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(Contd. on Cover page 3)

(g) Statutory auditors of the group-companies used for the entire modus operandi : The director-cum-statutory auditor of the group companies Mr. Rajashekar and Mr. Jayatheertha, the statutory auditor have been used for their expertise to facilitate the entire modus operandi.

9. Total dues to the CD :

As per the audited results as on March 31, 2018, the corporate debtor has overdues from its group companies, in the form of receivable of Rs. 33.70 crores and dues towards assets worth Rs. 1.52 crores which were distributed to the group companies. Details are below :

Group company name	*Net receivables (Rs.)*	*Assets of CD distributed to the group Rs.*	*Total dues (Rs.)*
M/s. Commune Properties India P. Ltd. (respondent No. 6)	46,322,665	13,375,380	59,698,045
M/s. Golden Gate Properties Ltd. (respondent No. 8)	41,804,526	1,801,180	43,605,706
M/s. Prisha Properties India P. Ltd. (respondent No. 7)	233,937,377		233,937,377
Total	322,064,568	15,176,560	337,241,128

10. Also as per audited results for 2017-18, the rest of the assets shown in the books have been distributed to the group companies to the extent of Rs. 1,51,76,560 (Rs. 1.52 crores), duly confirmed by the director of the company and the rest of the assets worth Rs. 74,41,849 is not found physically. Also, as pointed out in the audit report 2017-18 and also confirmed in the forensic audit report, the inventory of amount Rs. 941,23,192 have been written off without any revenue recognised/no invoice raised.

Hence, the minimum amount due from the group to the corporate debtor amounts to :

Sl. No.	*Details*	*Amount overdue from group (Rs.)*	*To be recovered from the directors of CD (Rs.)*	*Total amount due (Rs.)*
1.	Receivables overdue	322,064,5681		322,064,5681
2.	Assets with Group	15,176,560		15,176,560
3.	Assets not found	7,441,849		7,441,849
4.	WDV of assets sold to scrap dealers and money siphoned off	22,357,233		22,357,233

5.	Inventory consumed, not invoiced	94,123,192		94,123,192
	Total dues from group	337,241,128	123,922,274	461,163,403

8 The appellant, who is the third respondent, was heard by the Adjudicating Authority, which has been recorded by the Adjudicating Authority as follows :

> "3. The application is opposed by respondent No. 3 by filing separate reply dated March 20, 2019 by inter alia contending as follows :
>
> (1) The instant application is not maintainable either in law or on facts, and thus it is liable to be dismissed in limine on this ground alone.
>
> (2) It is true that the company M/s. Bhuvana Infra Projects was incorporated in the year 2011. However, it is not correct to state that it is a sub-contracting arm of its group companies. The companies has its own objects and functions within the ambit of objects as stated in the memorandum and articles of association. Hence, it is denied that the company-M/s. Bhuvana Infra Projects (hereinafter referred to as company for brevity) exclusive for the group companies obviously RP has not looked into the records and has made bald and frivolous allegations. It is asserted that the application is the New Age Properties LLP itself is not a group company belied this claim. However, the RP is put to strict proof of the allegations made in this paragraph.
>
> (3) It is admitted that the RP has to take control of all the assets of the corporate debtor but it is false to state that there are receivables overdue from the group companies. It is pointed out that the Tribunal rejected earlier I. A. No. 269 of 2018 with an observation that the appropriate forum for initiating fraudulent actions is criminal court and also granted liberty to RP to initiate criminal proceedings in accordance with law."

9 We have heard learned counsel for the parties and perused the record. As per section 60(1) of the I and B Code the National Company Law Tribunal having territorial jurisdiction over the place where the registered office is located will be the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors, as quoted below :

> "60. (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located."

The provision aforesaid makes it clear that the National Company Law Tribunal is empowered to deal with insolvency resolution and liquidation for corporate persons including corporate debtor and others. Merely because additional power of the Adjudicating Authority has been vested, the power of the National Company Law Tribunal under the Companies Act, 2013 does not stand extinguished. 10

In the case of *Y. Shivram Prasad* v. *S. Dhanapal* [2019] 214 Comp Cas 83 (NCLAT), Company Appeal (AT) (Insolvency) No. 224 of 2018, etc., disposed of on February 27, 2019 the Appellate Tribunal held that the Adjudicating Authority has dual role of the "Adjudicating Authority" and "National Company Law Tribunal" for the purpose of the "I and B Code". 11

The hon'ble Supreme Court in *Swiss Ribbons P. Ltd.* v. *Union of India* [2019] 213 Comp Cas 198 (SC) ; 2019 SCC Online SC 73 while dealing with the matter of settlement between the parties also observed that the National Company Law Tribunal has inherent power under rule 11 of the National Company Law Tribunal Rules, 2016. 12

Therefore, we hold that the Adjudicating Authority which is the National Company Law Tribunal has dual and interwoven role and power to pass order under section 213 of the Companies Act, 2013 read with rule 11 of the National Company Law Tribunal Rules, 2016. 13

Section 213 of the Companies Act, 2013 relates to "investigation into company's affairs in other cases" and reads as follows : 14

> "213. *Investigation into company's affairs in other cases.*—The Tribunal may,—
>
> (a) on an application made by—
>
> (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital ; or
>
> (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital,
>
> and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company ; or
>
> (b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—
>
> (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of

its members or that the company was formed for any fraudulent or unlawful purpose ;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members ; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct :

Provided that if after investigation it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose ; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447."

15 From clause (b) of section 213 of the Companies Act, 2013, it is clear that on an application made to it "by any other person" or "otherwise", if the Tribunal/Adjudicating Authority is satisfied that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, or that the company was formed for any fraudulent or unlawful purpose and that the person concerned in the formation of the company or

the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members or the members of the company have not given all the information with respect to its affairs which they might reasonably expect, and that the affairs of the company ought to be investigated, after giving a reasonable opportunity of being heard to the parties concerned, the Tribunal/Adjudicating Authority has power to refer the matter to the Central Government for investigation into the affairs of the company.

Apart from the power conferred by section 213 of the Companies Act, 2013, the National Company Law Tribunal has inherent powers under rule 11 of the National Company Law Tribunal Rules, 2016. Therefore, in public interest, it is always open to the National Company Law Tribunal after giving a reasonable opportunity of being heard to the parties concerned refer the matter to the Central Government for investigation, if the Tribunal/Adjudicating Authority forms a prima facie opinion that acts of fraud have been committed by company or group of companies or its director(s) or officers. In the present case "forensic audit report" alleged that the members of the corporate debtor and its group companies along with officers of the Bank of Maharashtra have committed certain fraud, which, inter alia, suggest that a sum of Rs. 3,172.25 lakhs are receivable by the corporate debtor. The appellant and others were given reasonable opportunity of hearing by the Adjudicating Authority. As such no interference is called for against the impugned order. In absence of any merit, the appeal is dismissed. No costs. **16**

[2020] 220 Comp Cas 101 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

MUKESH MANEKLAL CHOKSI

v.

UNION OF INDIA AND ANOTHER

JARAT KUMAR JAIN J. *(Judicial Member),*
BALVINDER SINGH and
DR. ASHOK KUMAR MISHRA *(Technical Members)*

February 17, 2020.

HF ▸ Appellant

OFFENCES AND PROSECUTION—AUDITOR—FAILURE TO DISCHARGE DUTY—NO PROOF THAT HE ACTED FRAUDULENTLY—ORDER DIRECTING

AUDITOR TO REFUND REMUNERATION AND SUSPENSION TO BE SET ASIDE—COMPANIES ACT, 1956, SS. 140, 447.

On March 12, 2014 the appellant was appointed statutory auditor of respondent No. 2-company. The appellant issued his auditor's report in respect of the company for the financial year 2014-15 and 2015-16 on September 5, 2015 and September 5, 2016 respectively. On March 20, 2017 the Ministry of Corporate Affairs ordered inspection of the company on the basis of a complaint, inter alia, alleging diversion of investors' money and irregularities in statutory compliances including non-listing of the company, non-issuance of financial statements after 1995. The Tribunal held that the appellant was not eligible to be appointed as auditor of any company for a period of five years and directed him to return to the company, the remuneration received by him during the period he acted as auditor. It also held that the auditor was liable for action under section 447 of the Companies Act, 1956. On appeal :

Held, *allowing the appeal, that the act of the appellant was a negligent act but there was no material on record to infer that he had acted fraudulently or had colluded with the directors of the company in relation to the affairs of the company or misused his position as statutory auditor of the company. The order of the Tribunal was not sustainable in law or in facts. Therefore, the order was to be set aside.*

Order of the National Company Law Tribunal set aside.

Company Appeal (AT) No. 89 of 2019.

Nesar Ahmed, Practising Company Secretary and *Rohit Chaudhary*, for the appellant.

C. Balooni, Assistant Director for respondent No. 1.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 JARAT KUMAR JAIN J. ***(Judicial Member)***.—The appellant, Mukesh Maneklal Choksi, filed this appeal against the order dated February 6, 2019 passed by the National Company Law Tribunal in C. P. No. 4365/140(5)/MB/2018.

2 The brief facts of this case are that M/s. Zen Shaving Ltd., respondent No. 2 herein, incorporated on March 7, 1995 under the Companies Act, 1956. On October 10, 1996 respondent No. 2-company came out with initial public offer and issued prospectus to raise public funds. On March 12, 2014 the appellant was appointed statutory auditor of respondent No. 2-company. The appellant issued auditor report for the financial years 2014-15 and 2015-16 on September 5, 2015 and September 5, 2016 respectively.

On March 20, 2017 respondent No. 1 herein through the Ministry of Corporate Affairs ordered inspection of respondent No. 2-company on the basis of complaint received from Jagdip H. Vaishnav against respondent No. 2-company, inter alia, alleging siphoning of investors' money and also about irregularities in statutory compliances including non-listing of company with Pune Stock Exchange, non-issuance of financial statements after 1995. On May 10, 2018 the inspecting officers of respondent No. 1 submitted its inspection report wherein it was highlighted that many times notices were sent to respondent No. 2-company through post but postal articles were returned with endorsement "left". On August 13, 2018 inspecting officer furnished supplementary inspection report to respondent No. 1.

3 Respondent No. 1 through MCA addressed a letter to the Regional Director, Western Region and forwarded inspection report of respondent No. 2-company, with a direction to take action under section 140(5) of the Companies Act, 2013 (hereinafter referred to as the "Act"). On the basis of the inspection report, Assistant Registrar of Companies, Maharashtra, Mumbai filed a Special Company Case No. 34 of 2018 before the City Civil and Sessions Court under section 447 of the Act against the appellant for providing clean audit reports to respondent No. 2-company for the financial years 2014-15 and 2015-16. On November 26, 2018 respondent No. 1 through the office of Regional Director, Western Region, filed Company Petition No. 4365/140(5)/MB/2018 before the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the National Company Law Tribunal) under section 140(5) of the Act. On January 3, 2019 the National Company Law Tribunal passed ad interim order whereby it was directed that the appellant shall cease to act as statutory auditor of respondent No. 2-company and further permitted respondent No. 1 to appoint an independent auditor for respondent No. 2-company.

4 After hearing the parties the National Company Law Tribunal vide order dated February 6, 2019 directed that appellant shall not be eligible to be appointed as an auditor of any company for a period of five years and also directed to refund the remuneration received by him during the period he acted as auditor, back to respondent No. 2-company. It is also directed that the auditor shall also be liable for action under section 447 of the Act.

5 Being aggrieved with this order the appellant filed the present appeal.

6 Learned counsel for the appellant filed written submissions and submitted that second proviso to sub-section (5) of section 140 of the Act was enforced with effect from June 1, 2016. From this date the National Company Law Tribunal was conferred with the jurisdiction to exercise powers

under second proviso to sub-section (5) of section 140 of the Act. Therefore, the National Company Law Tribunal cannot invoke the jurisdiction for the offence relating to financial years 2014-15 and 2015-16. It is further submitted that above referred provision is a penal provision and cannot be invoked retrospectively. Article 20(1) of the Constitution provides that no person shall be convicted of any offence except for violation of law in force at the time of the commissioning of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

7 It is further submitted that the appellant was appointed as an auditor of respondent No. 2-company for the financial years 2014-15 and 2015-16. During this period the company had not carried on any business activity. Previous auditor of respondent No. 2-company, i. e., S. M. Bhatt and Associates CAs (outgoing auditors) issued a letter dated March 10, 2014 to the appellant stating that they had certified balance-sheets and profit and loss account of the company for the year ending on March 31, 2013 on the basis of information given to them that there were no business transactions during the year. They have also clarified that respondent No. 2-company was not carrying on any business since many years and no books of account were produced before them for the purpose of audit. After considering the fact that the previous auditor had also adopted the same process the appellant has prepared the audit report for the financial years 2014-15 and 2015-16.

8 It is also submitted that inspecting officer before recording the appellant's statement has not provided the material documents, therefore, the appellant answered the questions as per the knowledge. Thus the reasonable opportunity has not been given to the appellant and the statement recorded by the inspecting officer cannot be used against the appellant.

9 Learned counsel for the appellant submits that respondent No. 1 except filing the inspection report has not placed on record any evidence to prove that the appellant directly or indirectly acted in a fraudulent manner or colluded in any fraud by or in relation to the company or its directors or its officers. The funds collected through initial public offer by the promoters/directors have already been siphoned off by them and in the financial years 2014-15 and 2015-16 respondent No. 2 has not carried out any business. The National Company Law Tribunal without giving any finding in this regard punished the appellant which is a major punishment without evidence.

10 Learned counsel for the appellant further submits that the National Company Law Tribunal before passing the order that the appellant would

be ineligible to be appointed as an auditor of the company has not given reasonable opportunity to put up his defence and solely gives his findings on the report of inspecting officer. The appellant has not committed any act, omission or concealed any fact in any manner with intent to deceive or gain undue advantage from respondent No. 2 and its stakeholders.

Learned counsel for the appellant submits that due to financial hardship **11**
the appellant could not engage counsel and did not file a formal reply to the company petition. However, he has filed an affidavit dated January 18, 2019 with respondent No. 1 stating that he accepted the interim order passed by the National Company Law Tribunal. He did not expect that any further adverse order to be passed against him. The appellant being a senior citizen and is a sole bread earner for his family, hence taking sympathetic view impugned order be set aside.

Learned counsel for respondent No. 1 has also filed the written sub- **12**
missions and submits that the appellant has accepted the interim order passed by the National Company Law Tribunal, hence on this ground alone appeal may be dismissed. Inspecting officers conferred with the powers of civil court under section 207(3) of the Act, therefore, during the inspection he has recorded the statement of the appellant and the appellant admitted that he has not called for any books of account and statutory register from the company and not audited the books of account of the company. It was found during the inspection that the company has defaulted/siphoned off funds, in such a situation it was duty of the statutory auditor to point it out and highlight the frauds committed by the company and its directors. However, the appellant being a statutory auditor fails to do so.

It is also submitted that as per the appellant he has received a letter from **13**
earlier statutory auditor that respondent No. 1 was not maintaining any books of account. However, such letter has not been brought to the notice of inspecting officer nor before the National Company Law Tribunal. This letter was produced before this Appellate Tribunal. At this stage the appellant may not be allowed to raise new submissions. The appellant has specifically admitted that respondent No. 1 has not produced any accounts books and without the accounts books he has prepared the audit report and has given a conclusion report. It seems that he is actively colluded with the management of the company in perpetrating frauds. The appellant has failed to discharge his duty as statutory auditor. The impugned order is well reasoned order. Hence the appeal may be dismissed.

Respondent No. 2-company is unrepresented. **14**

15 Having considered the submissions on behalf of the parties we have perused the record.

16 The findings of the National Company Law Tribunal is based on the report of inspecting officer, hence firstly we would like to refer the allegations raised in the complaint by Mr. Jagdip H. Vaishnav and findings of inspecting officer in his report which are as under :

(i) Shares are not listed at Pune Stock Exchange.

(ii) Siphoning of investors money.

(iii) Company has not issued financial statement after 1995.

(iv) Company changes registered office frequently.

(v) No company representatives attends calls given by the Registrar of Companies, Mumbai.

(vi) Investors are complaining about serious irregularities but do not get any response from regulators, investigating agency.

17 Pursuant to inspection, the inspecting officer has submitted an inspection report dated May 10, 2018 and supplementary inspection report dated August 13, 2018 wherein it is stated that :

"1. Many of the allegations raised by the complainant, Mr. Jagdip H. Vaishhav, are true due to the sheer fact that no registered office of respondent No. 2-company, existed.

2. No books of account of respondent No. 2-company were produced to the inspecting officer despite notices and summons being issued to respondent No. 2-company, its directors and statutory auditors.

3. The director/managing director at the helm of affairs failed to respond to the notices issued by the inspecting officer.

4. Respondent No. 2-company came out with initial public officer (IPO) and issued prospectus to raise public funds on October 10, 1996. Thereafter the team of directors has completely changed. The initial promoters of the company are not involved in the affairs of the company after September 29, 2005. Respondent No. 2-company is not listed on any stock exchange despite the assurances given in the prospectus dated October 10, 1996.

5. The date or retirement of Shri Ketan A. Gaglani, managing director who was involved in the day to day affairs of respondent No.2-company since December 18, 1995 (the company was incorporated on March 7, 1995) had retired on September 29, 2005.

6. The present directors, who took over the affairs of respondent No. 2-company since October 4, 2014 are not traceable.

7. The present directors of respondent No. 2-company are dummy/ shadow directors of Mr. Arvind Goyal Babulal, the chairman of respondent No. 2-company, who dodged his responsibilities to assist in the inspection.

8. All the commonly known attributes of a shell company exist in the case of respondent No. 2-company under inspection.

9. Mr. Arvind Goyal Babulal, the chairman of respondent No. 2-company, regarding provisions of section 2(60)(v) of the Companies Act, 2013, is the 'officer in default'.

10. The actions of the company and its directors prove that all the allegations raised are true and correct."

18 The respondent-company came up with an initial public offer vide prospectus dated October 10, 1996 with issue of 39,55,000 equity shares of Rs. 10 each as per aggregating Rs. 3,95,50,000. As per the statement made in the prospectus the shares of the respondent-company were to be listed on Pune, Vadodara and Ahmedabad Stock Exchange. However, it has been noted by the inspecting officer that the company is not listed in any of the Stock Exchange. In the report the details of funds collected and siphoned off has been mentioned. As per report before public issue loans and advances as on March 31, 1996 amounting to Rs. 33,14,592 and post public issue the said amount is tremendously increased to Rs. 3,41,04,407 as on March 31, 2016. The respondent-company has diverted funds to loans and advances. Apart from this the respondent-company has used public issue proceeds to write off more than Rs. 15.33 lakhs as expenses pertaining to capital issue, prospectus and registration fee/expenses, etc.

19 It is clear that the directors of respondent No. 2-company have not spent public issue money for the purpose for which the public issue was made, have not met the promise made in the prospectus, have diverted the funds and thus the prospectus dated October 10, 1996 issued by the respondent-company contains false and misleading promises. In the report, it is also found that the earning per share basic/diluted for March 31, 2014, March 31, 2015 and March 31, 2016 is Rs. 0.00055, company has enjoyed all the benefits given by the Government for 12 years from the date of public issue and there is clear cut indication that the respondent-company is heading for salvation.

20 It is clear that in the terms of provisions of section 62(1) of the Companies Act, 1956 the persons who are authorised to issue or prospectus of

the public/persons to subscribe for shares in/or debentures of the company shall be liable to pay compensation to every person who subscribes any shares in/or debentures of the company on the faith of prospectus for any loss or damage. It is also found that the company came out with initial public offer and issued prospectus to raise public funds on October 10, 1996. Thereafter the team of directors has completely changed. The initial promoters of the company are not involved in the affairs of the company subsequent to September 29, 2005 the directors who took over the affairs of the company since October 4, 2004 are not traceable. The present directors of the company are apparently dummy/shadow directors. Mr. Arvind Goyal Babu Lal, the chairman of the company who dodged his responsibility to assist in the inspection.

21 Thus it is apparent that inspecting officer could not trace out the directors who have actually defraud the shareholders and for last many years the company is not carrying out any business. In this background we have considered the submission of the appellant. The appellant was appointed as an auditor on March 12, 2014 and he has issued audit report for the financial years 2014-15 and 2015-16. During this period the company has not carried out any business activity. Previous auditor of the company, i. e., S. M. Bhatt and Associates issued letter dated March 10, 2014 to the appellant stating that they have certified balance-sheets and profit and loss account of the company for the year ending on March 31, 2013 on the basis of information given to them that there were no business transactions during the year. The appellant submitted that he adopted the same process and prepared the audit reports for the financial years 2014-15 and 2015-16. It is true that during the audit he has not called for any books of account and statutory register from the company. However, he has signed audit report of the company for the relevant period. Only on this ground it cannot be inferred that the appellant being an auditor acted in a fraudulent manner or abated or colluded in any fraud by or in relation to the company or its directors. It is apparent from the report of the inspecting officer that the funds collected by IPO has already been siphoned off by the earlier directors and the directors who are looking to the affairs of the company till 2004 are not traceable.

