OnLine SC 1262 which relied upon by Mr. Kshitij Amin, the learned advocate appearing for the respondent No.1 holds that the writ-applicant herein be relegated to availing of statutory remedy. However, in the opinion of this Court, the parties would normally be relegated to avail the statutory remedy. In the facts of the present case, the writ-applicant herein has carved out a case wherein the orders impugned are passed after the IBC proceedings came to be initiated, orders impugned are beyond the jurisdiction of competent authority and without any independent adjudication on the merits. In view thereof, in the opinion of this Court, no useful purpose would be served relegating the writ-applicant herein to avail statutory remedy by filing an appeal under Section 14 of the PMLA Act.

21. Considering the aforesaid, this Court is inclined to pass the following order:-



The action undertaken under IBC Act wherein liquidation of ABG Shipyard commenced on 25.4.2019 under the provisions of IBC Act, was prior to the provisional attachment order issued by the respondent No.1 under Section 5 of the PMLA on 21.9.2022. The action undertaken by the respondent No.1 under PMLA by provisionally attaching the properties of the writ-applicant came to be issued on 21.9.2022 which resulted in the final adjudication by the impugned order dated 14.3.2023 under Section 8 of the PMLA which is subsequent to the proceedings initiated under IBC and, therefore, in the opinion of this Court,

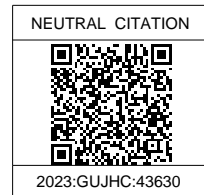
(a) Section 32A of the IBC Act would govern to the extent to which the non-obstante clause enshrined in the IBC would operate and exclude the operation of PMLA.

(b) The protection granted under Section 33(5) and Section 33(a)(2) of the IBC Act would override the power of the respondent No.1 to attach the properties under the PMLA Act.



Further Section 238 of the Act provides that the provisions of IBC would override anything inconsistent with any other law. Though the PMLA has similar provision under Section 71, the same is subservient to the provisions of IBC Act, since IBC Act was enacted after PMLA Act. When there are two enactments of non-obstante clauses, like the present one, the enactment which is subsequent in time overrides the other in line with the ratio as laid down in (2008) 8 SCC 148.

(c) The provisional attachment order which was subject matter of challenge and the writ-application herein being identically placed in the Special Civil Application No.19387 of 2022, the said order was quashed by order dated 17.2.2023. However, without considering the aforesaid and without assigning any “reasons to believe” while issuing show cause notice, the same having culminated in final adjudication under Section 8 of the Act, in the opinion of this Court, the respondent authority has passed the impugned order without considering the aforesaid and proceeded to pass an unreasoned



order.

(d) Though Mr. Kshitij Amin, the learned advocate appearing for the respondent authority submitted that the writ-applicant be relegated to avail alternative remedy by filing an appeal before the Tribunal, in the opinion of this Court, the facts of the present case wherein extraordinary jurisdiction under Article 226 of the Constitution of India is required to be exercised considering the ratio as referred above, wherein this Court has come to a conclusion that the orders impugned passed by the respondent authority are beyond jurisdiction.

22. For the foregoing reasons, by exercising extraordinary jurisdiction under Article 226 of the Constitution of India the order impugned dated 21.9.2022 passed by the respondent No.1 to the extent the same is qua the subject land and the writ-applicant and the consequential action to the impugned order including the complaint, show cause notice and final order dated 14.3.2023 passed by the adjudicating authority qua the subject land and the writ-applicant are quashed and set



aside. The writ-application stands allowed.

K.K. SAIYED

(VAIBHAVI D. NANAVATI,J)