22 We have carefully examined the balance-sheets and financial statements for the financial years 2014-15 and 2015-16 which shows that the company has not carried out any business. We have also found that the respondent-company has not filed any statements before the Registrar of Companies since its incorporation. However, the Registrar of Companies has not taken any action against the company and its directors. We have also seen that

the directors have siphoned the money between 1996 to 2004. However, the inspection was ordered on March 20, 2017 and the report submitted on May 10, 2018 and supplementary report on August 13, 2018 and the inspecting officer is unable to trace out real culprits, i. e., the then directors.

Now we have considered the legal issue raised in this appeal is that the **23** National Company Law Tribunal has passed the order against the appellant under second proviso to sub-section (5) of section 140 of the Act which came into force on June 1, 2016. However, the appellant issued report for the financial years 2014-15 and 2015-16, i. e., prior to the provision came into force. Therefore, the National Company Law Tribunal cannot invoke jurisdiction retrospectively.

The appellant was appointed on March 12, 2014 as statutory auditor of **24** respondent No. 2-company. The appellant issued audit report for the financial years 2014-15 and 2015-16 on September 5, 2015 and September 5, 2016 respectively. The appellant has issued the audit report for the financial year 2015-16 on September 5, 2016 before that the second proviso to sub-section (5) of section 140 of the Act came into force with effect from June 1, 2016. Hence the National Company Law Tribunal can exercise the powers in above referred provision.

We are of the view that the act of the appellant is certainly a negligent **25** act but there is no material on record to infer that he has acted fraudulently and colluded with the directors of the company in relation to affairs of the company or he has misused his position as statutory auditor of the company.

We are of the considered view that the findings of the National Com- **26** pany Law Tribunal are not sustainable in law as well as in facts. Therefore, the appeal is hereby allowed and the impugned order is set aside. However, no order as to costs.

[2020] 220 Comp Cas 110 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

RAI BAHADUR SHREE RAM AND CO. P. LTD. AND ANOTHER

v.

BHUVAN MADAN, RESOLUTION PROFESSIONAL OF FERRO ALLOYS CORPORATION LTD. AND OTHERS

SUDHANSU JYOTI MUKHOPADHAYA J. ***(Chairperson)*** and
BANSI LAL BHAT J. ***(Judicial Member)***

March 12, 2020.

HF ▶ Respondent

INSOLVENCY RESOLUTION—RESOLUTION PLAN—COMMITTEE OF CREDITORS—COMMERCIAL WISDOM OF COMMITTEE OF CREDITORS IN APPROVING OR REJECTING RESOLUTION PLAN—ADJUDICATING AUTHORITY HAS NO POWER TO SCRUTINISE RESOLUTION PLAN APPROVED OR DECLINED BY REQUISITE MAJORITY OF COMMITTEE OF CREDITORS—INSOLVENCY AND BANKRUPTCY CODE, 2016, SS. 30, 31, 32.

The resolution plan submitted by SPTL was approved by 95.15 per cent. of voting share of the committee of creditors and was further approved by the Adjudicating Authority. The settlement proposal from the appellants was rejected by the committee of creditors with requisite majority leaving no scope for the Adjudicating Authority to direct reconsideration of settlement proposal. On appeal :

Held, *that the commercial wisdom of the committee of creditors in approving or rejecting a resolution plan was essentially based on a business decision, which involved evaluation of the resolution plan based on its feasibility besides the committee of creditors being fully informed about the viability of the corporate debtor. Such commercial wisdom of the committee of creditors with requisite voting majority was non-justiciable and the discretion of the Adjudicating Authority was circumscribed to scrutiny of the resolution plan as approved by the requisite majority voting share of the financial creditors. The enquiry postulated under section 31 of the Insolvency and Bankruptcy Code, 2016, was limited to matters covered under section 30(2) of the Code when the resolution plan did not conform to the stated conditions. Therefore, the appellants could not question the commercial wisdom of the committee of creditors in rejecting the settlement proposal emanating from the appellants, with the requisite majority and in approving the resolution plan of SPTL. No*

material irregularity in the corporate insolvency resolution process before the resolution professional had been demonstrated. The fact that the Adjudicating Authority had declined to direct reconsideration of the settlement proposal of the appellants which had already been rejected did not impinge upon the legality and conformity of the approved resolution plan with the conditions stated in section 32 of the Code.

Committee of Creditors of Essar Steel India Ltd. *v.* Satish Kumar Gupta [2020] 219 Comp Cas 97 (SC) *and* Sashidhar (K.) *v.* Indian Overseas Bank [2019] 213 Comp Cas 356 (SC) *relied on*.

Order of the National Company Law Tribunal affirmed.

Cases referred to :

Committee of Creditors of Essar Steel India Ltd. *v.* Satish Kumar Gupta [2020] 219 Comp Cas 97 (SC) (paras 5, 7)

Maharashtra Seamless Ltd. *v.* Padmanabhan Venkatesh [2020] 9 Comp Cas-OL 683 (SC) (para 4)

Sashidhar (K.) *v.* Indian Overseas Bank [2019] 213 Comp Cas 356 (SC) (paras 3, 5, 7)

Company Appeal (AT) (Insolvency) Nos. 207 and 208 of 2020.

Rajeev Ranjan, Senior Advocate with *S. C. Das*, *Saurav*, *N. S. Ahluwalia*, *Deepak Chawla*, *Adhish Sharma*, *Neeraj* and *Ms. Aliya Durafshan*, for the appellants.

Krishnan Venugopal, Senior Advocate with *Saurav Pander* and *Ms. Charu Bansal*, for Resolution Professional.

Ramji Srinivasan, Senior Advocate with *Karan Kanwal*, *Kunal Godhwani* and *Rishab Kapoor*, for respondent No. 3.

Amit S. Chaddha and *Ms. Pratiksha Mishra*, Advocates for Successful Resolution Application.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

Bansi Lal Bhat J. ***(Judicial Member)***.—The resolution plan submitted 1
by respondent No. 4-"Sterlite Power Transmission Ltd." (SPTL) was approved by 95.15 per cent. of voting share of the committee of creditors and same was further approved by the Adjudicating Authority (National Company Law Tribunal), Cuttack Bench, Cuttack by deciding in terms of order dated January 30, 2020 passed in I. A. No. 157/CTB/2019 arising out of C. P. (IB) No. 251/KB/2017. The appellant's application being I. A. No. 175/CTB/2019 arising out of C. P. (IB) No. 251/KB/2017 to direct the committee of creditors to consider the settlement proposal came to be rejected

by virtue of another order passed on same date, viz., January 30, 2020 regard being had to approval of resolution plan of SPTL coupled with the fact that the settlement proposal emanating from the appellants has been rejected by the committee of creditors with requisite majority leaving no scope for the Adjudicating Authority to direct reconsideration of settlement proposal. Being aggrieved of both orders passed by the Adjudicating Authority on January 30, 2020 the appellants have filed the instant appeal.

2 It is contended before us that the Adjudicating Authority while passing the impugned orders, failed to consider whether the approved resolution plan conformed with section 30 of the Insolvency and Bankruptcy Code, 2016 (for short the "I and B Code") and its objective, i. e., maximization of value of assets of the corporate debtor. The impugned orders have also been assailed on the ground of being non-speaking cryptic orders without application of mind.

3 Having heard learned counsel for the parties, we are of the considered opinion that the committee of creditors, acting on the basis of evaluation of proposed resolution plan and assessment made by their team of experts, expressed their opinion after due deliberations in CoC meetings through voting as per voting share which is a collective business decision. The commercial wisdom of the financial creditors individually or their collective decision is beyond the pale of challenge before the Adjudicating Authority and the same has been made non-justiciable. This is the dictum of the hon'ble apex court in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC) ; [2019] 12 SCC 150 ; [2019] 4 SCC (Civ) 222 ; [2019] SCC Online SC 257. Dealing with the scope of an appeal under section 61(1) of the I and B Code, the hon'ble apex court noticed that apart from other grounds the appeal could be instituted against an order approving a resolution plan limited to six grounds noticed therein including that the approved resolution plan is in the contravention in the provisions of any law for the time being in force or that there has been any material irregularity in exercise of powers by the resolution professional during the corporate insolvency resolution process. Thus, it is clear that the jurisdiction bestowed upon this Appellate Tribunal too is expressly circumscribed. The examination in challenge to the approved resolution plan by this Tribunal is limited to matters other than enquiry into the business decision based on commercial wisdom of the committee of creditors. The limited judicial review in appeal does not extend to oversee and question the business decision of the majority of committee of creditors and the committee of creditors cannot be directed to reverse its business decision or reconsider a settlement proposal that has been rejected with requisite majority.

In *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* (Civil Appeal No. 4242 of 2019 vide judgment dated January 22, 2020) [2020] 9 Comp Cas-OL 683 (SC), the hon'ble apex court held that the Appellate Tribunal ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. 4

The dictum of law laid down in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC) ; [2019] 12 SCC 150 ; [2019] 4 SCC (Civ) 222 ; [2019] SCC Online SC 257 stands reiterated in *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2019] SCC Online SC 1478 ; [2020] 219 Comp Cas 97 (SC), wherein the hon'ble apex court observed as under : 5

> "Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the committee of creditors, has to be within the four corners of section 30(2) of the Code, in so far as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, in so far as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC) ; [2019] 12 SCC 150 ; [2019] 4 SCC (Civ) 222 ; [2019] SCC Online SC 257.
>
> The argument, though attractive at the first blush, but if accepted, would require us to rewrite the provisions of the I and B Code. It would also result in doing violence to the legislative intent of having consciously not stipulated that as a ground to challenge the commercial wisdom of the minority (dissenting) financial creditors. Concededly, the process of resolution plan is necessitated in respect of corporate debtors in whom their financial creditors have lost hope of recovery and who have turned into non-performer or a chronic defaulter. The fact that the concerned corporate debtor was still able to carry on its business activities does not obligate the financial creditors to postpone the recovery of the debt due or to prolong their losses indefinitely. Be that as it may, the scope of enquiry and the grounds on which the decision of 'approval' of the resolution plan by the CoC can be interfered with by the Adjudicating Authority (National Company Law Tribunal), has been set out in section 31(1) read with section 30(2) and by the Appellate Tribunal (National Company Law Appellate Tribunal) under section 32 read with section 61(3) of the I and B Code. No corresponding provision has been envisaged by the Legislature to empower the resolution professional, the Adjudicating Authority (National Company Law Tribunal) or for

that matter the Appellate Authority (National Company Law Appellate Tribunal), to reverse the 'commercial decision' of the CoC much less of the dissenting financial creditors for not supporting the proposed resolution plan. Whereas, from the legislative history, there is contraindication that the commercial or business decisions of the financial creditors are not open to any judicial review by the Adjudicating Authority or the Appellate Authority . . .

Suffice it to observe that in the I and B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I and B Code which empowers the Adjudicating Authority (National Company Law Tribunal) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by the CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under section 30(4) of the I and B Code. At best, the Adjudicating Authority (National Company Law Tribunal) may cause an enquiry into the 'approved' resolution plan on limited grounds referred to in section 30(2) read with section 31(1) of the I and B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (National Company Law Appellate Tribunal) is limited to the grounds under section 61(3) of the I and B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by the financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent. of voting share to approve the resolution plan ; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the Adjudicating Authority under section 31 of the I and B Code dealing with approval of the resolution plan."

Thus, it is the settled proposition of law that the commercial wisdom of **6**
the committee of creditors in approving or rejecting a resolution plan is essentially based on a business decision, which involves evaluation of the resolution plan based on its feasibility besides the committee of creditors being fully informed about the viability of the corporate debtor. Such commercial wisdom of the committee of creditors with requisite voting majority is non-justiciable and the discretion on Adjudicating Authority is circumscribed to scrutiny of resolution plan as approved by the requisite majority voting share of the financial creditors. The enquiry postulated under section 31 of the I and B Code is limited to matters covered under section 30(2) of the I and B Code when the resolution plan does not confirm the stated conditions. Therefore, the appellants cannot question the commercial wisdom of the committee of creditors in rejecting the settlement proposal emanating from the appellants, with the requisite majority and in approving the resolution plan of SPTL. No material irregularity in corporate insolvency resolution process before the resolution professional has been demonstrated. Merely because the Adjudicating Authority has declined to direct reconsideration of the already rejected settlement proposal of the appellants does not impinge upon the legality and conformity of the approved resolution plan with the conditions stated in section 32 of the I and B Code.

Viewed thus, we find that the impugned orders have been passed on **7**
proper application of mind and conform to the proposition of law as propounded by their Lordships of the hon'ble apex court in *K. Sashidhar* v. *Indian Overseas Bank* [2019] 213 Comp Cas 356 (SC) ; [2019] 12 SCC 150 ; [2019] 4 SCC (Civ) 222 ; [2019] SCC Online SC 257 and *Committee of Creditors of Essar Steel India Ltd.* v. *Satish Kumar Gupta* [2019] SCC Online SC 1478 ; [2020] 219 Comp Cas 97 (SC). We find no merit in these appeals and same are dismissed. However, there shall be no order as to costs.

[2020] 220 Comp Cas 116 (NCLT)

[BEFORE THE NATIONAL COMPANY LAW TRIBUNAL — NEW DELHI—COURT-III]

PARVESH MAGOO[1]

v.

IREO GRACE REALTECH P. LTD.

R. VARADHARAJAN *(Judicial Member)* and
K. K. VOHRA *(Technical Member)*

September 26, 2019.

HF ▶ Respondent

INSOLVENCY RESOLUTION—APPLICATION BY FINANCIAL CREDITOR—FINANCIAL CREDITOR ALLOTTEE OF REAL ESTATE PROJECT—SEEKING REFUND OF MONEY ON GROUND OF DELAY—FINDING THAT NO DELAY IN DELIVERY OF POSSESSION—APPLICATION TO BE REJECTED—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 7.

The financial creditor entered into a flat buyer's agreement dated June 3, 2014 with the corporate debtor and paid an amount of Rs. 1,59,29,016 in respect of the project. According to the flat buyers agreement, the corporate debtor was obliged to deliver possession within a period of 42 months from the date of approval of the building plans or fulfilment of pre-conditions imposed thereunder with a further grace period of 6 months failing which the corporate debtor was liable to refund the amount paid by the financial creditor with simple interest at 8 per cent. per annum till the date of the refund. On an application filed under section 7 of the Insolvency and Bankruptcy Code, 2016, contending that the corporate debtor had not handed over possession of the unit nor refunded the amount paid by the financial creditor :

Held, *dismissing the application, that the occupation certificate was applied for by the corporate debtor on July 5, 2018 and it was received on May 31, 2019 and the e-mail for the termination of the agreement was sent on December 8, 2018 which was 5 months after the occupation certificate was obtained from the authorities by the corporate debtor. Hence the corporate debtor had fulfilled its obligation of applying for the occupation certificate within the time frame. Also by letter dated June 14, 2019 the corporate debtor had written to the financial creditor stating that apartment was ready for possession. This was not a fit case to initiate the insolvency process.*

1. This order has been affirmed by the National Company Law Appellate Tribunal : see [2020] 220 Comp Cas 120 (NCLAT) *infra*.—Ed.

PIONEER URBAN LAND AND INFRASTRUCTURE LTD. *v.* UNION OF INDIA [2019] 217 Comp Cas 1 (SC) (para 2) *referred to*.

C. P. No. IB-10/ND/2019.

Piyush Singh, advocate for the applicant.

Saurabh Kalia and *Sameer Chaudhary*, advocates for the respondent.

ORDER

The present application is filed under section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity "Code") read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Parvesh Magoo (for brevity "applicant") with a prayer for initiation of corporate insolvency process against IREO Grace Realtech P. Ltd. (for brevity "corporate debtor"). **1**

The applicant-Parvesh Magoo is an allottee of a real estate project. The applicant is ex facie a financial creditor in terms of the provisions of section 5(8)(f) and *Explanation* inserted by the Second Amendment Act, 2018 with effect from June 6, 2018. The challenge to the aforesaid amendment has been repelled by the hon'ble Supreme Court in the judgment rendered in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC) ; [2019] SCC Online SC 1005 (Writ Petition (Civil) No. 43 of 2019, decided on August 9, 2019). Therefore, no doubt is left that the applicant is a financial creditor. **2**

The respondent-IREO Grace Realtech P. Ltd., is a company incorporated on May 12, 2010 under the provisions of the Companies Act, 1956 having its registered office at C-4, 1st Floor, Malviya Nagar, New Delhi-110 017 and CIN U70200DL2010PTC202572. The authorised share capital of the corporate debtor is Rs. 1,80,00,00,000 and paid-up capital of the company is Rs. 1,11,21,92,950. **3**

As per the averments made in the application, the financial creditor entered into a flat buyer's agreement dated June 3, 2014 with the corporate debtor and had paid an amount of Rs. 1,59,29,016 in respect of the project named "The Corridors' at Sector 67A, Gurgaon, Haryana, India during the year 2013. According to the flat buyers agreement, the financial creditor was supposed to make payments to the corporate debtor in terms of the payment plan opted by the financial creditor as set out in the payment plan and the corporate debtor was obliged to deliver possession within the period of 42 months from the date of approval of the building plans and/or fulfilment of preconditions imposed thereunder with a further grace period of 6 months failing which the corporate debtor was liable to refund the **4**

amount paid by the financial creditor with simple interest at 8 per cent. per annum till the date of the refund.

5 It is submitted by the financial creditor that as per the agreement, the possession of the said flat had to be handed over by July, 2017. It is stated that despite having received an amount of Rs. 1,59,29,016 the corporate debtor has till date neither handed over the possession of the said unit nor has refunded the amount paid by the financial creditor.

6 The financial creditor have given the details of the total amount of the financial debt and the transactions on account of which the debt fell due. The total amount of financial debt as per financial creditor is Rs. 2,07,57,385 which includes both principal amount and compensation (interest).

7 The financial creditor further submitted that after the elapse of the due date of delivery, the financial creditor started enquiring with the corporate debtor about the tentative date of delivery. However, the corporate debtor kept making false promises of delivering the residential unit I in near future in order to use the financial creditor's hard earned money as interest free loan. And after having several meetings in person and telephonic conversations with the corporate debtor, the financial creditor sent an e-mail dated December 8, 2018 requesting the corporate debtor to cancel their booking and refund Rs. 1,59,29,016 paid by the financial creditor along with the interest. Despite the notice of termination issued by the financial creditor and the demand for refund of amount paid to the corporate debtor, the corporate debtor has failed to return the amount to the financial creditor.

8 The corporate debtor has filed its reply and it states that in terms of clause 43 of Schedule I of the booking application and clause 13.3 of the agreement, the non-applicant had to handover the possession of the apartment within 42 months ("Commitment Period") + 6 months ("Grace Period") + 12 months ("Extended Delay Period") from the date of approval of building plans and/or fulfilment of the pre-conditions imposed there under. Therefore, the total period for delivery of possession was 60 months from the date of approval of building plans and or/fulfilment of the pre-conditions imposed thereunder.

9 The corporate debtor further asserted that the building approval was granted on July 23, 2013 whereas, several pre-conditions were required to be satisfied, and the last of the pre-condition, i. e., Fire Safety Scheme approval was granted only on November 27, 2014. Therefore, the proposed time for handing over the possession has to be computed from November 27, 2014 which will expire on November 27, 2019.

The corporate debtor further states that since the time for the proposed delivery of possession has not arisen as yet, question of any delay in delivery of possession has not arisen as yet. There is no question of any delay in delivery of possession, or a claim for compensation in relation thereto. 10

The additional affidavit filed by the corporate debtor on September 3, 2019 shows that the occupation certificate was applied by the corporate debtor on July 5, 2018 and the same was received by it on May 31, 2019 and the e-mail for the termination of the agreement was sent on December 8, 2018 which was 5 months after the occupation certificate was obtained from the authorities by the corporate debtor. Hence the corporate debtor had fulfilled its obligation of applying for the occupation certificate with in the time frame. 11

Also, upon the perusal of clause 13.3 of the apartment buyer's agreement which states as under : 12

> "Subject to force majeure, as defined herein and further subject to the allottee having complied with all its obligations under the terms and conditions of this agreement and not having defaulted under any provision(s) of this agreement including but limited to the timely payment of all dues and charges including the total sale consideration, registration charges, stamp duty and other charges and also subject to the allottee having complied with all formalities and documentation as prescribed by the· company, the company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder ('commitment period')."

Also vide letter dated June 14, 2019 the corporate debtor has written to the financial creditor stating that Apartment No. CD-A6-02-203, Type-3 BHK, Floor 2, Tower A6 in Corridors, Sector 67A, Dhumaspur, Gurgaon is ready for possession. 13

For the reasons stated, this Tribunal is of the opinion that it is not a fit case to initiate insolvency process as prayed for by the petitioner-applicant. Hence, this application is dismissed, however without costs. 14

[2020] 220 Comp Cas 120 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

PARVESH MAGOO

v.

IREO GRACE REALTECH P. LTD.

VENUGOPAL (M.) J. ***(Judicial Member),***
KANTHI NARAHARI and
V. P. SINGH ***(Technical Members)***

February 26, 2020.

HF ▶ Respondent

INSOLVENCY RESOLUTION—APPLICATION BY FINANCIAL CREDITOR—CREDITOR ALLOTTEE OF FLAT CLAIMING REFUND OF AMOUNT PAID FOR POSSESSION OF FLAT—LETTER FOR HANDING OVER POSSESSION ISSUED BY CORPORATE DEBTOR—NO DEFAULT ON PART OF CORPORATE DEBTOR—PETITION REJECTED—PROPER—INSOLVENCY AND BANKRUPTCY CODE, 2016, s. 7.

A petition was filed under section 7 of the Insolvency and Bankruptcy Code, 2016, contending that despite assurances to deliver possession by July, 2017 the corporate debtor failed to fulfil its obligation within the stipulated time. Thus the financial creditor claimed refund of the amount paid along with interest, till the date of refund. The Adjudicating Authority rejected the application filed by the financial creditor holding that there was no default on the part of the corporate debtor and that the financial creditor had failed to prove that any debt was due and payable by the corporate debtor. On appeal :

Held, *that despite the approval of the building plan on July 23, 2013 the project could not be started due to certain pre-imposed conditions, including but not limited to obtaining the grant of approval by the Ministry of Environment and Fire Safety, before commencement of construction. The corporate debtor obtained environmental approval on December 12, 2013 and the approval reiterated the requirement of approval by the Fire Department. Therefore, the corporate debtor applied for the Fire Safety approval on October 23, 2013 and before starting any construction, approval from the Fire Department, in terms of section 15 of the Haryana Fire Safety Act, 2009, was material for the fulfilment of the obligations and commencement of construction. Accordingly, the date of handing over of possession was to be computed from the date of grant of fire safety approval, i. e., dated November 27, 2014. Before that, the letter for handing over possession was already issued to the*

financial creditor. If the intention of the allottees was only recovery of money and not resolution for possession of the apartment, the corporate debtor should bring this to the notice of the Adjudicating Authority. There was no need for interference with the order.

PIONEER URBAN LAND AND INFRASTRUCTURE LTD. *v.* UNION OF INDIA [2019] 217 Comp Cas 1 (SC) *relied on*.

Order of the National Company Law Tribunal in PARVESH MAGOO *v.* IREO GRACE REALTECH P. LTD. [2020] 220 Comp Cas 116 (NCLT) *affirmed*.

Cases referred to :

Navin Raheja *v.* Shilpa Jain [2020] 219 Comp Cas 589 (NCLAT) (para 14)

Parvesh Magoo *v.* IREO Grace Realtech P. Ltd. [2020] 220 Comp Cas 116 (NCLT) (para 1)

Pioneer Urban Land and Infrastructure Ltd. *v.* Union of India [2019] 217 Comp Cas 1 (SC) (paras 14, 15, 17)

Company Appeal (AT) (Insolvency) No. 1141 of 2019.

Piyush Singh, *Aditya Parolia* and *Ms. Sumbul Ismail* for the appellant.

Saurabh Kalia, *Sameer Choudhary* and *Ms. Saloni Purohit* for the respondent.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

V. P. SINGH ***(Technical Member)***.—This appeal emanates from the order passed by the Adjudicating Authority/National Company Law Tribunal, New Delhi in C. P. No. IB-10/(ND)/2019—(*Parvesh Magoo* v. *IREO Grace Realtech P. Ltd.* [2020] 220 Comp Cas 116 (NCLT)), whereby the Adjudicating Authority has rejected the application filed by the appellant under section 7 of the Insolvency and Bankruptcy Code, 2016 (for short "I and B Code"). The parties are represented by their original status in the company petition for the sake of convenience. **1**

Brief facts of the case are as follows : **2**

The applicant/appellant being a financial creditor made a booking of a unit No. 203 in Tower No. A6, having a super area of 1,726.91 sq.ft., in the real estate project, being developed by the respondent under the name of "The Corridors" situated at Sector 67A, Gurgaon, Haryana. The respondent after collecting Rs. 17,00,000 (rupees seventeen lakhs only) from the appellant issued an allotment letter dated August 7, 2013 and subsequently

after a delay of almost a year executed an "apartment buyer's agreement" on June 3, 2014. As per clause 13.3 of the terms of agreement, the respondent was to deliver the possession of the unit by July, 2017 (i. e., 42 months from the date of approval of building plans), which the respondent had grossly failed to deliver. Despite assurances to deliver possession by July, 2017 the respondent, failed to fulfil its obligation within the stipulated time. Thus the appellant claimed refund of the amount as paid by them along with interest, till the date of refund. The appellant, as per terms of the agreement, made prompt payment of all the instalments, as and when demanded by the respondent. The appellant adhered to the payment schedule and paid a total sum of Rs. 1,59,29,016 (rupees one crore fifty nine lakhs twenty nine thousand and sixteen only) to the respondent and despite receiving timely payments failed to deliver the possession of the allotted unit. Thus the appellant/financial creditor terminated the agreement vide e-mail dated December 8, 2018 and sought a refund of the total amount already paid, along with interest, which she was legally entitled to as per the agreement. The appellant contends that the respondent corporate debtor owes Rs. 2,07,57,385 (rupees two crores seven lakhs fifty seven thousand three hundred and eighty five only) as financial debt. Therefore, the applicant/financial creditor filed an application under section 7 of the I and B Code for initiation of the corporate insolvency resolution process (in short "CIRP"), which was rejected by the impugned order.

The appeal has been filed mainly on the ground as under :

(a) The Adjudicating Authority, while rejecting the application has ignored the fact that the default occurred on July 10, 2017 and the project, i. e., being developed by the respondent, is still incomplete.

(b) The Adjudicating Authority, while rejecting the application has completely overlooked the well-settled principle of law as laid down by the hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Govindan Raghavan* in Civil Appeal No. 12238 of 2018 that a home buyer cannot be made to wait for years after the due date of possession and the home buyer cannot be forced to take possession of the allotted unit if the real estate developer has completely failed to construct the project within the promised period.

(c) The Adjudicating Authority has completely ignored the settled principle of law laid down by the National Consumer Disputes Redressal Commission in the case of *Abhishek Khanna* v. *IREO Grace Realtech P. Ltd.* in Consumer Complaint No. 38 of 2017.

(d) The decision of the Adjudicating Authority that default has not occurred on the part of the respondent is erroneous.

(e) The Adjudicating Authority has ignored the fact that the possession was due in July, 2017. The purpose of the builder buyer agreement got completely frustrated due to delay in delivery of possession.

(f) The finding of the Adjudicating Authority that the appellant had terminated the said agreement dated December 8, 2018 when the respondent had not even received the occupation certificate, is erroneous.

We have heard the arguments of learned counsel for the parties and perused the record. 3

The Adjudicating Authority has rejected the application mainly on the ground that the building approval is of dated July 23, 2013 which was subject to several preconditions required to be satisfied. The last precondition was regarding Fire Safety Scheme approval, which was granted only on November 27, 2014. Therefore, the proposed time for handing over the possession, i. e., five years from November 27, 2014 was to expire on November 27, 2019. 4

The respondent/corporate debtor submitted that the question of delay in delivery of possession could not arise, before the time for the proposed delivery of possession starts. The respondent further contends that it had applied for the occupational certificate on July 5, 2018 but it was received on May 31, 2019 and the e-mail for the termination of the agreement is of December 8, 2018 which is just five months after the occupational certificate was obtained by the corporate debtor. The corporate debtor had fulfilled its obligation by applying for the occupational certificate within the time frame. 5

The respondent-corporate debtor further contends that the letter was sent to the appellant/financial creditor, stating that Apartment No. CD-A6-02-203, Type 3 BHK, Floor-2, Tower A-6, The Corridors, Sector-67A, Dhumaspur, Gurgaon is ready for possession. In the circumstances, the Adjudicating Authority has held that the corporate debtor has not committed any default. Therefore the application for initiation of CIRP has been rejected by the impugned order. 6

The respondent further contends that the petition, filed under section 7 of the I and B Code, is only to harass the corporate debtor and to extract a huge amount of money. As per clause 13.3 of the apartment buyers agreement (from now on referred to as "the agreement"). The respondent had fulfilled its obligation in applying for the "occupational certificate" within the time frame and had even offered possession to the appellant within the stipulated time. It is further contended that the respondent had completed construction of 1,356 apartments (approximately out of which 700 apartments in Towers A6 to A10, B1 to B4, C3 to C7, EWS, convenient 7

shopping, two-level basement are ready to move in, and occupational certificate for the same has been obtained on May 31, 2019. The notice of possession was given to the applicant on June 14, 2019 and the possession of units have been offered to 381 allottees, out of which 62 allottees have already taken possession, and some of the allottees are also residing in the said group housing society.

8 The respondent further contends that as per section 3(12) of the I and B Code, no debt was ever due and payable as per section 3(11) of the I and B Code. Given the "agreement" dated June 3, 2014 allottees had agreed that the offer for possession for the concerned apartment in terms of provisions of clauses 13.3, 13.4, and 13.5 of agreement. The date of the offer for possession about a unit of the apartment depended on the approval of the building plan, and fulfilment of the conditions imposed by the said approval. Accordingly, the respondent undertook to handover the possession of the apartment within the stipulated period of 60 months, i. e., 42 months commitment period plus six months "grace period" and six months extended "delay period" from the date of approval of plan and fulfilment of the preconditions imposed thereunder.

9 In the present case, the respondent emphatically contends that it could not commence construction despite approval of the building plan dated July 23, 2013 as the said approved imposed certain pre-conditions including but not limited to (a) obtaining grant of approval by Ministry of Environment and Forest, (ii) Fire Safety Approval before the commencement of construction. The respondent obtained environmental approval on December 12, 2013 and the said approval reiterated the requirement for approval of the Fire Department. Therefore, the respondent applied for Fire Safety Approval on October 23, 2013 before starting any construction. It is further elucidated that the approval of the Fire Department in terms of section 15 of the Haryana Fire Safety Act, 2009 was material for the fulfilment of the obligations of the respondent and commencement of construction. Accordingly, the date of handing over of the possession is to be computed from the date of Fire Safety Approval, i. e., November 27, 2014 which expired on November 27, 2019. In the circumstances, the respondent emphasised that there was no default on their part and letter for the handover of the possession was sent within the timeline as stipulated under agreement.

10 The Adjudicating Authority accepted the contention of the respondent and held that there was no default on the part of the corporate debtor and further observed that the financial creditor has also failed to prove that any debt was due and payable by the corporate debtor.

11 Learned counsel for the appellant placed reliance on the order passed by the hon'ble Supreme Court in the case of *IREO Grace Realtech P. Ltd.* v. *Subodh Pawar Etc.* (Diary No. 48148 of 2018), order dated January 28, 2019 wherein the date of handing over the possession has already been determined as May 27, 2018.

It is further noted in the said order that :

> "Mr. Mukul Rohatgi, learned senior counsel upon instructions from Mr. Manjeet Singh, the authorised representative of the appellant, states that the money which is due and payable under the impugned order of the National Consumer Disputes Redressal Commission to the three purchasers, namely, Subodh Pawar, Ritu Bansal and Geeta Bansal shall be refunded within four weeks from today together with interest at 10 per cent. per annum with effect from May 27, 2018 until the date of payment."

12 The appellant also placed reliance on the law laid down by the hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Govindan Raghavan* in Civil Appeal No. 12238 of 2018. In this case, it is held that a home buyer cannot be made to wait for years after the due date of possession and the home buyer cannot be forced to take possession of the allotted unit if the real estate developer has completely failed to construct the project within the promised period. Learned counsel for the appellant further contends that the occupational certificate is only for some towers, and not for the project as a whole. Therefore, there is an admitted default of two years by the respondent.

13 Counsel for the appellant further emphasised on the judgment of the case of *IREO Grace Realtech P. Ltd.* (supra). The corporate debtor herein had stated in the case of *IREO Grace Realtech P. Ltd.* v. *Subodh Pawar Etc.* before the National Consumer Disputes Redressal Commission that May 27, 2018 was the date of possession. Therefore, the promised date of possession as per the allottee could be latest by May 27, 2018. Therefore, the appellant contended that default had occurred on the date of termination of the agreement by an e-mail dated December 8, 2018.

14 It is pertinent to mention that Co-ordinate Bench of this Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 864 of 2019 in *Navin Raheja* v. *Shilpa Jain* [2020] 219 Comp Cas 589 (NCLAT), has held that (page 603) :

> "Taking into consideration the fact that many of the allottees are filing applications under section 7 fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, the hon'ble President of India has recently promulgated

an Ordinance further making amendment in the 'Insolvency and Bankruptcy Code, 2016' by published in the Gazette of India extraordinary Part II, section 1, dated December 28, 2019[1].

In section 7 of the principal Act, in sub-section (1), before the *Explanation*, the following provisos have been inserted (page 11 of 9 Comp Cas-OL (St.)) :

'Provided that for the financial creditors, referred to in clauses (a) and (b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less :

Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less :

Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first or second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first or second provisos as the case may be within thirty days of the commencement of the said Ordinance, failing which the application shall be deemed to be withdrawn before its admission.'

The aforesaid provisos inserted in sub-section (1) of section 7 came into force since December 28, 2019 though not applicable in this appeal, but the Adjudicating Authority is required to notice the said provisions.

Before admitting such case, it will be desirable to find out whether the allottees have come for refund of the money or to get their apartment/flat/premises by way of resolution. If the intention of the allottees only for refund of money and not possession of apartment/flat/

1. See [2020] 9 Comp Cas-OL (St.) 10.

premises, then the 'corporate debtor' may bring it to the notice of the Adjudicating Authority as held by the hon'ble Supreme Court.

The Adjudicating Authority before admitting an application under section 7 filed by allottee(s) will take into consideration the decision of the hon'ble Supreme Court in *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC), as noticed in paragraph 33 of this judgment."

15 Thus, given the law laid down by this hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC) ; [2019] 8 SCC 416 (paragraph 36 of this judgment) it is held that the Adjudicating Authority has to see whether the delay is due to the corporate debtor and in case the delay is not due to the corporate debtor, but force majeure as noticed above, it cannot be alleged that the corporate debtor defaulted in delivering the possession.

16 In this case, it is on record that the corporate debtor/respondent was to handover the possession of the apartment within 60 months, i. e., 42 months (commitment period) + 6 months grace period + 12 months extended period from the date of approval of building plan and on fulfilment of the pre-conditions imposed thereunder as per clause 13.3 to 13.5 of the agreement.

17 It is noticed that the despite the approval of building plan on July 23, 2013 project could not be started due to the certain pre-imposed conditions, including but not limited to obtaining the grant of approval by the Ministry of Environment and Fire Safety approval, before the commencement of construction. The respondent obtained the environmental approval on December 12, 2013 and the said approval reiterated the requirement of approval by the fire department. Therefore, the respondent applied for the fire safety approval on October 23, 2013 and before starting any construction, approval from the fire department, in terms of section 15 of the Haryana Fire Safety Act, 2009 was material for the fulfilment of the obligations of the respondent and commencement of construction. Accordingly, the date of handover of possession is to be computed from the date of grant of Fire Safety Approval, i. e., dated November 27, 2014. Before that, the letter for handing over possession was already issued to the appellant. It is also clear that the Co-ordinate Bench of this hon'ble Tribunal has also held that the proviso inserted in sub-section (1) section 7 of the I and B Code, which comes to be force since December 28, 2019 though not applicable in this appeal, but the Adjudication Authority is required to take notice of the said provision and this Tribunal also holds that it will be desirable to find out whether the allottees has come to claim the money or

to get their apartment by way of resolution. If the intention of the allottees is only for recovery of the money and not for resolution for possession by apartment, then the corporate debtor may bring to the notice of the Adjudicating Authority, as held by the hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [2019] 217 Comp Cas 1 (SC) ; [2019] 8 SCC 416. Thus, in the circumstances as aforesaid, we do not find any justification for the interference with the impugned order and appeal is liable to be dismissed. Accordingly, the appeal is dismissed. No order as to costs.

[2020] 220 Comp Cas 128 (NCLAT)

[BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL — NEW DELHI]

QVC EXPORTS P. LTD.

v.

UNITED TRADECO FZC AND ANOTHER

KANTHI NARAHARI, V. P. SINGH *(Technical Members)* and **VENUGOPAL (M.) J. *(Judicial Member)***

January 28, 2020.

HF ▸ Appellant

INSOLVENCY RESOLUTION—RESOLUTION PLAN—RESOLUTION PLAN SUBMITTED BY TWO APPLICANTS APPROVED AND IMPLEMENTED—RECTIFICATION OF PLAN—ADJUDICATING AUTHORITY—POWERS—NO POWER TO RECTIFY RESOLUTION PLAN ALREADY APPROVED—ORDER DIRECTING RECTIFICATION ON APPLICATION FILED BY ONE APPLICANT WITHOUT CONSENT OF OTHER APPLICANT—TO BE SET ASIDE—INSOLVENCY AND BANKRUPTCY CODE, 2016, S. 60—NATIONAL COMPANY LAW TRIBUNAL RULES, 2016, R. 11.

Since rectification of the resolution plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Insolvency and Bankruptcy Code, 2016, it is not permitted to modify the resolution plan under the guise of inherent powers of the Tribunal.

An order which has attained finality cannot be reviewed under the inherent powers of the court. This power can only be exercised to correct clerical errors or arithmetical mistakes in the judgment.

Bijay Kumar Saraogi *v.* State of Jharkhand [2005] 7 SCC 748 *relied on.*

The Adjudicating Authority allowed the application for rectification of the resolution plan which had already been approved and implemented. On appeal contending that the Adjudicating Authority had no jurisdiction to alter a joint resolution plan submitted by the appellant and respondent No. 1, as co-applicants in the resolution process, without there being any consent on the part of the appellant :

Held, *allowing the appeal, that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of resolution plan and make substantial changes in the plan, after a lapse of 13 months of the completion of the corporate insolvency resolution process, even after the approval and implementation of the resolution plan, on the pretext of rectification of clerical or typographical error in the order. Since the appellant and respondent No. 1 were joint resolution applicants, any application for rectification of the resolution plan could have been moved by both the resolution applicants. The Adjudicating Authority had no jurisdiction to allow amendment in the resolution plan, submitted by the appellant and respondent No. 1 as co-applicants in the resolution process, without there being any consent on the part of the appellant. The order of the Adjudicating Authority was to be set aside.*

Order of the National Company Law Tribunal set aside.

Cases referred to :

Bijay Kumar Saraogi *v.* State of Jharkhand [2005] 7 SCC 748 (para 25)

Hero Fincorp Ltd. *v.* Rave Scans P. Ltd. [2019] 8 Comp Cas-OL 1 (NCLAT) (para 19)

Rahul Jain *v.* Rave Scans P. Ltd. [2019] 8 Comp Cas-OL 612 (SC) (para 19)

Sankatha Singh *v.* State of U. P., [1962] AIR 1962 SC 1208 ; [1962] Supp (2) SCR 817 ; [1962] 2 Cri. LJ 288 (SC) (para 22)

Sooraj Devi (Smt.) *v.* Pyare Lal [1981] 1 SCC 500 ; [1981] SCC (Cri) 188 (para 22)

State of Punjab *v.* Darshan Singh [2004] 1 SCC 328 (para 25)

Company Appeal (AT) (Insolvency) No. 1351 of 2019.

Abhijeet Sinha, *Aditya Shukla* and *Nitin Kumar Chahar*, for the appellant.

Piyush Singh, for the respondents.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 V. P. SINGH ***(Technical Member)***.—This appeal emanates from the order dated November 20, 2019 passed by the hon'ble Adjudicating Authority, National Company Law Tribunal, Kolkata Bench, Kolkata in C.A. (IB) No. 1131 of 2019, C. P. (IB) No. 596 of 2017 by which the Adjudicating Authority has allowed the application for rectification of the resolution plan already approved and implemented.

2 The appellant submits that the company Cosmic Ferro Alloys Ltd., was admitted under the corporate insolvency resolution process (in short "CIRP") on January 16, 2017. The appellant and respondent No. 1 had jointly submitted the resolution plan for taking over the company. The same was approved unanimously by the committee of creditors (in short "CoC"), and after that, the resolution plan was further approved by the Adjudicating Authority vide its order dated October 11, 2018.

3 Given the approved resolution plan, the appellant-QVC Exports P. Ltd., was to hold 34 per cent. of the paid-up equity shares, of and in the company, the Cosmic Ferro Alloys Ltd., and respondent No. 1 was to hold 51 per cent. paid-up equity shares and 15 per cent. of the paid-up equity shares were to be allotted to a trust, namely, Cosmic Ferro Alloys ESOP Trust. The approved resolution plan got executed, and the shares were allotted as per the terms of the approved plan. All money in respect of 34 per cent. shares were paid by the appellant and is the rightful owner of 34 per cent. paid-up equity shares of and in the company.

4 The board resolution passed by respondent No. 1-company admittedly states that respondent No. 1 has purchased 51,00,000 equity shares of and in the company, Cosmic Ferro Alloys Ltd., by investing Rs. 31,60,00,000 whereby respondent No. 1 has purchased such shares on premium at Rs. 51.96 per share, over and above the face value.

5 The appellant further contends that the company application was filed before the Adjudicating Authority to make rectification in the approved resolution plan, after 13 months of the completion and conclusion of the CIRP. The Adjudicating Authority allowed the company application by the impugned order, resultantly reducing the shareholding of the appellant to 10 per cent. from 34 per cent. This appeal is preferred on grounds stated as under :

(a) The impugned order is perverse, erroneous and without cogent reasons and is liable to be set aside.

(b) The Adjudicating Authority had no jurisdiction to entertain an application after a lapse of 13 months, after the completion of CIRP, even after the approval and implementation of the resolution plan.

(c) The Adjudicating Authority had no jurisdiction to alter a joint resolution plan submitted by the appellant and respondent No. 1, as co-applicants in the resolution process, without there being any consent on the part of the appellant.

Respondent No. 1, after having agreed to 34,00,000 shares allotted to the **6** appellant, and after such shares were issued, cannot now turn around and contend otherwise. Respondent No. 1 is estopped from contending that the appellant and its nominees do not have 34,00,000 shares. The following issue arises for our consideration :

(i) Whether the hon'ble Adjudicating Authority had jurisdiction to entertain an application for rectification of resolution plan and making substantial changes in the plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the resolution plan ?

(ii) Whether the hon'ble Adjudicating Authority had the jurisdiction to alter a resolution plan submitted by the appellant and respondent No. 1 as co-applicants in the resolution process, without there being any consent on the part of the appellant ?

(iii) Whether substantial rectification of the resolution plan resulting in a change in shareholding of the shareholders could be brought under the purview of the typographical/arithmetic/clerical error ?

We have heard the arguments of learned counsel for the parties and **7** perused the record.

Admittedly, that the "corporate debtor", namely, Cosmic Ferro Alloys **8** Ltd., was put under CIRP and the Adjudicating Authority vide its order dated October 11, 2018 approved the resolution plan with regards to the allotment and transfer of shares by the approved plan. The relevant part of the resolution plan is as under :

> "Transfer of shares from existing equity shareholders—As the value payable to shareholders of the corporate debtor is 'Nil', the equity shares will be extinguished, and new shares will be issued to the new promoters as under :
>
> It is the intention of the resolution application to own at least 85 per cent. of the shareholding in the corporate debtor. The balance shareholding will be held by Cosmic Ferro Alloys Ltd., Employee Stock Option Trust by way of 15 per cent. of equity to be issued to new directors, KMPs, employees of the company based on their

performance or as joining bonus at Rs. 0.50 per share within next 4 years and vetted within 1 year of allotment on approval of this resolution plan as stated under—

On approval of the resolution plan and payment of upfront amount of Rs. 99.74 crores, the shareholding of the entire shareholders, i. e., 1,04,08,529 shares of Rs. 10 each will be extinguished, and 1,00,00,000 shares with face value of Rs. 10 each shall be issued as stated under :

Name of the shareholder	*Quantity (Nos.)*	*Paid-up value (lakhs)*	*Premium paid (lakhs)*	*Issued at discount*	*Total value paid (in lakhs)*	*% of share-holding*	*Remarks*
United Tradeco FZC	51,00,000	510	2,650		3,160		
QVC Exports P. Ltd.	34,00,000	340			340		
Cosmic Ferro Alloys Ltd., ESOP Trust	15,00,000	150		(135.00)	15		Stock options to employees
	1,00,00,000	1,000	2,650	(135.00)	3,515	100%	

Stock options will be issued and subscribed at Rs. 0.50 per share within four years of the National Company Law Tribunal approval of this resolution plan.

Note : Regulation 37(1)(i) of the CIRP Regulations, 2016 provides for inclusion in any resolution plan as follows 'Issuance of securities of the corporate debtor, for cash, property, securities or in exchange of claims interest."

9 The combined shareholding of the resolution applicants as per the approved resolution plan was 85 per cent. for which consideration has been paid by both the resolution applicants accordingly. M/s. United Tradeco FZC has paid Rs. 3,160 lakhs, whereas QVC Exports P. Ltd., has paid 340 lakhs.

10 The Adjudicating Authority has mentioned in the order that "the percentage of holding of both parties stands at 75 per cent. and 10 per cent. which is not at all disputed".

11 Thus, the number of shares according to these percentage, which needs to be issued and allotted to M/s. United Tradeco FZC and QVC Exports P. Ltd., respectively.

12 The Adjudicating Authority had further stated that :

"4. Considering the submission made by both the sides and in the background of undisputed fact of percentage of shareholding of both the parties individually there appears to have occurred a mistake in quantity of shares to be allotted to these parties. It is further to be noted that in the share transfer agreement dated July 31, 2019 executed between the parties to this application it has been specifically mentioned that there have been certain clerical and/or arithmetical and/or numerical mistakes arising from the accidental slip or omission at the middle person of page 41 of such resolution due to which various disputes and/or difference arose between the parties which have been resolved and settled upon conciliation in the manner as mentioned hereafter. Copy of this agreement is placed at pages 20 to 33 of the reply affidavit and relevant pages 22. Thus, the resolution plan stands corrected in the following manner and the revised chart is reproduced as under :

Name of the shareholder	*Quantity (Nos.)*	*Paid-up value*	*Premium paid*	*Issued at discount*	*Total value paid*	*% of shareholding*	*Remarks*
United Tradeco FZC	75,00,000	750	2,410		3,160	75%	
QVC Exports P. Ltd.	10,00,000	400	240		340	10%	
Cosmic Ferro Alloys Ltd., ESOP Trust	15,00,000	150		(135)	15	15%	Stock options to employees
	100,00,000	1,000	2,650	(135)	3,515	100%"	

On perusal of the alleged rectification allowed by the Adjudicating **13**
Authority, it appears that the shareholding of M/s. United Tradeco FZC has been substantially increased, i. e., from 51,00,000 shares to 75,00,000 and contrary to this the shareholding the appellant, QVC Exports P. Ltd., reduced to 10,00,000 shares from 34,00,000 shares. The portion of equity allotted to employees of the Cosmic Ferro Alloys Ltd., remains the same. The Adjudicating Authority has observed that joint shareholding of both the resolution plan, was 85 per cent. for which the consideration has been paid for by both the parties accordingly. Respondent No. 1-M/s. United Tradeco FZC has paid Rs. 3,160 lakhs and the appellant, QVC Exports P. Ltd., has paid Rs. 340 lakhs. Considering the investment of the resolution

plan, the Adjudicating Authority has stated in the order that mistake occurred in the resolution plan which was approved by this Adjudicating Authority vide order dated October 11, 2018. The resolution plan stands corrected.

14 Accordingly, the equity shares which needs to be issued and allotted to respondent No. 1-M/s. United Tradeco FZC and appellant, QVC Exports P. Ltd., respectively work out to 75,00,000 and 10,00,000.

15 The above presumption is without any basis, as the Adjudicating Authority was having no role in interfering in terms of the approved resolution plan, which was executed 13 months back. The Adjudicating Authority has failed to consider that resolution plan was submitted jointly by the applicant and respondent No. 1 and the rectification application, for amendment in approved resolution plan has been filed by only one of the resolution applicant, i. e., respondent No. 1. When approved resolution plan was submitted by the applicant and respondent No. 1 jointly, then one party had no right to move the rectification of the said resolution plan, without the consent of another party. But the Adjudicating Authority has allowed this application without any cogent reasons.

16 It is pertinent to mention that the joint resolution plan was approved unanimously by the CoC and after that, the same was approved by the Adjudicating Authority vide its order dated October 11, 2018. After that, the approved resolution plan was implemented, and shares were allotted as per the terms of the approved resolution plan. Resultantly, M/s. United Tradeco FZC (respondent No. 1) was allotted 51,00,000 equity shares. After that on October 25, 2018 in the board meeting of respondent No. 1. It was resolved that in term of the provisions of the approved resolution plan, the company needs to infuse a sum of Rs. 316 million towards the acquisition of 51,00,000 equity shares of Rs. 10 each at a premium of Rs. 51.96. The copy of the board resolution is annexed with annexure A1 of the appeal. It shows that the board of respondent No. 1-company had also acknowledged and approved the allotment of 51,00,000 shares in terms of approved resolution plan at 51.96 per shares.

17 After the board resolution dated October 25, 2018 of respondent No. 1 had no right to say that there was a typographical/clerical error in the resolution plan. After the acknowledgment by the board of respondent No. 1-company, there was no justification to allege that due to typographical error, 51,00,000 shares is erroneously typed, instead of 75,00,000 shares in the approved resolution plan, in the account of respondent No. 1.

18 It is also important to point out that the 4th Monitory Committee Meeting, held when the appellant was allotted 34,00,00 equity shares of and in

the company Cosmic Ferro Alloys Ltd. Copy of the minutes of the Monitory Committee Meeting is annexed with the appeal which shows that the Monitory Committee in its meeting dated June 21, 2019 resolved that all disputes among parties were deliberated and resolved that the appellant was to sell its 34 per cent. share, of and in the company Cosmic Ferro Alloys for Rs. 6.5 crores plus one crore subject to the valuation. It is also on record that on July 31, 2019 share transfer agreement was executed, but the same was never given effect to, as there were a few preconditions. After the execution of the share transfer agreement, respondent No. 1 changed the course of action and filed company application for rectification of the resolution plan before the Adjudicating Authority. The implication of the order of the Adjudicating Authority has caused a substantial reduction of the shareholding of the appellant from 34 per cent. to 10 per cent. in the company Cosmic Ferro Alloys.

It is important to mention that the hon'ble Supreme Court has not permitted the change in resolution plan after attaining the finality. In the case of *Rahul Jain* v. *Rave Scans P. Ltd.* [2019] 8 Comp Cas-OL 612 (SC) ; [2019] 10 SCC 548 at page 553 ; [2019] SCC Online SC 1447, the hon'ble Supreme Court held that (page 620 of 8 Comp Cas-OL) : **19**

> "In the present case, it is noticeable that no doubt, Hero was provided with 32.34 per cent. of its admitted claim as it has dissented with the plan. On the other hand, Tata Capital Financial Services Ltd., was provided with 75.63 per cent. of its admitted claim ; other financial creditors (Indian Overseas Bank, Bank of Baroda and Punjab National Bank) were provided with 45 per cent. of their admitted claims. Given that the resolution process began well before the amended regulation came into force (in fact, January, 2017) and the resolution plan was prepared and approved before that event, the wide observations of the National Company Law Appellate Tribunal, requiring the appellant to match the pay-out (offered to other financial creditors) to Hero, were not justified. The court notices that the liquidation value of the corporate debtor was ascertained at Rs. 36 crores. Against the said amount, the appellant offered Rs. 54 crores. The plan was approved and, except the objections of the dissenting creditor (i. e., Hero), the plan has attained finality. Having regard to these factors and circumstances, it is held that the National Company Law Appellate Tribunal's order (*Hero Fincorp Ltd.* v. *Rave Scans P. Ltd.* [2019] 8 Comp Cas-OL 1 (NCLAT) ; [2019] SCC Online NCLAT 584 and directions were not justified. They are hereby set aside ; the order of the National Company Law Tribunal is hereby restored."

20 It is important to point out that this Tribunal in Company Appeal No. 509 of 2018 in the case of *R. G. G. Vyapar P. Ltd.* v. *Arun Kumar Gupta* this Tribunal has held that has held that the Adjudicating Authority has no jurisdiction to reopen resolution process under section 31 of the Code.

21 But in the instant case, the Adjudicating Authority after approval and execution of the resolution plan, and after a lapse of 13 months allowed the rectification in the resolution plan. The Adjudicating Authority failed to consider that the approved resolution plan is a joint resolution plan by the appellant and respondent No. 1 whereas the application for rectification of the resolution plan is moved only by respondent No. 1. However, the Adjudicating Authority had no jurisdiction under section 31 to allow the rectification in the approved resolution plan. It is pertinent to mention that rule 11 of the National Company Law Tribunal Rules, 2016 gives inherent power, but powers under this section cannot be used to de hors the statutory provision of law.

22 The hon'ble Supreme Court in the case of *Sooraj Devi* v. *Pyare Lal* [1981] 1 SCC 500 ; [1981] SCC (Cri) 188 at page 502 has held that :

> "5. The appellant points out that he invoked the inherent power of the High Court saved by section 482 of the Code and that notwithstanding the prohibition imposed by section 362 the High Court had power to grant relief. Now it is well-settled that the inherent power of the court cannot be exercised for doing that which is specifically prohibited by the Code (*Sankatha Singh* v. *State of U. P.*, AIR 1962 SC 1208 ; [1962] Supp (2) SCR 817 ; [1962] 2 Cri. LJ 288 (SC)). It is true that the prohibition in section 362 against the court altering or reviewing its judgment is subject to what is 'otherwise provided by this court or by any other law for the time being in force'. Those words, however, refer to those provisions only where the court has been expressly authorised by the Code or other law to alter or review its judgment. The inherent power of the court is not contemplated by the saving provision contained in section 362 and, therefore, the attempt to invoke that power can be of no avail."

23 Given the law laid down by the hon'ble Supreme Court it is clear that under inherent powers of the court can act the Adjudicating Authority could only interfere in the field here the I and B Code, 2016 has authorized to do so. After approval of the resolution plan by the Adjudicating Authority can exercise his powers under section 60 of the I and B Code, 2016 Code provides that :

> "60. *Adjudicating Authority for corporate persons.*—(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation

for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person ;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India ; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

24 Since rectification of the resolution plan does not involve the question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code, therefore it is not Code, therefore it is not permitted to modify the resolution plan under the guise of inherent powers of the Tribunal.

25 This hon'ble Supreme Court in *Bijay Kumar Saraogi* v. *State of Jharkhand* [2005] 7 SCC 748 at page 748 has held that :

> "3. We find no reason to interfere with the order of the High Court because a mere perusal of section 152 makes it clear that section 152 CPC can be invoked for the limited purpose of correcting clerical errors or arithmetical mistakes in the judgment. The section cannot be invoked for claiming a substantive relief which was not granted under the decree, or as a pretext to get the order which has attained finality reviewed. If any authority is required for this proposition, one may refer to the decision of this court in *State of Punjab* v. *Darshan Singh* [2004] 1 SCC 328."

26 Thus it is clear that the order which has attained finality cannot be reviewed under the inherent powers of the court. This power can only be exercised to correct clerical errors or arithmetical mistakes in the judgment. By the impugned order the Adjudicating Authority has changed terms of resolution plan based on the application of one of the resolution applicant without even consent of the appellant, even though he was the joint applicant in the resolution plan.

27 Thus we are of the considered opinion that the Adjudicating Authority had no jurisdiction to entertain an application for rectification of resolution plan and making substantial changes in the plan, after a lapse of 13 months of the completion of CIRP, even after the approval and implementation of the resolution plan on the pretext of rectification of clerical or typographical error in the order.

28 Since the appellant and respondent No. 1 was the joint resolution applicant. Therefore, any application for rectification of the resolution plan could have been moved by both the resolution applicants. Thus the Adjudicating Authority had no jurisdiction to allow amendment in the resolution plan, submitted by the appellant and respondent No. 1 as co-applicants in the resolution process, without there being any consent on the part of the appellant.

29 In the circumstances, we are of the considered opinion that appeal deserved to be allowed, and the impugned order is not sustainable in law. The appeal is thus allowed and the impugned order passed by the

Adjudicating Authority dated November 20, 2019 is set aside. No order as to costs.

[2020] 220 Comp Cas 139 (NCLAT)

[Before the National Company Law Appellate Tribunal — New Delhi]

1. LALIT AGGARWAL AND ANOTHER

(Company Appeal (AT) No. 380 of 2018)

2. PRAMOD KUMAR GOIL

(Company Appeal (AT) No. 23 of 2019)

v.

SHREE BIHARI FORGINGS P. LTD. AND OTHERS

Jarat Kumar Jain J. ***(Judicial Member),***
Balvinder Singh and
Dr. Ashok Kumar Mishra ***(Technical Members)***

January 22, 2020.

HF ▸ Respondent

Oppression and mismanagement—Petition for relief—Finding that substratum of company lost—Order for winding up—Justified—Companies Act, 1956, ss. 397, 398, 402, 403, 408.

The petition filed under sections 397, 398, 402 and 403 read with section 408 of the Companies Act, 1956, was dismissed and the company was ordered to be wound up. On appeal :

Held, *dismissing the appeal, that allotment of shares had been done without getting it approved in any board meeting. The appellant had not co-operated with the auditor and administrator to produce the statutory documents and while on the one hand he admitted that the documents had been lost while shifting the premises on the other he admitted that the statutory records had been burnt in a car accident. This was a clever attempt to disobey the orders of the High Court for which the High Court had rightly initiated contempt proceeding against him. The appellant had also siphoned off the assets of the company. When the substratum was lost and both directors had been in destruction mode whenever they were in control of the company and had dubiously destroyed the company, the winding up of the company would not unfairly prejudice its members, and the order of winding up of the company was justified. In the absence of any record available to be produced by either of the parties and non-existence of the assets of the company, it would be futile*

exercise to make any order except winding up of the company in the circumstances. The Tribunal had passed a speaking and well reasoned order and there was no merit in the appeals.

Order of the National Company Law Tribunal affirmed.

Company Appeal (AT) Nos. 380 of 2018 and 23 of 2019.

Karan Luthra and *Niyati Kohli*, for the appellant in C. A. (AT) No. 380 of 2018 and for respondent No. 2 in C. A. (AT) No. 23 of 2019.

Ankur, proxy counsel for respondents Nos. 1 to 5 in C. A. (AT) No. 380 of 2018 and for the appellants in C. A. (AT) No. 23 of 2019.

P. S. Singh, Senior Panel Counsel for the Registrar of Companies in both the appeals.

JUDGMENT

The judgment of the Appellate Tribunal was delivered by

1 BALVINDER SINGH ***(Technical Member)***.—This appeal has been preferred by the appellant under section 421 of the Companies Act, 2013 against the order dated September 4, 2018 passed by the National Company Law Tribunal, Bench III, New Delhi in Company Petition No. 47(ND) of 2008 filed under sections 397, 398, 402 and 403 read with section 408 of the Companies Act, 1956 whereby the company petition was dismissed and the respondent-company was ordered to be wound up. Vide the same impugned order dated September 4, 2018 the National Company Law Tribunal, New Delhi has also dismissed Company Petition No. 15(ND) of 2008 filed by respondent No. 2 against appellant No. 1.

Company Appeal (AT) No. 380 of 2018

2 The appellants submit that their petition has been dismissed on the sole ground of alleged suppression on part of the appellants with regard to non-disclosure of allotment of equity shares of the respondent-company by appellant No. 1 to various persons including appellant No. 1 himself on December 17, 2007, December 28, 2007 and February 27, 2008 and the irregularities in the allotment of shares.

3 The appellants submit that respondent No. 2 has handled the affairs of the respondent-company in a "dishonest manner" and the same has been accepted by the Tribunal.

4 The appellants submit that the hon'ble High Court of Delhi vide order dated May 13, 2013 (page 362 of appeal) directed that the auditor appointed by the Company Law Board will undertake a comprehensive audit of accounts of respondent No. 1-company from the year 2007-08 to

2012-13. The appellants submits that respondent No. 2 did not produce any record but filed a police complaint No. 1727 of 2013 dated July 6, 2013 (page 470) that during the shifting of office of Shahdara, Delhi to Ashok Nagar, Delhi one bundle containing various documents were not found and lost in transit. The appellants submits that respondent No. 2 intimated the administrator that his son who was carrying the record in his car and all the records of the company in the car burns out (page 528 of appeal).

The appellant submits that the assets of respondent No. 1-company has been illegally dissipated under the watch of respondent No. 2 as recorded by the administrator. The appellant submitted that on the basis of the final report of the administrator, the hon'ble High Court initiated suo motu contempt proceedings against respondent No. 2. **5**

We have heard the parties and perused the record. **6**

Learned counsel for the appellant argued that the allotment of equity shares on December 17, 2007, December 28, 2007 and February 27, 2008 were legal and were allotted with the consent of respondent No. 2. Form No. 2 filed with the Registrar of Companies for the allotment of equity shares on these dates was digitally signed by respondent No. 2 along with the chartered accountant of respondent No. 1-company. **7**

Learned counsel for the respondent argued that the shares were allotted by the appellants illegally, therefore, the allotment of shares be set aside. Learned counsel argued that the appellant in connivance with the chartered accountant allotted shares to his own HUF and even to his wife and friends in order to fraudulently increase his shareholdings in the company. The said allotment was without any corresponding authorization by the board of director and/or without respondent's consent as per the articles of association of the company. **8**

We find that no board resolution has been placed before the National Company Law Tribunal or before this Appellate Tribunal to establish that the shares were allotted as per law and respondent No. 2 has also contradicted that the allotment were made with his consent. The appellant has himself admitted in C. P. No. 47 of 2008 that no board meetings were held in SBF and that no board meeting was held for the allotment of shares. Further the appellant's wife has also made a statement that she had never consented to issue of shares to her against the unsecured loan advanced by her to respondent No. 1. All these facts point towards suppression of facts and false claims being made by the appellant. Therefore, we are in agreement with the findings of the National Company Law Tribunal on this issue. **9**

10 We have heard the parties on the issue of producing of record before the administrator. We find that in the year 2013, respondent No. 2 lodged police complaint stating the during the shifting of office, the statutory record was not found and lost in transit. We also note that in the year 2015 respondent No. 2 is stating that the record of the company which was carried by his son, has been burn out due to fire in the car. On this issue we doubt that two instances cannot happen again and again. Thus there was an attempt not to produce the record by the respondent.

11 We have perused the proceedings dated November 18, 2015 (page 532) of administrator and noted that the administrator has clearly stated that all the tangible assets of the company had been removed from the said premises at Pilukhawa, Hapur. We also note that the hon'ble High Court of Delhi vide its order dated March 11, 2016 (page 545) has ordered to initiate suo motu proceedings for contempt against respondent No. 2 for disobeying the order of the hon'ble High Court and Company Law Board. On these basis we find that the conduct of respondent No. 2 is not up to the mark.

12 We also note that a complaint was filed against the chartered accountants by respondent No. 2 which was dismiss vide order dated February 10, 2014 (page 394) and this order was finally upheld all the way up to the hon'ble Supreme Court (page 409). On the basis of these we are of the view that respondent No. 2 has filed false cases against the chartered accountant.

Company Appeal (AT) No. 23 of 2019

13 The appellant submitted that the impugned order is liable to be set aside, being a non-speaking, non-reasoned order. The appellant submitted that the following nine issues were framed on the basis of pleadings in both the petitions :

(a) The jurisdiction under section 397/398 of the Companies Act, 1956 being that of an equitable jurisdiction whether the parties have approached this Tribunal invoking the equitable jurisdiction with clean hands and if not, whether the petitions are liable to be dismissed on this ground ?

(b) Whether respondent No. 2 illegally issued 3,66,750 equity shares of respondent No. 1 in violation of the provisions of the Companies Act, 2013 and behind the back of the PG to himself, to his HUF, wife and other friends and business associates ?

(c) Whether respondents Nos. 2 and 3 have misused the digital signature of the PG for illegally allotting the above shares ?

(d) Whether allotment of shares alleged to be made by respondent No. 2 were in violation of the terms imposed by Canara Bank in its term loan ?

(e) Whether respondent No. 2 siphoned off money from respondent No. 1's bank account ?

(f) Whether respondent No. 2 replaced his Gurgaon property mortgaged with Canara Bank with property of BSL Buildcon for which the PG also paid Rs. 15 lakh ?

(g) Whether the PG has siphoned off sums of respondent No. 1 ?

(h) Whether the PG has manipulated the books of account, financial statements and other records of respondent No. 1 ?

(i) Whether the enhancement of the cash credit limit from Rs. 85 lakhs to 200 lakhs by Canara Bank in favour of respondent No. 1 was in violation of specified procedure ?

The appellant submitted that both the petitions were dismissed summarily, while deciding only one issue under the cover of equity.

14 The appellant submitted that once the Tribunal has framed issues, it is for the court to decide all the issues and giving its findings on each issue. The appellant submitted that he has filed the petition on the arbitrary and illegal allotment of shares by respondent No. 2 to himself and to his friends and relatives.

15 The appellant submitted that no board meeting took place for the allotment of shares by respondent No. 2. The appellant submitted that the said allotment is rightly set aside and shareholding is liable to be restored to its original position and pattern as on September 30, 2007.

16 The appellant submitted that the records were actually burnt in car accident and the appellant approached various authorities for reconstruction of documents but the same were denied by the authorities. The appellant submitted that ultimately the appellant informed the arbitrator to pass directions in this respect to procure the entire record. The appellant submitted that respondent No. 2 opposed the request of the appellant.

17 The appellant submitted that respondent No. 2 in connivance with the chartered accountant allotted shares to his own HUF and even to his wife and friends in order to fraudulently increase his shareholding in the company. The said allotment was without any board meeting. The appellant stated that respondent No. 2 with chartered accountant did the fraudulent acts of illegal allotment by misusing the digital signatures of the appellant (contained in pen drive) which used to be in the possession of chartered accountant.

18 The appellant submitted that respondent No. 2 committed fraud on the company and withdrew crores of rupees from company's account for his own gratification and for satisfying debts, which were in no way related with the company's affairs and thereby siphoned off huge funds of the company. The appellant submitted that the encashment of cheques and transfers of funds of the company to other accounts was not related to company's affairs and respondent No. 2 did not give any explanation.

19 The appellant stated that respondent No. 2 filed counter petition No. 47(ND)/2008 before the Company Law Board against the appellant to avoid penal consequences and also filed various false complaints before various authorities with the sole object to obstruct the growth and day-to-day functioning of the company and to bring the company at the brink of closure.

20 The appellant stated that respondent No. 2 has filed affidavit before the Police Authorities wherein he has falsely stated on oath that all transactions and dealings of the company are illegal and unlawful and that the appellant has been opening various bank accounts by fabricating board resolutions without any substance.

21 The appellant submitted that respondent No. 2 did not co-operate with the auditors and administrator.

22 On the other hand respondent No. 2 submitted that the appellant failed to abide by the orders of the hon'ble National Company Law Tribunal, the hon'ble High Court and learned arbitrator with regard to directions to produce the books of account and records of respondent No. 1-company.

23 Respondent No. 2 submitted that the appellant has avoided furnishing the documents of respondent No. 1-company and then claimed that the documents were accidently destroyed and thereafter failed to reconstruct the same.

24 Respondent No. 2 submitted that the appellant was in exclusive control of respondent No. 1-company since the year 2008 and the appellant is responsible for the state of affairs of respondent No. 1-company.

25 Respondent No. 2 submitted that the appellant did not co-operate with the auditor and did not produce the documents of respondent No. 1-company though they were directed to produce by the hon'ble High Court. Respondent No. 2 submitted that the appellant filed a false complaint with the police that the statutory record has been lost.

26 Respondent No. 2 submitted that the appellant undertook to produce the record on September 16, 2015 before the administrator but he did not produce the same and later on informed the administrator that the record has been burnt.

Respondent No. 2 submitted that due to non-co-operation extended to **27**
administrator by the appellant, the hon'ble High Court initiated suo motu contempt proceedings against the appellant.

We have heard the parties and perused the record. **28**

Learned counsel for the appellant argued that the allotment of equity **29**
shares on December 17, 2007, December 28, 2007 and February 27, 2008 were illegal. Learned counsel for respondent No. 2 argued that the shares were legally allotted. We find that no board resolution has been placed before the National Company Law Tribunal or before this Appellate Tribunal to establish that the shares were allotted as per law. Therefore, we have no material that the findings of the National Company Law Tribunal on this issue are not reasonable.

We have heard the parties on the issue of producing of record before the **30**
administrator. We find that in the year 2013, respondent No. 2 lodged police complaint stating that during the shifting of office, the statutory record was not found and lost in transit. We also note that the appellant undertook to produce the record before the administrator but did not produce and informed the administrator that the record has been burnt in car. As stated above we doubt that two instances cannot happen again and again. This was a clever attempt not to produce the record by the appellant. Admitted the record was in his custody and it was also his duty to take adequate care of the record so that the statutory record preserved to be produced before the administrator. Apparently he has not taken due care of the record while shifting and hindering the work of administrator for which he cannot avoid his responsibility for the same.

We have perused the proceedings dated November 18, 2015 (page 532) **31**
of administrator and noted that the administrator has clearly stated that all the tangible assets of the company had been removed from the said premises at Pilukhawa, Hapur. We also note that the hon'ble High Court of Delhi vide its orders dated March 11, 2016 (page 545) has ordered to initiate suo motu proceedings for contempt against the appellant for disobeying the order of the hon'ble High Court and Company Law Board. On these basis we find that the conduct of respondent No. 2 is not up to the mark and he has siphoned off the assets of respondent No. 1-company.

Section 242(1)(b) provides as under : **32**

> "(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up.

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit."

33 It is apparent that there is dispute between the two directors regarding their shareholding of the company. Whenever any one of the director has been in control of the company admittedly before 2008 by Lalit Agarwal and after 2008 by Pramod Goil, both of them have taken action in such a manner that the company has been mismanaged to the extent that it has lost its substratum. Once the company has lost its substratum that itself is a valid ground for winding up of company on just and equitable ground. However, when the substratum is lost and both directors have been in destruction mode whenever they were in control of the company and having dubiously destroyed the company, the winding up of the company would not unfairly prejudice its members thus the winding up will be just and proper order.

34 As to the averment made by the appellant that there were 9 issues framed but only one issued has been decided. Looking at the issues framed and in absence of any record and destruction of the company we are of the considered opinion even if these issues are decided separately it will not bring back the substratum of the company. Hence the arguments that these issues have not been decided by the Tribunal are not material to the decision made.

35 We also note that a complaint was filed against the chartered accountants by appellant which was dismissed vide order dated February 10, 2014 (page 394) and this order was finally upheld all the way up to the hon'ble Supreme Court (page 409). On the basis of these we are of the view that the appellant has filed false cases against the chartered accountant.

Conclusion

36 On the basis of the pleadings and arguments we have come to the conclusion that allotment of shares has been done without getting it approved in any board meeting. Mr. Parmod Kumar Goil, appellant in Company Appeal (AT) No. 23 of 2019, has not co-operated with the auditor and administrator to produce the statutory documents and one hand he is admitting that the documents have been lost while shifting the premises and second time he is admitting that the statutory records has been burnt in car accident. This is clever attempt to disobey the orders of the hon'ble High Court for which the hon'ble High Court has rightly initiated contempt proceeding against him. The appellant in Company Appeal (AT) No. 23 of 2019 has also siphoned off the assets of respondent No. 1-company. The order of winding up of the company is also justified. In the

absence of any record available to be produced by either of the parties and non-existence of the assets of the company, it will be futile exercise to make any order except winding up of the company in the circumstances.

In view of the above discussions and observations we are of the view **37**
that the National Company Law Tribunal has passed a speaking and well reasoned order and there is no merit in the appeals to interfere with the impugned order. The impugned order is upheld. The appeals are accordingly dismissed. The first appellant in both the appeals are imposed a cost of Rs. 5 lakhs each to be deposited with national defence fund within one month from the date of this order. Proof of depositing the cost with the national defence fund will be submitted before the Registrar of this Tribunal within fifteen days thereafter.

[2020] 220 Comp Cas 147 (Delhi)

[IN THE DELHI HIGH COURT]

DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT OF DELHI

v.

1. AXIS BANK AND OTHERS

(Crl. A. No. 143 of 2018 and Crl. M. A. No. 2262 of 2018)

2. STATE BANK OF INDIA AND OTHERS

(Crl. A. No. 210 of 2018 and Crl. M. A. No. 3233 of 2018)

3. IDBI BANK LTD.

(Crl A. No. 623 of 2018 and Crl. M. A. Nos. 10886, 10887 and 48245 of 2018)

UNION OF INDIA

v.

PUNJAB NATIONAL BANK

(Crl. A. No. 764 of 2018 and Crl. M. A. Nos. 28500 of 2018, 199 and 202 of 2019)

DIRECTORATE OF ENFORCEMENT

v.

PUNJAB NATIONAL BANK AND ANOTHER

(Crl. A. No. 1076 of 2018 and Crl. M. A. Nos. 34565 and 34567 of 2018)

R. K. GAUBA J.

April 2, 2019.

HF ▶ Appellant/Remanded

BANK—ENFORCEMENT OF SECURITY INTEREST—PROPERTY ATTACHED UNDER PREVENTION OF MONEY-LAUNDERING ACT, 2002—PROCEEDS OF CRIME NOT DEBT DUE TO GOVERNMENT—ATTACHMENT OF PROCEEDS OF CRIME UNDER ACT IN NATURE OF CIVIL SANCTION—EMPOWERED ENFORCEMENT OFFICER HAVING AUTHORITY NOT ONLY TO ATTACH "TAINTED PROPERTY" BUT ALSO ANY OTHER ASSET OR PROPERTY OF EQUIVALENT VALUE OF OFFENDER OF MONEY-LAUNDERING IF TAINTED PROPERTY UNAVAILABLE OR UNTRACEABLE—ACT HAVING OVERRIDING EFFECT OVER OTHER EXISTING LAWS IN MATTER OF DEALING WITH "MONEY-LAUNDERING" AND "PROCEEDS OF CRIME" RELATING THERETO—CHARGE OR ENCUMBRANCE OF A THIRD PARTY IN PROPERTY ATTACHED UNDER ACT CANNOT BE TREATED OR DECLARED AS "VOID" UNLESS MATERIAL AVAILABLE TO SHOW THAT IT WAS CREATED TO DEFEAT ACT—THIRD PARTY CLAIMANT TO PROVE ITS BONA FIDE BY COGENT EVIDENCE THAT IT HAD ACQUIRED INTEREST IN SUCH PROPERTY LAWFULLY AND FOR ADEQUATE CONSIDERATION, NOT BEING PRIVY TO OR COMPLICIT IN OFFENCE OF MONEY-LAUNDERING AND THAT ALL COMPLIANCES WITH EXISTING LAW MADE—MERE ISSUANCE OF ORDER OF ATTACHMENT UNDER ACT DOES NOT IPSO FACTO RENDER ILLEGAL PRIOR CHARGE OR ENCUMBRANCE OF SECURED CREDITOR—INTEREST OF THIRD PARTY IN SUCH PROPERTY NOT TO BE SUBJECTED TO CONFISCATION IF PROVEN THAT ACQUISITION WAS ANTERIOR TO COMMISSION OF PROSCRIBED CRIMINAL ACTIVITY—PREVENTION OF MONEY-LAUNDERING ACT, 2002, ss. 2(1)(d), 4, 5, 8, 9, 12, 71—RECOVERY OF DEBTS AND BANKRUPTCY ACT, 1993, ss. 31B, 34—SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITIES INTEREST ACT, 2002, ss. 26E, 35—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 14, 238.

PREVENTION OF MONEY-LAUNDERING—SPECIAL COURT—JURISDICTION—ATTACHMENT—RELEASE OF PROPERTY—JURISDICTION TO RELEASE GOODS AND TO ENTERTAIN OBJECTIONS TO ATTACHMENT CONFERRED

BOTH ON APPELLATE COURT AND SPECIAL COURT—SPECIAL COURT CANNOT ONLY RELEASE ATTACHMENT BUT ALSO RESTORE CONFISCATED PROPERTY TO LEGITIMATE CLAIMANT—UPON ATTACHMENT OR CONFISCATION ORDER ATTAINING FINALITY, OR COMMENCEMENT OF TRIAL OF CASE UNDER SECTION 4 OF ACT, CLAIM OF PARTY ASSERTING TO HAVE ACTED BONA FIDE OR HAVING LEGITIMATE INTEREST CAN BE INQUIRED INTO AND ADJUDICATED UPON ONLY BY SPECIAL COURT—PREVENTION OF MONEY-LAUNDERING ACT, 2002, ss. 4, 5, 8, 9, 43.

PREVENTION OF MONEY-LAUNDERING—ATTACHMENT—THIRD PARTY INTEREST—COMMISSION OF CRIMINAL ACTIVITY BE TREATED AS CUT-OFF DATE—INTEREST CREATED PRIOR TO CRIMINAL ACTIVITY—ORDER OF ATTACHMENT VALID BUT STATE ACTION WOULD BE RESTRICTED TO VALUE OF PROPERTY EXCEEDING CLAIM OF THIRD PARTY—PREVENTION OF MONEY-LAUNDERING ACT, 2002, s. 5.

INSOLVENCY RESOLUTION—MORATORIUM—EFFECT—NOT TO INTERFERE WITH AUTHORITY CONFERRED ON ENFORCEMENT OFFICER UNDER 2002 ACT IN RESPECT OF PROCEEDS OF CRIME—INSOLVENCY AND BANKRUPTCY CODE, 2016, ss. 14, 238—PREVENTION OF MONEY-LAUNDERING ACT, 2002, ss. 5, 9.

The expression "proceeds of crime" constitutes the core of the offence of money-laundering under the Prevention of Money-Laundering Act, 2002. "The concealment, possession, acquisition or use" of "proceeds of crime" in a manner where they are projected or are claimed to be "untainted property" forms the essential part of actus reus, the intent to so conceal, possess, acquire or use, or guilty knowledge, being the requisite mens rea. It is inherent in this that prior to coming in possession, acquisition, concealment or use of "tainted property" (the claim being to the contrary that it is untainted property) there must have been some other offence committed, the property perceived or alleged to be tainted being the product of such criminal activity.

A provisional attachment under the directions of enforcement authorities is subject to confirmation by the adjudicating authority. Mere confirmation of attachment by the adjudicating authority does not lead to the person claiming interest in the property being divested of such interest as he legitimately holds, inasmuch as the expression "attachment" is defined by section 2(1)(d) of the Act to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under the Third Chapter of the Act. The possibility of possession of such property being taken over or being treated as "frozen" arises only upon confirmation by the adjudicating authority under section 8(4) of the Act. In terms of such scheme, the attachment is an interim

measure, eventual intendment being that in the event of it being "found" that the offence of money-laundering has been committed and that such property is involved or has been used for such offence to be committed, it shall be ordered to be confiscated to the Central Government. In contrast to the effect of the order of attachment which only entails prohibition of transfer, conversion, dispossession or movement of such property, the confiscation in terms of section 8(5) and (7) of the Act entails all the rights and title in such property vesting absolutely in the Central Government free from all encumbrances. Further the provision in section 10 conferring upon the Central Government the power to take over and manage such property as has been confiscated even by disposing it of leaves no doubt that the vesting of the property in the Government is absolute. As is clear from the provisos to section 9, the liability under the encumbrance subsists in favour of such third party as had acted in good faith but if the creation of such encumbrance was with the objective of managing escape of such property from such attachment or confiscation, the law empowers the special court, or the Adjudicating Authority, to declare such encumbrance to be void, this also leading to confiscation of the property in favour of the State. The eventual touchstone, even for the special court, dealing with the offence of money-laundering (and connected offences) remains that the property attached, or to be confiscated, must be such as was "involved in" or "used for" the commission of the offence of money-laundering.

The law recognises that there may be third parties having legitimate interest in such property. It is for this reason that they are afforded opportunity to approach the adjudicating authority under section 8(1) or (2) of the Act and also the Appellate Tribunal under section 26, as indeed the special court under section 8(6), (7) and (8) of the Act. Generally, the jurisdiction of the special court to deal with the issue comes at the time of conclusion of the trial before it but, in a fit case, it may consider a request for release of the property from attachment even during the trial (second proviso to sub-section (8) of section 8). The basic tests prescribed by the law while dealing with the claim of a third party for release of the property are to find whether such claimant has a legitimate interest in the property, whether he had acted in good faith having taken all reasonable precautions and himself was not involved in the offence of money-laundering or may have suffered a quantifiable loss as a result of the offence of money-laundering. It is with this view that section 8 permits the special court to not only release from attachment but even restore the confiscated property (or its part) to the claimant with a proven legitimate interest (third party) and further allow such party as may have claim over an

encumbrance lawfully and bona fide created to recover its legitimate dues from the debtor by a suit for damages though treating as void the encumbrance or charge that may have been created by the person found guilty of money-laundering with a view to defeat the law in the Act (provisos to section 9). The Act provides for presumptions to be raised about a property having the character of "proceeds of crime" being involved in money-laundering and also respecting the illicit nature of a transaction involving its acquisition on account of connection with other transaction(s) of suspect nature.

Under the prevention of money-laundering law, the confiscation of property (which is akin to forfeiture of property) is definitely not envisaged as a criminal sanction, for the reason that the objective of the Legislature clearly is to deprive the offender of the enjoyment of illegally acquired fruits of crime affecting his civil rights. This is all the more so, because the jurisdiction to order attachment of the property is vested in the executive and its confirmation is left to the decision of the quasi-judicial body, i. e., Adjudicating Authority. The statutory authorities vested with the jurisdiction to provisionally direct or confirm attachment are, however, expected to assess, even if tentatively, the value of proceeds of crime so that it is ensured that only proceeds or assets of the offender of money-laundering of equivalent value are subjected to restraint, the evaluation undoubtedly open to variation or modification in light of evidence gathered till the probe is concluded. The provision for provisional attachment and its confirmation, pending trial before the court (wherein the issue of confiscation would come up at the time of determination of guilt in criminal case), is similar to that for attachment before judgment in civil law. The law conceives of the possibility of disposal of ill-gotten assets to frustrate the objective. Ultimately, the confiscation is left to the special court. But an order to such effect only follows the determination of the guilt in the criminal trial on the charge for offence of money-laundering.

STATE OF WEST BENGAL *v.* GHOSH (S. K.) [1963] AIR 1963 SC 255 *and* BISWANATH BHATTACHARYA *v.* UNION OF INDIA [2014] 4 SCC 392 *relied on.*

Section 5(4) of the Act protects the continuation of enjoyment of the immovable property by a "person interested" if he had a claim or title to any interest in the property. Similarly, in terms of section 12(7) of the Act, a property may be held exempt from confiscation if a third party (any other person, other than the fugitive economic offender) has an interest which was acquired bona fide and without knowledge of the fact that the property was proceeds of crime. Generally speaking, the civil sanction of forfeiture for confiscation of

property is thus directed by various enactments against property with which there is a link or nexus of the criminal offence. A bona fide holder of such property is protected but the onus to displace the inference arising from the evidence available by proving that his acquisition was legitimate and for adequate consideration is on him.

"Proceeds of crime", as given in section 2(1)(u) of the Act may be deconstructed into three parts : (i) property derived or obtained (directly or indirectly) as a result of criminal activity relating to scheduled offence ; or (ii) the value of any such property ; or (iii) if the property of such nature has been "taken or held" abroad, any other property "equivalent in value" whether held in India or abroad.

Generally, there would be no difficulty in proceeding with the attachment or confiscation of a tainted property respecting which there is material available to show that it was derived or obtained as a result of criminal activity of specified nature, so long as such property is found held by the person who had indulged in such criminal activity, it amounting to money-laundering, as indeed those who may have aided or abetted such acts. Dispute, however, is likely to arise in relation to attachment or confiscation upon questions being raised at the instance of the person suspected of money-laundering (or his abettor) as to the sufficiency of the material or reasons to believe for such action, and the fairness or propriety of the procedure followed. Dispute may also arise in such context if the property has been transferred to another person, after it had been acquired by the transaction relatable to money-laundering and before its attachment under the Act. The third party may have a claim to agitate that it had been acquired by it bona fide and for lawful and adequate consideration. The inclusive definition of "proceeds of crime" respecting property of the second nature—i. e., "the value of any such property"—gives rise to potential multi-layered conflicts between the person suspected of money-laundering (the accused), a third party (with whom such accused may have entered into some transaction vis-a-vis the property in question) and the enforcement authority (the State). Since the second kind of species of "proceeds of crime" uses the expression "such property", the qualifying word being "such", it is vivid that the "property" referred to here is equivalent to the one indicated by the first kind. The only difference is that it is not the same property as of the first kind, it having been picked up from among other properties of the accused, the intent of the Legislature being that it must be of the same "value" as the former. The third kind does use the qualifying words "equivalent in value". Though these words are not used in the second category, it is clear that it also has to be understood in the same sense. Thus, it

must be observed that if the enforcement authority under the Act has not been able to trace the "tainted property" which was acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused, by tapping the second (or third) kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of "proceeds of crime" derived or obtained from the criminal activity so that proceeds or other assets of equivalent value of the offender of money-laundering (or his abettor) are subjected to attachment to such extent, the eventual order of confiscation being always restricted to take over by the Government of illicit gains of crime, the burden of proving facts to the contrary being on the person who so contends.

Chronologically speaking, the Recovery of Debts and Bankruptcy Act, 1993 (in its original form and moniker Recovery of Debts to Banks and Financial Institutions, 1993) was enacted in 1993, followed by the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 coming on the statute book in 2002, the Prevention of Money-Laundering Act, 2002 being enacted in 2002, commencing in 2005, the Insolvency and Bankruptcy Code, 2016 being the latest legislation enforced in 2016. These laws, enacted for different objects and reasons, have come with provisions declaring each of them to have the overriding effect. However, section 34 of the 1993 Act would not give primacy to it over the Act since the object of the original first enactment was to provide for expeditious adjudication of the claims of banks and financial institutions and quite distinct from the objective of the latter. As in the case of the 1993 Act, section 35 of the 2002 Act would not render the Act subservient to it because of the different objects and reasons of both enactments. Thus, the Act, enacted in 2002 (but enforced in 2005), continued to prevail, particularly in the matter of attachment and confiscation, by virtue of its section 71.

The objects and reasons of enactment of the four legislations are distinct, each operating in different field. There was no overlap. While the 1993 Act has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, the 2002 Act (with an added chapter on registration of secured creditors) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "due" to the claimant, i. e., the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The 2016 Code, in contrast, seeks to

primarily protect the interests of creditors by entrusting them with the responsibility to seek resolution through a professional, failure on his part leading eventually to the liquidation process. The purpose, purport and import of section 31B inserted in the 1993 Act, and section 26E inserted in the 2002 Act, has to be understood in the above light. The marginal heads of both the provisions are identically worded—"Priority to secured creditors". Though section 26E of the 2002 Act requires, as a condition precedent, "the registration of security interest", which is not requisite for section 31B of the 1993 to operate, both provisions give precedence to realisation of "debts due to" the "secured creditor", the clause in the 1993 Act also clarifying this by the additional words "payable to them by sale of assets over which security interest is created". Each of these provisions renders secondary "all other debts" and "revenues, taxes, cesses" and "rates" enforced by "the Central Government, State Government or local authority". Section 31B of the 1993 Act uses the expression "due to" while section 26E of 2002 Act uses the words "payable to" in relation to such debts, revenues, taxes, etc., the meaning being similar.

The proposition that the jurisdiction conferred on the State by the Act to confiscate the "proceeds of crime" concerns a property the value whereof is "debt" due or payable to the Government (Central or State) or local authority, is not acceptable. The Government, when it exercises its power under the Act 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 in the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity.

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 convey taxation. The reliance on the use of the expression "non-tax revenue" with reference to the Act under major accounting head "0047 Other Fiscal Services" in the list of Heads of Accounts of Union and States issued by the 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 the Act the colour of taxation.

A resolution professional appointed under the 2016 Code does not have any personal stake in the resolution process. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of section 14 of the Code cannot come in the way of the statutory authority conferred by the Act on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A contrary view would defeat the objective of the Act by opening an escape route. After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason that such assets are not lawfully his to claim.

The objective of the legislation in the Act being distinct from the purposes of the three other enactments, viz., the 1993 Act, 2002 Act and the 2016 Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different.

These laws (or similar other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other, with regard to assets respecting which there is material available to show it to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" rendering it "proceeds of crime", within the mischief of the Act. The Act, declares, by virtue of section 71, that it has overriding effect over other existing laws, such provision containing a non obstante clause with regard to inconsistency apparently to be construed as referable to the dealings in "money-laundering" and "proceeds of crime" relating thereto.

An order of attachment under the Act, if it meets with the statutory prerequisites, is as lawful as an action initiated by a bank or financial institution, or a secured creditor, for recovery of dues legitimately claimed or for enforcement of secured interest in accordance with the 1993 Act or 2002 Act. An order of attachment under the Act is not rendered illegal only because a secured creditor has a prior secured interest (charge) in the subject property. Conversely, mere issuance of an order of attachment under the Act cannot, by itself, render illegal the prior charge or encumbrance of a secured creditor, this subject to such claim of the third party (secured creditor) being bona fide. In these conflicting claims, a balance has to be struck.

The legislation on money-laundering, as is the case of similarly placed other legislations providing for forfeiture or confiscation of illegally acquired assets, contains sufficient safeguards to protect the interest of such third parties as may have acted bona fide.

A charge or encumbrance of a third party in a property attached under the Act can be treated as "void" if there is material to show that it had been created "to defeat" the law, such declaration rendering the property liable to attachment and confiscation in favour of the Government vesting it "free from all encumbrances".

The definition of the expression "proceeds of crime" clearly refers to a property respecting which there is material to show it to have been "derived or obtained", directly or indirectly, by a person "as a result of criminal activity (of specified nature)". In case such property is held by the person who is charged with the offence of money-laundering, there is a statutory presumption under section 24(a) of the Act about it being proceeds of crime involved in such money-laundering. It is a rebuttable presumption, the onus to prove facts to the contrary being on the person accused of such offence. If the acquisition of such property by such accused has involved more than one inter-connected transactions, one of such transactions being proved to be involving money-laundering, a statutory presumption is raised under section 23 of the Act that the other transactions form part of the former, the burden to prove facts to the contrary being again on the person claiming otherwise.

But, in cases where the enforcement authority seeks to attach other properties, because they are of equivalent value as to the proceeds of crime which cannot be traced, it is essential that there be some nexus or link between such property on one hand and the person accused of or charged with the offence of money-laundering on the other. In cases of this nature, the person accused of money-laundering must have had an interest in such property at least till the time of engagement in the proscribed criminal activity from which he is stated to have derived or obtained pecuniary benefit which is to be taken away by attachment or confiscation. It is with this view that the Act provides for a possible presumption to be drawn, under section 24(b) using the expression "may presume", about a property being involved in money-laundering in the case of person other than the one who is charged with the offence of money-laundering. There is no doubt that such presumption, if drawn, may also be rebutted by evidence showing facts to the contrary.

If a bona fide third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the date or period of the commission of criminal

activity which is the basis of such action under the Act can be safely treated as the cut-off. From this, it naturally follows that an interest in the property of an accused, vesting in a third party acting bona fide, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under section 8 of the Act. Though the bona fide third party claimant has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the order of attachment under the Act, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in situations where a third party interest is created prior to the criminal activity, the order of attachment under the Act would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party. Situation may also arise, wherein a secured creditor, it being a bona fide third party claimant vis-a-vis the alternative attachable property (or deemed tainted property) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under the Act, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the attachment under the Act, though remaining valid and operative, takes a back-seat allowing the secured creditor bona fide third party claimant to enforce its claim by disposal of the subject property, the remainder of its value, if any, thereafter to be made available for purposes of the Act.

The newly inserted provisions[1] contained in sections 26B to 26E falling in Chapter IV-A on "registration by secured creditors and other creditors" of the 2002 Act are yet to be notified and brought into force. In the event of the statutory clauses coming into force, a creditor will not be entitled to exercise the right of enforcement, inter alia, of security interest over the property of borrower unless such "security interest" has been duly registered under the law. Upon such amended law being enforced, a bona fide third party claimant seeking relief against an order of attachment under the Act will also be obliged to show due compliance with such statutory requirements.

The provisional order of attachment is subject to confirmation by the Adjudicating Authority. The order of the Adjudicating Authority, in turn, is

1. By section 18 of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (Act 44 of 2016).

amenable to appeal to the Appellate Tribunal. The Appellate Tribunal may pass such orders as it thinks fit confirming, modifying or setting aside the order appealed against. Undoubtedly, an aggrieved party is entitled in law to invoke the jurisdiction of the Appellate Tribunal to bring a challenge to the orders of attachment (as confirmed) but, the law in the Act, at the same time, also confers jurisdiction on the special court to entertain such claim for purposes of restoration of the property during the trial of the case (section 8). The jurisdiction to entertain objections to attachment conferred on the Appellate Tribunal on one hand and, on the special court, on the other, thus, may be co-ordinate, to an extent.

If the order confirming the attachment has attained finality, or if the order of confiscation has been passed or, further if the trial of a case for the offence under section 4 of the Act has commenced, the claim of a party asserting to have acted bona fide or having legitimate interest will have to be inquired into and adjudicated upon only by the special court. But this does not confer a general right to seek release of such property from attachment even in cases where the encumbrance is created or interest acquired at a time around or after the date or period of criminal activity. In such cases, the third party will have the additional burden to prove that it had exercised due diligence having "taken all reasonable precautions" at the time of acquisition of such interest or creation of such charge, the jurisdiction to entertain and inquire into such claim and grant relief of release after order of attachment has attainted finality, or of restoration after order of confiscation, vesting only in the special court under section 8(7) and (8) of the Act. The due diligence is to be tested amongst others, on the touchstone of questions as to whether the party had indulged in transaction after due inquiry about untainted status of the asset or legitimacy of its acquisition.

The process of attachment (leading to confiscation) of proceeds of crime under the Act is in the nature of civil sanction which runs parallel to investigation and criminal action vis-a-vis the offence of money-laundering. The empowered enforcement officer is expected to assess, even if tentatively, the value of proceeds of crime so as to ensure such proceeds or other assets of equivalent value of the offender of money-laundering are subjected to attachment, the evaluation being open to modification in light of evidence gathered during investigation. The empowered enforcement officer has the authority of law in the Act to attach not only a "tainted property"—that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence—but also any other asset or property of equivalent value of the offender of money-laundering, the latter not

bearing any taint but being alternative attachable property (or deemed tainted property) on account of its link or nexus with the offence (or offender) of money-laundering. If the tainted property respecting which there is evidence available to show it to have been derived or obtained as a result of criminal activity relating to a scheduled offence is not traceable, or for some reason it cannot be reached, or to the extent found is deficient, the empowered enforcement officer may attach any other asset ("the alternative attachable property" or "deemed tainted property") of the person accused of or charged with offence of money-laundering provided it is near or equivalent in value to the former, the order of confiscation being restricted to taking over by the government of illicit gains of crime. If the person accused of (or charged with) the offence of money-laundering objects to the attachment, his claim being that the property attached was not acquired or obtained (directly or indirectly) from criminal activity, the burden of proving facts in support of such claim is to be discharged by him. The objective of the Act being distinct from the purpose of the 1993 Act, 2002 Act and 2016 Code, the latter three legislations do not prevail over the former. The Act, by virtue of section 71, has overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto. The Act, 1993 Act, 2002 Act and 2016 Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show it to have been derived or obtained as a result of criminal activity relating to a scheduled offence and consequently being proceeds of crime, within the mischief of the Act. An order of attachment under the Act is not illegal only because a secured creditor has a prior secured interest (charge) in the property, within the meaning of the expressions used in the 1993 Act and the 2002 Act. Similarly, mere issuance of an order of attachment under the Act does not ipso facto render illegal a prior charge or encumbrance of a secured creditor, the claim of the latter for release (or restoration) from the Act attachment being dependent on its bona fides. If the bona fide third party claimant is a "secured creditor", pursuing enforcement of "security interest" in the property sought to be attached, it being an alternative attachable property or deemed tainted property, it having acquired such interest from person(s) accused of the offence of money-laundering (or his abettor), or from any other person through such transaction or inter-connected transactions as involve(s) criminal activity relating to a scheduled offence, such third party having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under the Act, the directions of such attachment under the Act shall be valid and operative subject to satisfaction

of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the third party. The bona fide third party claimant shall be accountable to the enforcement authorities for the "excess" value of the property subjected to prevention of money-laundering attachment. If the order confirming the attachment has attained finality, or if the order of confiscation has been passed, or if the trial of a case under section 4 of the Act has commenced, the claim of a party asserting to have acted bona fide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court.

The banks which held mortgage or lien or legitimately created encumbrances over properties attached under the Act filed appeals before the Appellate Tribunal constituted under the Act challenging the orders of attachment. The Appellate Tribunal took the view that the relevant statutory provisions of the Act would take a back seat, and the enactments such as the 2002 Act and the 1993 Act under which the banks laid their claims over the properties had primacy. The Deputy Director, Directorate of Enforcement questioned the correctness of the logic and reasoning of the Appellate Tribunal :

Held accordingly, *that there was a need for further scrutiny particularly on facts, of the claims. The assets which had been the subject matter of attachment were not "tainted property", as they seemed to have been acquired prior to the criminal activity giving rise to accusations of money-laundering. They were sought to be attached and subjected to eventual confiscation on account of being alternative attachable properties or deemed tainted properties, which was permissible in law. The car was acquired by a transaction which had no direct connection with the case of money-laundering. However, there was no clarity as to the value of proceeds of crime which were to be confiscated as against the value of the attached property as indeed the extent of the debt yet to be recovered by the secured creditor. The monetary gains made by the transactions which were the subject-matter of the accusations of money-laundering on account of illicit foreign exchange transactions or the case of cheating by use of fabricated defence supply orders involved public servants. They required closer scrutiny as to the claim of the banks of bona fide action. Though there was no such element of complicity on the part of any of the officials of the banks in the case relating to fictitious hospital equipment or the one involving consortium of banks, scrutiny respecting the legitimacy and bona fides of the claim on the touchstone, inter alia, of the subsisting value of the secured interest and chronology of events leading to attachment was necessary. It had to be under taken by the Appellate Tribunal after calling for further responses from each side.*

GANESAN (V. M.) (DR.) *v.* JOINT DIRECTOR, DIRECTORATE OF ENFORCEMENT [2014] SCC Online Mad 10702 *distinguished*.

Decision of the Appellate Tribunal, Prevention of Money-Laundering Act set aside and matter remanded.

Cases referred to :

All India Film Corporation Ltd. *v.* Raja Gyan Nath [1969] 3 SCC 79 (para 157)

Aslam Mohammad Merchant *v.* Competent Authority [2008] 14 SCC 186 (para 97)

Assistant Commissioner (CT) *v.* Indian Overseas Bank [2017] 202 Comp Cas 226 (Mad) [FB] (paras 74, 138, 145)

Bank of Bihar (now State Bank of India) *v.* State of Bihar [1971] 41 Comp Cas 591 (SC) (para 142)

Bhoruka Steel Ltd. *v.* Fairgrowth Financial Services Ltd. [1997] 89 Comp Cas 547 (Bom (Special TORTS)) (paras 74, 133, 134)

Biswanath Bhattacharya *v.* Union of India [2014] 4 SCC 392 (paras 89, 93)

Chellamuthu (C.) *v.* Deputy Director, Prevention of Money-Laundering Act MANU/TN/4087/2015 (paras 74, 79)

CIT (Principal) *v.* Monnet Ispat and Energy Ltd. [2018] 211 Comp Cas 99 (SC) ; [2018] 12 ITR-OL 281 (SC) (paras 142, 144)

Dena Bank *v.* Bhikhabhai Prabhudas Parekh and Co. [2001] 107 Comp Cas 157 (SC) ; [2001] 247 ITR 165 (SC) ; [2001] 120 STC 610 (SC) (paras 142, 144)

Ganesan (V. M.) (Dr.) *v.* Joint Director, Directorate of Enforcement [2014] SCC Online Mad 10702 (paras 74, 152, 153)

Gopi Pershad *v.* State of Punjab [1957] AIR 1957 Punjab 45 (para 143)

Gunwant Lal Godawat *v.* Union of India [2018] 12 SCC 309 (paras 80, 87, 90)

KSL and Industries Ltd. *v.* Arihant Threads Ltd. [2015] 190 Comp Cas 328 (SC) (para 135)

Life Insurance Corporation of India *v.* Bahadur (D. J.) [1981] 1 SCC 315 (para 135)

Pramatha Nath Talukdar *v.* Maharaja Probirendra M. Tagore [1966] AIR 1966 Cal 405 (para 155)

Rajah Salig Ram *v.* Secy. of State of India [1872] SCC Online PC 43 (para 80)

Rama Raju (B.) *v.* Union of India [2011] 164 Comp Cas 149 (AP) (paras 74, 77, 78)

Reserve Bank of India *v.* Peerless General Finance and Investment Co. Ltd. [1987] 61 Comp Cas 663 (SC) (para 136)

Sanjay Bhandari *v.* CBI [2015] SCC Online Delhi 10079 ; [2015] 222 DLT (CN) 5 (paras 74, 75)

Sarwan Singh *v.* Kasturi Lal [1977] 1 SCC 750 (para 133)

Shivdev Singh *v.* Sucha Singh [2000] 4 SCC 326 (para 157)

Solidaire India Ltd. *v.* Fairgrowth Financial Services Ltd. [2001] 104 Comp Cas 569 (SC) (paras 74, 134)

State of West Bengal *v.* Ghosh (S. K.) [1963] AIR 1963 SC 255 (paras 87, 93)

Syndicate Bank *v.* Official Liquidator, Prashant Engineering Co. P. Ltd. [1986] 59 Comp Cas 301 (Delhi) (para 155)

Union of India *v.* SICOM Ltd. [2009] 147 Comp Cas 531 (SC) (para 142)

United Bank of India *v.* Satyawati Tondon [2010] 158 Comp Cas 251 (SC) (para 74, 76)

Urmila Kumari *v.* Om Prakash Jangra [2015] SCC Online Delhi 8283 (paras 118, 119)

Crl. A. Nos. 143, 210, 623, 764 and 1076 of 2018 and Crl. M. A. Nos. 2262, 3233, 10886, 10887, 28500, 34565, 34567 and 48245 of 2018 and 199 and 202 of 2019.

Amit Mahajan, CGSC with *Mohammed Faraz* and *Ms. Mallika Hiremath*, for the appellants in all the appeals.

Shri Singh with *Pradyumna Sharma*, *Ms. Maneka Khanna* and *Ms. Sayali Kadu*, for respondent No. 1 in Crl. A. No. 143 of 2018 and Crl. M. A. No. 2262 of 2018.

Ankur Mittal for respondent No. 1 in Crl. A. No. 210 of 2018 and Crl. M. A. No. 3233 of 2018.

Ajay Bahl with *Vikas Sharma* for the respondent in Crl. A. No. 623 of 2018 and Crl. M. A. Nos. 10886-10887 and 48245 of 2018.

Vipul Agarwal and *Rajesh Rattan* for PNB in Crl. A. No. 764 of 2018 and Crl. M. A. Nos. 28500 of 2018, 199 and 202 of 2019.

Jayant Mehta, *Ashu Kansal* and *Milan Singh Negi*, for resolution professional in Crl. A. No. 764 of 2018 and Crl. M. A. Nos. 28500 of 2018, 199 and 202 of 2019.

Rajesh Rattan for PNB in Crl. A. No. 1076 of 2018 and Crl. M. A. Nos. 34565 and 34567 of 2018.

Saumyen Das for respondent No. 2/DBS in Crl. A. No. 1076 of 2018 and Crl. M. A. Nos. 34565 and 34567 of 2018.

JUDGMENT

R. K. GAUBA J.—These five appeals presented under section 42 of the Prevention of Money-Laundering Act, 2002 ("PMLA", for short) against more or less similar orders of the Appellate Tribunal (constituted under section 25), such orders having been rendered on appeals of the respondents ("banks") vis-a-vis the orders of provisional attachment issued by the enforcement officers under section 5, as confirmed by the Adjudicating Authority under section 8, give rise, inter alia, to certain common questions of law of import concerning nature of property that may be attached under this special law as indeed the conflict arising from claim of bona fide acquisition of interest by third parties. Hence, they have been heard together and are being decided by this common judgment. 1

The issues

The measure of attachment of property involved in "money-laundering", it essentially representing "proceeds of crime" (as defined in law), is provided to ensure that the ultimate objective of "confiscation" of such ill-gotten property be not frustrated, the power and jurisdiction to order confiscation being vested in the Special Court. As would be seen at length in later part of this judgment, the provisions for attachment (followed by adjudication) leading to confiscation are sanctions in addition to the criminal sanction rendering the act of "money-laundering" a penal offence (by virtue of section 4). The order of "confiscation" of property attached under PMLA takes away the right and title of its owner and vests it "absolutely in the Central Government free from all encumbrances" (section 9). 2

The appeals at hand relate to claims of entities other than the persons in whose name the attached properties are held—to be referred hereinafter as "third party"—such claims of the third party emanating from charge, lien or encumbrances legitimately created. To put it simply, the conflict meriting resolve here concerns the sovereign authority of the State to take away and confiscate the property which has been acquired by a person through criminal activity as against the lawful claim of a third party to reach out to such property to recover, in accordance with law, what is due by attachment and sale of same very property. 3

Bearing in mind the above, learned counsel on both sides of the divide in these matters repeatedly submitted that the issues presently brought for 4

adjudication are not adversarial in nature, in that both sides concededly have been given certain authority by law to reach out to the properties in question for their respective purposes, the challenge essentially being to prioritize the claims of one over the other. The Appellate Tribunal (as constituted under the PMLA), by its impugned orders, has taken the view that the relevant statutory provisions of the PMLA take a back seat, the enactments under which the third parties (the banks) lay a superior claim over the properties in question having primacy. The appellant assails the said view questioning the correctness of the logic and reasoning by which the Appellate Tribunal has so concluded arguing that if the decision of the Tribunal were to prevail it would not only be prone to misuse but also render the PMLA toothless.

The facts

5 Before proceeding further, it would be apposite to take note of the background facts in each case.

Crl. Appeal No. 143 of 2018 (the case of "Audi car")

6 The dispute in the first captioned matter (Crl. A. No. 143 of 2018) stems from the conflict arising out of the attachment of car make Audi, model No. A-335TDI bearing registration No. DL-2C-AT-4920 ("the Audi car") of seventh respondent Rajeev Singh Kushwaha (the registered owner), by the enforcement officer under the PMLA, as confirmed by the Adjudicating Authority, and the claim of the respondent-bank ("Axis Bank") over the said Audi car on account of hypothecation in relation to the finance that had been provided by it for its acquisition by the said registered owner.

7 There is no dispute between the parties herein as to the facts that the registered owner of the Audi car had availed of loan facility vide account No. AUR012601217345 from the above mentioned bank for purchasing the same in December, 2015, he having executed, inter alia, the loan-cum-hypothecation agreement dated September 13, 2014 and irrevocable power of attorney dated December 4, 2014 in its favour and by virtue of such documents the vehicle is under hypothecation with the bank, the finance provided for its acquisition having remained unpaid. The bank, it appears, had taken certain steps, through its separate legal entity (Axis Asset Management Co. Ltd.), to take over the control/possession of the said asset and recover its dues by its sale, the liability, as on July 12, 2017 being Rs. 12,08,949.

8 The Government of India had announced demonetization policy on November 8, 2016 in terms of which the then existing Indian currency notes of the denomination of Rs. 1,000 and Rs. 500 ceased to be legal tender, a window having been provided for exchange of demonetized notes,

with the new currency introduced, by deposit in the bank accounts. On November 29, 2016 three persons (including one Mohit Garg) travelling in a car were intercepted in the area of police station Kashmere Gate, their search revealing unaccounted and unauthorized possession of four bags containing demonetized currency notes of the face value of Rs. 1,000 each, totalling worth Rs. 3.70 crores. In the wake of revelations made, first information report (FIR) No. 416 of 2016 was registered initially for offences punishable under sections 420 and 120B of the Indian Penal Code to which, on the basis of evidence gathered in due course, other offences were added, they including those punishable under sections 409, 467, 468, 471 of the IPC and sections 7 and 13(1)(d) of the Prevention of Corruption Act, 1988.

It is stated that the investigation carried out has brought to light evi- **9**
dence showing involvement of, amongst others, Vineet Gupta and Shobhit Sinha, Branch Manager and Operations Manager of Axis Bank, Kashmere Gate, Delhi, besides Rajeev Singh Kushwaha in whose name the Audi car was purchased and stands registered. It is further stated that the evidence has been collected to show that Rajeev Singh Kushwaha had floated certain fictitious companies, one of his associates (Mohit Garg) providing services of an entry operator. It is also stated that the evidence collected has shown that a criminal conspiracy was hatched pursuant to which the individuals who were intercepted, along with others, including Rajeev Singh Kushwaha, had indulged in acts to convert unaccounted demonetized currency by depositing the same in above mentioned fictitious companies of Rajeev Singh Kushwaha, for consideration, so as to project the same as untainted money. It is alleged that the abovementioned two bank officials had actively participated in the said transactions leading to the demonetized currency being channelized into the fictitious accounts, they having taken illegal gratification, in the form of cash or gold, from Rajeev Singh Kushwaha.

The accounts of the abovementioned four fictitious companies saw **10**
demonetized currency being deposited to the tune of Rs. 39.26 crores during the period November 10, 2016 to November 21, 2016. Certain recoveries, including in the form of gold, statedly proceeds of the above-said crimes, were effected from close associates of Rajeev Singh Kushwaha.

Primarily on the basis of abovementioned facts, and the material gath- **11**
ered during investigation into the police case, it involving scheduled offences, information was also conveyed to enforcement authorities, which resulted in ECIR No. 11/2016 being registered on November 30, 2016 under the PMLA. The investigation into the said case under the PMLA has

led to a complaint being presented, on February 1, 2017 under section 45 upon which cognizance has been taken by the Special Court.

12 Simultaneously, on the basis of reasons to believe recorded in writing, provisional attachment order No. 01 of 2017 was passed and properties of Rajeev Singh Kushwaha of the total value of Rs. 3.40 crores were attached on January 27, 2017. These include the Audi car. The Adjudicating Authority, by its order dated May 31, 2017 confirmed the attachment order. Before confirmation, the Adjudicating Authority had issued a notice (under section 8) to the bank to show cause as to why the properties, including the Audi car, be not attached. The request of its asset management company for suspending the provisional attachment was, however, rejected.

13 The Appellate Tribunal by its decision dated October 25, 2017 in appeal (FPA-PMLA-1848/DLI/2017) of the bank set aside the order of the Adjudicating Authority confirming the attachment order directing the vehicle to be returned to the bank holding it entitled to dispose it of to recover the balance amount due to it under the loan contract as per law, pointing out, inter alia, that the loan facility pre-dated the allegations of money-laundering, the finance used for its acquisitions not representing "proceeds of crime", the lender (the bank) having first priority/charge over the hypothecated property, the objective of the PMLA not detracting or derogating from the protection of legitimate transaction and financial assets as afforded by legislation such as the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act", for short).

14 When this appeal came up before the court on February 6, 2018 in light of the submissions made, the bank was permitted to sell the Audi car, by open auction, in terms of the relevant guidelines and the proceeds of such sale directed to be deposited with the Registrar General in the form of interest bearing fixed deposit receipt (FDR).

Crl. Appeal No. 210 of 2018 (the case of "hospital equipment")

15 The second captioned matter (Crl. Appeal No. 210 of 2018) relates to the conflict arising out of attachment under the PMLA of certain immovable properties described as agricultural lands and built-up properties on plot of land in Ghaziabad ("the immovable properties") of private respondents, by the enforcement authority, as confirmed by the Adjudicating Authority and the claim of the respondent-bank ("State Bank of India") over the said immovable properties under the mortgage contract in relation to the loan facility that had been provided by it.

16 The State Bank of India ("SBI") had been approached by the second respondent (Dr. Kewal Krishan Sood) for sanction of a term loan in favour

of the third respondent M/s. Raghubir Hospital P. Ltd. (RHPL) of which he claims to be the director and promoter for setting up a 150 bedded hospital in district Ghaziabad (UP) and pursuant to the said request term loan aggregating Rs. 5.63 crores was disbursed during the year 2007 for purchase of certain diagnostic machinery. At the time of sanction, and disbursal of the said loan, title deeds of immovable properties were tendered by the borrowers and guarantors and the said properties were accordingly subjected to mortgage/hypothecation. The loan, was not repaid and the account was classified as "non-performing asset" (NPA) with effect from April 30, 2009.

17 The SBI, in exercise of its power under section 13(4) of the SARFAESI Act, took over the hypothecated property/mortgage property (the immovable properties) vide notice dated December 7, 2008. The action was challenged by the second respondent before the Debts Recovery Appellate Tribunal (DRAT), constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, "RDDBFI Act"—since renamed as the Recovery of Debts and Bankruptcy Act, 1993 or "RDBA"), but without success. The SBI, thereafter, moved the Debts Recovery Tribunal (DRT), by O. A. No. 151 of 2011, for issuance of recovery certificate by sale of the mortgaged properties and hypothecated securities. The request was granted by the DRT on February 15, 2013 the amount outstanding as on September 7, 2009 being Rs. 6.44 crores.

18 The inquiries statedly brought out that the per forma invoices and receipts presented in support of the claim of purchase of diagnostic machinery were fabricated documents, no such machinery having actually being purchased, the communications to this effect to the bank being in the nature of misrepresentation.

19 The bank lodged FIR with Central Bureau of Investigation (CBI) which registered it as RC No. BDI/2009/E/0019. The investigation into the said FIR culminated in charge-sheet being presented seeking, inter alia, prosecution of the second and third respondents for offences under sections 420/467/468/471 and 120B of the IPC. It is stated that the investigation has also brought out evidence to show that the second respondent had siphoned off the money received from SBI as loan to RHPL through certain bank accounts maintained with the Nainital Bank, Ghaziabad.

20 Against the above backdrop, information was conveyed to the directorate of enforcement which registered a case vide No. ECIR/11/DZ/2011/AD (VM) under the PMLA. On the basis of reasons for belief recorded in writing, the enforcement officer found it a case of money-laundering and attached certain assets of the borrowers and guarantors (private party

respondents herein) by two separate orders, the property thus attached (under the PMLA) including the assets which are subject to mortgage with SBI.

21 The attachment orders having been confirmed by the Adjudicating Authority, the same were challenged by SBI before the Appellate Tribunal by two appeals (FPA-PMLA-729/DLI/2014 and FPA-PMLA-1411/DLI/2016), both of which were allowed, by common order dated August 31, 2017, inter alia, holding that neither the bank nor its employees being alleged to be involved in money-laundering, the amount of loan sanctioned being "public money", the bank was entitled to recover it by sale of the mortgage properties "as first charge", the SARFAESI Act having overriding effect over PMLA. As a result of the order of the Tribunal, the subject properties have been released from attachment under the PMLA.

Crl. Appeal No. 623 of 2018 (the case of "mortgaged shops")

22 In the third captioned matter (Crl. Appeal No. 623 of 2018), the claim of the respondent-bank (IDBI Bank Ltd.) over certain properties attached by enforcement authority has been accepted by the Appellate Tribunal. The properties in question are described as shop Nos. 4 and 128 (first floor), both located at 6, DLF Industrial Area, Moti Nagar, New Delhi, in the name of one Arun Suri, proprietor of M/s. Aryan Electronics.

23 It is stated that Arun Suri had taken cash credit facility from IDBI in January, 2009 executing various security documents thereby creating equitable mortgage in respect of six properties, including the said two shops, depositing the title deeds with the bank. The cash credit facility initially sanctioned for Rs. 300 lakhs on October 23, 2009 was enhanced to Rs. 500 lakhs and further to Rs. 750 lakhs on July 10, 2010 both times, on request, the charge of equitable mortgage having been extended for enhanced facilities.

24 The borrower (Arun Suri) failed to maintain financial discipline and defaulted in deposit of sale proceeds through the cash credit account, it being declared NPA on December 31, 2012 by IDBI. The bank initiated action under section 13(2) of the SARFAESI Act on January 30, 2013 a receiver having been appointed by the Chief Metropolitan Magistrate (CMM), by order dated June 7, 2017 to take possession of one of the mortgaged properties. The IDBI also moved the DRT for recovery of its dues (by O. A. No. 582 of 2014), the amount outstanding at that stage being Rs. 11,19,81,600.44.

25 Meanwhile, certain serious irregularities involving foreign exchange transactions in the current accounts of various firms/companies of the borrowers, and those connected to him, came to the notice of the Bank of

Baroda (BoB), its internal audit report showing the value of such illicit transactions being to the tune of Rs. 3,600 crores. On the complaint of BoB, the CBI registered FIR (No. RC.BD.F1/2015) on October 9, 2015 against 59 current account holders, it statedly including the borrower in the present case, and certain bank officials, the case involving offences punishable under section 420 read with section 120B of the IPC and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988.

Upon information from CBI, finding it to be a case of money-laundering, **26** the enforcement directorate registered a case (ECIR No. DLZO/20/2015) on October 9, 2015. On the basis of reasons to believe reduced to writing, the enforcement authority issued an attachment order on July 28, 2017 in respect of certain properties, including the abovementioned two shops. The Adjudicating Authority confirmed the said attachment by its order dated November 27, 2017.

On the appeal (FPA-MLA-2147/DLI/2018) of IDBI, the Appellate Tri- **27** bunal, by its decision dated May 10, 2018 set aside the said attachment of the two properties under the PMLA upholding the contention that the said assets had not been acquired by money-laundering and thus could not be described as "proceeds of crime", it being noted that the two shops had been purchased by sale deeds of 2003, much prior to the alleged commission of acts constituting money-laundering. As in the previous case, the Tribunal has reiterated its view that the claim of the IDBI under the SARFAESI Act overrides the authority for attachment under the PMLA, there being no illegality or unlawfulness in the title of the bank to recover its dues under the mortgage, the bank itself (or its employees) not being involved in money-laundering.

Crl. Appeal No. 764 of 2018 (the case of "defence supply orders")

The fourth captioned matter (Crl. Appeal No. 764 of 2018) pertains to **28** mortgage of six properties by depositing title deeds with Punjab National Bank (PNB) for credit facilities taken in the name of M/s. Dynamic Shells (India) P. Ltd. ("DSIPL") by certain individuals including Shambhu Prasad Singh, Shyam Sunder Bhatter, Nirmala Bhatter and Ms. Jaspreet Kaur, the said properties including residential house No. C-3/275, Vipul Khand, Gomti Nagar, Lucknow (UP) ; commercial shop No. SS-14, Gulmohar Complex, Section 15, Noida (UP) ; Factory land and building at A-43, Section-8, Noida, UP ; Land and building (two storeyed) Industrial Shed and Machineries, situated at plot No. 350, Section 3, Phase-II, Industrial Growth Centre, Bawal, Haryana ; Agricultural Land (7.35 acre), Khata No. 28, 55/109, Maujapur, Tehsil, Sikanderpur, Ballia, UP and Agricultural Land, Mauzapur, Gata No. 1009, Pargana Sikandarpur, Purbi, Tehsil,

Sikandarpur, Dist. Ballia, UP, the total mortgage value whereof at the relevant point of time is stated to be Rs. 2,129.74 lakhs. Shambhu Prasad Singh is described as owner of the first said property and co-owner in the last two abovementioned properties, DSIPL being indicated to be the owner of fourth said property, Shyam Singh Bhatter having title over the other two properties, in one as a co-owner.

29 It is stated that on December 10, 2009 DSIPL had approached the PNB to take over the then existing liabilities from Syndicate Bank. The PNB sanctioned credit facilities to the tune of Rs. 2,010.50 lakhs on February 18, 2010 on the request of Shambhu Prasad Singh. The credit facility was enhanced from then Rs. 650 lakhs to 1,800 lakhs, in the context of certain supply orders to the tune of Rs. 2,170.90 lakhs statedly received from armed forces. The enhanced credit facility was availed by DSIPL but with no adjustment, putting PNB to a loss of about Rs. 29.75 crores.

30 The inquiries by PNB revealed that the supply orders from defence authorities which was the basis of drawals were fictitious claims based on forged and fabricated documents, the amounts received against the credit facility having been diverted to the accounts of certain dummy firms and companies set up by Shambhu Prasad Singh in the name of his employees showing them as directors or proprietors.

31 The PNB invoked section 13(2) of the SARFAESI Act to take the symbolic possession of the mortgaged properties of DSIPL and moved DRT, by Original Application No. 84 of 2013, for recovery of debts and also lodged a complaint with CBI which registered FIR No. RCBDI 2014/E/0003 involving offences under sections 120B/420/468/471 of the IPC and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988.

32 It is stated that investigation has confirmed that fictitious supply orders had been used to seek release of funds from PNB against the abovementioned credit facility and the funds received in the account of DSIPL were diverted by Shambhu Prasad Singh and his abovementioned associates to the accounts of fictitious firms and companies. The CBI has since concluded investigation and filed a charge-sheet in the court of Special Judge (Prevention of Corruption Act).

33 The CBI also informed the enforcement directorate which registered a case (ECIR/08/DZ/2015) under the PMLA. Finding it, on the basis of reasons to believe reduced to writing, a case involving money-laundering, the enforcement officer issued attachment order under the PMLA on March 29, 2017 attaching the abovementioned six properties mortgaged with PNB. The said order was confirmed by the Adjudicating Authority on August 4, 2017.

34 The PNB challenged the abovementioned order of attachment under the PMLA by appeal FPA-PMLA-1958/DLI/2017 before the Appellate Tribunal. The appeal of the PNB was allowed and the attachment orders have been set aside, the reasons set out in the said order being similar to those in the abovementioned other cases, it being the conclusion of tribunal that the provisions of the SARFAESI Act and RDDBFI Act (or RDBA) prevail over the PMLA. The Tribunal has also observed that the properties in question had not been acquired out of any proceeds of crime, their acquisition being prior to the commission of offence of money-laundering. It was also noted that there was no nexus between those indulging in money-laundering on one hand and the PNB (or its employees) on the other, its claim under the mortgage being a charge which merited priority.

35 The above order of the Appellate Tribunal was challenged by Union of India in this appeal and by order dated July 25, 2018 it was directed that the first four abovementioned properties shall not be alienated by the PNB.

36 In this case, there have been certain developments post the decision of the Tribunal rendered on the appeal of PNB on May 16, 2018. The PNB proceeded to invoke the jurisdiction of the National Company Law Tribunal, it being the Adjudicating Authority under the recently enacted the Insolvency and Bankruptcy Code, 2016 ("Insolvency Code", for short), by filing a company petition, it being No. (IB)-718(PB)/2018, seeking initiation of corporate insolvency resolution process ("CIRP") against DSIPL. The National Company Law Tribunal, by its order dated September 27, 2018 admitted the said petition and appointed Mr. Nilesh Sharma as the interim resolution professional ("IRP") of DSIPL for carrying out the "CIRP". In the wake of developments that took place pursuant to the said appointment the National Company Law Tribunal, by its order dated December 6, 2018 confirmed the appointment of Mr. Nilesh Sharma as the resolution professional ("RP") of DSIPL.

37 The abovesaid RP, appointed by the National Company Law Tribunal under the Insolvency Code, has approached this court by interlocutory applications (Crl. M. A. Nos. 199 and 202 of 2019), inter alia, seeking impleadment and for clarification of the restraint order dated July 25, 2018. At the time of hearing on the said applications of RP (intervenor) it was submitted on his behalf that he would feel satisfied if he was given audience in opposition to the appeal, he not pressing for any further directions at that stage. The applications were accordingly allowed, to that extent, by order dated January 30, 2019.

Crl. Appeal No. 1076 of 2018 (the claim of "consortium of banks")

38 The last captioned appeal (Crl. Appeal No. 1076 of 2018) also involves Punjab National Bank (PNB) as the prime respondent, though in its capacity as the lead bank of consortium of almost twenty banks. Similar to the factual matrix of the preceding cases, this case involves credit facilities having been taken, in the name of Surya Vinayak Industries Ltd. (SVIL), from various banks, by its directors Sanjay Jain and Rajiv Jain, mortgaging several of their immovable properties, they including factory land and building 1.52 acre, plot No. 38, Khaitan No. 2, Industrial Growth Centre, Zone-11, Bodhjung Nagar, Agartala ; land and building at Villa Naya Bans, Sampla, Distt. Rohtak, Haryana msg. 14,520 sq. yard ; land and building at Vill-Naya Bans, Sampla, Distt. Rohtak, Haryana, msg. 10 Kanal (6,050 sq. yards) ; Residential House msg. 167.20 sq. Mt., D-259, Ground Floor, Ashok Vihar-1, Delhi-52 ; land and bldg on plot of land bearing Khevat No. 90 at Vill-Naya Bans, Sampla, Rohtak ; land bearing Khewat 145 measuring 11 Kanal 8 Marla (6897 sq. yard) and Khewat No. 135 measuring 7 Kanal 7 Marla (4,446.75 sq yrd) at Vill-Naya Bans, Sampla, Distt-Rohtak (total 11,343.75 sq yards) ; Land measuring 30 Kanal 9 Marla (18,422.25 sq. yard) at village Naya Bans, Sampla, Distt. Rohtak, Haryana; Land measuring 53 kanal (32,065 sq. yards) at vill-Naya Bans, Sampla, Distt, Rohtak (Haryana) ; Khasra No. 4564 (0.78 Hect), 455 (0.62 Hect), 481 (4.82 Hect), 482 (2.95 Hect) Total 9.17 Hect) situated at Vill-Gudri, Distt, Katni and Khasra No. 499, 501/1 502/2m 503/1, 503/2 (part), 2162/1, 2162 (part), Piproudh, NH-7, Distt-Katni (MP). The first three properties are stated to be owned by SVIL, next four held in the name of Rajiv Jain, the one following owned by Sanjay Jain and the last two of SVIL Mines Ltd., a sister concern.

39 In the loan accounts, the aforesaid directors of SVIL had stood guarantee, a corporate guarantee to secure credit facility having also been executed by SVIL, it being claimed that the company in whose favour money was being borrowed was majorly engaged in the business of trading of agro-commodities and manufacturing and marketing of essence oils, perfumery compounds, flavours, fragrances and aromatic chemicals. The loans were taken and the mortgage contracts created during 2005 and 2007, the properties which were placed under mortgage having been acquired during 1994 to 2005.

40 All the loans became NPA after 2011. A forensic audit of the borrowers was carried out by the consortium (led by PNB) in the wake of resolution of December, 2013. The audit report brought out serious financial irregularities including misrepresentation of value of stock in book debts. It is stated

evidence was gathered in due course that the statement of stock as well as debtors and receivables on the basis of which credit facilities were obtained were false and fabricated.

Eventually, the matter was reported to CBI which registered FIR (No.RCBDI/2014/E/0001) involving offence under section 120B read with section 420 of the IPC. **41**

It is stated that the CBI brought the above facts to the notice of enforcement directorate which, for reasons reduced to writing, found it to be a case of money-laundering and, thus, registered its own case (ECIR No. DLZO/01/2015/AD (VM)), under the PMLA. **42**

While the consortium of banks led by PNB has proceeded to take steps for recovery of outstanding dues under the SARFAESI Act and RDBA, the enforcement directorate, for reasons to believe reduced to writing, proceeded to attach the abovementioned properties on March 31, 2016 which order was confirmed by the Adjudicating Authority on September 22, 2016. **43**

The respondents, i. e., PNB and DBS Bank Ltd. (members of the consortium) approached the Appellate Tribunal by appeals (FPA-PMLA-1616/DLI/2017 and FPA-PMLA-1618/DLI/2017). The Appellate Tribunal, by its common judgment dated June 28, 2018 has allowed the said appeals and set aside the attachment order under the PMLA, the reasons for such decision being similar (if not identical) to the other cases mentioned above. **44**

The contentions of third party

It is clear from the background facts of these five appeals that the properties which have been targeted in most of the corresponding cases for attachment by the enforcement authority under the PMLA are not properties which can be described even remotely to be those which had been derived or obtained as a result of criminal activity leading to commission of money-laundering. All such assets were acquired much prior to the acts of commission or omission relating to money-laundering. The assets in question seem to be held in the name of, or owned by, persons against whom there is material available forming the basis of reasons to believe of complicity in money-laundering. But the properties which were attached are not product of money-laundering, the enforcement authority concededly having moved against such properties because there are reasons to believe that they are properties of value equivalent to the assets that may have been acquired, derived or obtained as a result of money-laundering. To put it simply, it appears that the enforcement authority having not been able to lay its hands on the property derived or obtained from money-laundering has proceeded to reach out to other assets of the suspects that appear prima facie to have been acquired earlier from legitimate means because **45**

they are properties of the same value as would have been the value of the pecuniary advantage gained by money-laundering.

46 It is in the above context that the conflicts involving third party claims have arisen because the respondents (banks) claim to have acquired lawful interest (by mortgage or hypothecation) in the properties (which have been attached) in due course of their banking activities. It is not disputed that neither the concerned bank nor any of its agents or employees have had any connection whatsoever with any act of commission or omission relating to the money-laundering of which the borrowers are accused in these cases. It is also well conceded by the State (the appellant) that the banks in these matters may be entitled to and may have been pursuing lawful remedies where-under these very properties can be legitimately attached and sold, by public auction, to satisfy their respective claims, such satisfaction, in turn, concededly giving a lawful discharge to the borrowers for the corresponding debt.

47 It is argued that if the contentions of the respondent banks were to be upheld and the view taken by the Appellate Tribunal endorsed, the law under the PMLA would stand defeated, not only because the sovereign authority to take away the property of the money-launderer "free from all encumbrances" would stand frustrated, but also because the wrong-doer (the borrower who has indulged in money-laundering) would derive illegitimate pecuniary advantage by getting a discharge for the debt by using an asset the right to hold which had been forfeited.

48 Conversely, it is argued that the legislative intent and command is that the RDDBFI Act (or "RDBA") and SARFAESI Act (as also the Insolvency Code) must prevail over the PMLA, the authority of enforcement agency taking a back-seat. At the same time, it was urged that a harmonious construction of the PMLA and the legislations (RDBA and SARFAESI Act) under which the respondent banks ("secured creditors") seek remedy has to be achieved such that the objective of each is sub-served, none defeated.

Sanctions against money-laundering

49 The malaise of money-laundering has been a challenge faced by various members of the global community for many a decade now. At least two international organisations (the European Commission and the Gulf Co-operation Council) and a number of sovereign States had set up an Inter-Governmental body called the Financial Action Task Force (FATF) on Money-Laundering with the objective of development and promotion of policies to combat the menace. The FATF, by its recommendations made in 1990, suggested measures to be adopted similar to those set forth in the Vienna Convention (on criminalizing the drug money-laundering)

including legislative ones, to enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money-laundering offence or property of corresponding value. By its document titled "The Forty Recommendations" [1996], it reiterated the said suggestion for legislative measures to be adopted for confiscation of such assets or "property of corresponding value", cautioning that such measures be "without prejudicing the rights of bona fide third parties".

The Prevention of Money-Laundering Act, 2002 ("PMLA") though **50**
enacted and notified on January 17, 2003, came into force with effect from July 1, 2005 and has been amended more than once, lastly by the Finance Act, 2018 and the Prevention of Corruption (Amendment) Act, 2018. It was brought on the statute book with the avowed objective "to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incident thereto", pursuant to the obligation in terms, inter alia, of Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 as adopted by the General Assembly of the United Nations on February 23, 1990 and the Political Declaration adopted by the Special Session of the United Nations General Assembly on 8-10 of June, 1998, the global view, which India shares, being that "money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty". As is noted in the "statement of objects and reasons" for this law to be enacted, in the run up to the abovementioned political declarations by the United Nations, the international community had taken certain initiatives that include the following :

> "(a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence.
>
> (b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.
>
> (c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from July 14 to 16, 1989 to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The

recommendations were classified under various heads. Some of the important heads are—

(i) declaration of laundering of monies carried through serious crimes a criminal offence ;

(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions ;

(iii) confiscation of the proceeds of crime ;

(iv) declaring money-laundering to be an extraditable offence ; and

(v) promoting international co-operation in investigation of money-laundering."

51 The PMLA deals with "money-laundering", treating it as an offence, defining it thus :

"3. *Offence of money-laundering*.—Whosoever directly or indirectly attempts to *indulge* or *knowingly assists* or knowingly is a party or is actually involved in *any process or activity* connected with the *proceeds of crime including* its *concealment*, *possession*, *acquisition* or *use and projecting or claiming it as untainted property* shall be guilty of offence of money-laundering." (emphasis[1] supplied)

52 The challenge posed by money-laundering is intended to be met by the legislation through measures which include penal consequences for the offence (section 4) and by deprivation of the "proceeds of crime" through "confiscation", the latter being a process which commences with order of "attachment". In such context, detailed provisions are also made for reciprocal arrangement (9th Chapter) for assistance to be given by India to other sovereign states or expected by from the latter vis-à-vis property that is subject matter of money-laundering, this being dependent upon agreements to such effect being entered into by India with other countries. Similarly, the law envisages certain obligations (4th chapter) on the part of banking companies, financial institutions and intermediaries to render assistance to the enforcement agency not only by maintaining records but also reporting, or giving access, to information about certain transactions for dealing with the scourge of money-laundering. The PMLA establishes an enforcement agency, collectively described as "Authorities" (8th Chapter) and criminal justice fora styled as "Special Courts" (7th Chapter) conferring, by section 44, upon the latter (i. e., the Special Courts), exclusive jurisdiction to try the offence (under section 4) of "money-laundering" and

1. Here printed in italics.

any "scheduled offence" connected thereto, also making it the court of cognizance vis-a-vis the offence of money-laundering (under section 3).

53 For comprehensive understanding of the law on money-laundering (under the PMLA), it may also be noted here that the expression "proceeds of crime" constitutes the core of the offence of money-laundering, "the concealment, possession, acquisition or use" of "proceeds of crime" in a manner where the same are projected or are claimed to be "untainted property" being what forms the essential part of actus reus, the intent to so conceal, possess, acquire or use, or guilty knowledge, being the requisite mens rea. It is inherent in this that prior to coming in possession, acquisition, concealment or use of "tainted property" (the claim being to the contrary that it is untainted property) there must have been some other offence committed, the property perceived or alleged to be tainted being the product of such criminal activity.

54 It is in the above sense that the expression "proceeds of crime" is defined in the PMLA, by section 2(1)(u). It is not any or every crime, the fruits whereof would be treated as "proceeds of crime" for initiation of action under the PMLA. The enactment restricts it to the "result of criminal activity" relating to a "scheduled offence". The expression "scheduled offence" is defined by section 2(1)(y) as under :

> "'scheduled offence' means—
>
> (i) the offences specified under Part A of the Schedule ; or
>
> (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more ; or
>
> (iii) the offences specified under Part C of the Schedule."

55 While Part "C" of the Schedule concerns certain offences which have "cross-border implications", Part "B" is restricted to the offence under section 132 of the Customs Act, 1962. In contrast, Part "A" comprises of twenty-nine paragraphs thereby including offences under many a penal law they including certain offences under the Indian Penal Code, 1860 (IPC) besides some offences under special laws such as the Narcotic Drugs and Psychotropic Substances Act, 1985, Explosive Substances Act, 1908, Unlawful Activities (Prevention) Act, 1967, Prevention of Corruption Act, 1988, etc.

56 There are three parts of the definition of "proceeds of crime". The distinct flavour of each would need elaborate discussion later.

PMLA's sanction of confiscation

57 The power and jurisdiction to provisionally attach a property involved in money-laundering is conferred by the law, by virtue of section 5(1) of

PMLA generally on the director (of enforcement), or on an additional director or joint director or a deputy director, appointed in terms of sections 48 and 49. These officers are the authorities who have been conferred by law with the powers and jurisdiction to carry out the requisite probe leading to criminal action vis-a-vis the offence of money-laundering defined in section 3 and also to initiate action in the nature of attachment leading to confiscation of "proceeds of crime" (sections 50 and 51). Detailed provisions have been made (in 5th Chapter) to equip these functionaries with the requisite powers of survey (section 16), search and seizure (section 17), search of persons (section 18), arrest (section 19), retention of property (section 20) and retention of records (section 21). By virtue of section 65, the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.) also apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the PMLA, in so far as the same are "not inconsistent" with the provisions of the PMLA (section 75). Similar is the application of the Cr.P.C. to the proceedings before the Special Court by virtue of section 46.

58 For dealing generally with the matters relating to attachment leading to confiscation of "proceeds of crime" (as defined by the PMLA), the statute prescribes elaborately the procedure conferring powers on enforcement authorities thereby established, such process beginning with "provisional attachment", such provisional attachment being subject to "confirmation" by the Adjudicating Authority (constituted under section 6), the order of the Adjudicating Authority being amenable to challenge by appeal (under section 26) to the Appellate Tribunal (as constituted in terms of section 25). For such properties other than those covered by reciprocal arrangement for assistance with other sovereign States (9th Chapter), as are tainted, the same representing "proceeds of crime" available in India, the process of attachment is to follow the prescription under section 5, this being subject to adjudication (and eventual confiscation) in accord with section 8.

59 For purposes of answering the questions raised in these appeals, it is essential to take note of the said provisions of the PMLA (3rd Chapter) in extenso. The main provision as the law presently stands reads thus :

> "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 or complaint has been made or filed under the corresponding law of any other country :

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

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

(2) The director, or any other officer not below the rank of deputy director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, 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 (3) of section 8, whichever is earlier.

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

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

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

60 As in the case of power of survey, search and seizure, search of persons, retention of property and power to arrest, for enforcing "provisional attachment", it is sine qua non for the empowered officer, acting under section 5(1), to record in writing his "reason to believe" that grounds are made out to direct such provisional attachment.

61 The bare reading of the above provision makes it clear that following are the pre-requisites for a valid provisional attachment order :

(i) existence of material ("in possession of" the enforcement officer i.e. the specified authorities under the PMLA) which is the basis of the "reason for belief" ;

(ii) existence of identifiable "property" which qualifies to be treated as "proceeds of crime" ;

(iii) there being likelihood that such proceeds of crime are to be concealed or transferred or dealt with in any such manner as may result in "frustrating" the proceedings relating to its confiscation ;

(iv) the "reasons for belief" relating to such foundational material (as above) having been "recorded in writing" ;

(v) prior submission of charge-sheet (report under section 173 Cr.P.C.) or a "complaint" in the court of cognizance respecting the "scheduled offence" to which the proceeds of crime relate unless there is "recorded in writing" the "reasons to believe" that if attachment be not ordered "immediately" the omission to do so is similarly "likely to frustrate" ;

(vi) the order of provisional attachment, to be issued in writing, to be valid maximum for one hundred eighty days from the date of such order (this excluding the period for which the order may have been stayed by the court) ; and

(vii) submission of a copy of provisional order of attachment by the empowered officer to the adjudicating authority, in a sealed envelope in

the manner prescribed, such submission to include "material" in possession of the officer directing such provisional attachment.

The provisional order of attachment has the outside validity of maxi- **62**
mum one hundred eighty days and the concerned authority must take the matter to the Adjudicating Authority for confirmation, such submission being in the form of "complaint" under section 5(5) within thirty days from the date of provisional attachment, and the complaint must necessarily set out the facts on the basis of which it is made.

The provisional attachment of the property by the enforcement officers **63**
is an executive action. The law mandatorily requires its scrutiny by independent entity called the Adjudicating Authority which is vested with quasi judicial powers. As noted above, the complaint under section 5(5) of the PMLA by the enforcement officer comes before the adjudicating authority for "confirmation" of the attachment order. The procedure to be followed by the adjudicating authority and its powers leading eventually to release or confiscation are prescribed by the following provision :

> "8. *Adjudication.*—(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government :
>
> Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person :
>
> Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.
>
> (2) The Adjudicating Authority shall, after—
>
> (a) considering the reply, if any, to the notice issued under sub-section (1) ;

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

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

by an order, record a finding whether all or any of the properties referred to in the notice issued under 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 sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

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

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

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

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

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

money-laundering shall stand confiscated to the Central Government.

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

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

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

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

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

As noted earlier, the enforcement officers of the prescribed rank have **64**
also been conferred with the powers of search and seizure (section 17) and power to carry out search of persons (section 18). Occasions may arise and the competent authority during the course of investigation may seize any such record or property and if seizure "not be practicable" to freeze the record or property. In terms of section 17(1) and (1A) similar situation may arise in case of search of persons under section 18(1). All such seizures of record, or property, or directions for freezing of such record or property are also matters that require confirmation by the Adjudicating Authority.

65 Restricting this study of the law to the proceedings leading to confirmation of the attachment by the Adjudicating Authority with reference to section 8 of the PMLA, it may be noted that the prescribed procedure begins by issuance and service of notice within thirty days by the Adjudicating Authority on the person respecting whom there is reason to believe as to either (a) his complicity in the crime in the offence of money-laundering or (b) of he being in possession of proceeds of crime (section 8(1)).

66 Pertinent to note here that in terms of the provisos to sub-section (1) of section 8, the right to be heard in opposition to the prayer for confirmation of attachment by the Adjudicating Authority is also given to such third parties as may be holding the property in question "on behalf of any other person" (whether jointly or otherwise), the Adjudicating Authority also being obliged by the proviso to sub-section (2) of section 8 to give opportunity of being heard and prove that the property is "not involved in money-laundering" even to such third parties as to whom notice may not have been issued but may have "claimed" the same. Such third parties may include a benamidar, transferee, lessee, mortgagee, hypothecatee, manager, agent, trustee, etc.

67 In the context of present appeals, it is also necessary to take note of the provision contained in section 9 the PMLA inasmuch as it prescribes the consequences that flow from the eventual order of confiscation. The provision reads thus :

> "9. *Vesting of property in Central Government*.—Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances :
>
> Provided that where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest :

Provided further that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages."

68 As is plain and clear from the above noted legislative scheme, the provisional attachment under the directions of enforcement authorities is subject to confirmation by the Adjudicating Authority. Mere confirmation of attachment by the Adjudicating Authority does not lead to the person claiming interest in the property being divested of such interest as he legitimately holds, inasmuch as the expression "attachment" is defined by section 2(1)(d) to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under the Third Chapter of the PMLA. As is seen, upon perusal of section 5(4), mere order of provisional attachment does not prevent a person "entitled to claim" any interest in the property ("person interested") or to enjoyment of an immovable property (for example a lessee) from such enjoyment, the possibility of taking over the possession of such property or for it to be treated as "frozen" (section 17(1A)) arising only upon confirmation by the Adjudicating Authority under section 8(4). In terms of such scheme, the attachment is an interim measure, eventual intendment being that in the event of it being "found" that the offence of money-laundering has been committed and that "such property" is involved or has been used for such offence to be committed, the same shall be ordered to be "confiscated to the Central Government" (section 8(5)).

69 In contrast to the effect of the order of "attachment" which only entails "prohibition of transfer, conversion, dispossession or movement" of such property, "the confiscation" in terms of section 8(5) and (7) entails all the rights and title in such property vesting absolutely in the Central Government "free from all encumbrances". The further provision in section 10 conferring upon the Central Government the power to take over and manage such property as has been confiscated even by disposing it of leaves no doubt that the vesting of the property in the Government is absolute. As is clear from the provisos to section 9, the liability under the encumbrance subsists in favour of such third party as had acted in good faith but if the creation of such encumbrance was with the objective of managing escape of such property from such attachment or confiscation, the law empowers the Special Court, or the Adjudicating Authority, to declare such encumbrance to be "void", this also leading to confiscation of the property in favour of the State.

70 The eventual touchstone, even for the special court, dealing with the offence of money-laundering (and connected offences) remains that the

property attached, or to be confiscated, must be such as was "involved in" or "used for" the commission of the offence of money-laundering.

71 The law recognizes that there may be third parties having "legitimate interest" in such property. It is for this reason that they are afforded opportunity to approach the adjudicating authority under section 8(1) or (2) and also the Appellate Tribunal under section 26, as indeed the special court under section 8(6), (7) and (8). Generally, the jurisdiction of the special court to deal with the issue comes at the time of conclusion of the trial before it but, in a fit case, it may consider request for release of the property from attachment even "during the trial" (second proviso to sub-section (8) of section 8).

72 The basic tests prescribed by the law while dealing with the claim of a third party for "release" of the property are to find as to whether such claimant has "a legitimate interest" in the property, whether he had "acted in good faith" having taken "all reasonable precautions" and himself was "not involved in the offence of money-laundering" or "may have suffered a quantifiable loss as a result of the offence of money-laundering". It is with this view that the law permits the special court (by section 8) to not only "release" from attachment but even "restore" the confiscated property (or its part) to the claimant with a proven legitimate interest (third party) and further allow such party as may have claim over an encumbrance lawfully and bona fide created to recover its legitimate dues from the debtor "by a suit for damages" though treating as "void" the encumbrance or charge that may have been created by the person found guilty of money-laundering "with a view to defeat" the law in the PMLA (provisos to section 9).

73 The PMLA provides for presumptions to be raised about a property having the character of "proceeds of crime" being involved in money-laundering and also respecting the illicit nature of a transaction involving its acquisition on account of connection with other transaction(s) of suspect nature, the relevant clauses to such effect contained in sections 23 and 24 to be discussed later.

Appellate Tribunal's approach

74 In the impugned decisions of the Appellate Tribunal, reference is made to the conclusions on question of law arrived at by the said forum in its earlier decision dated July 14, 2017 in the matter of *State Bank of India* v. *Director, Directorate of Enforcement, Kolkata* (in Appeal No. FPA-PMLA-1026/KOL/2015), the Tribunal having chosen to quote verbatim the articulated views. The said observations reflect reliance, inter alia, on decisions of the Supreme Court in *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.* [2001] 104 Comp Cas 569 (SC) ; [2001] 3 SCC 71 and *United*

Bank of India v. *Satyawati Tondon* [2010] 158 Comp Cas 251 (SC) ; [2010] 8 SCC 110 ; decision of a learned single judge of this court in *Sanjay Bhandari* v. *CBI* [2015] SCC Online Delhi 10079 ; [2015] 222 DLT (CN) 5 ; three decisions of the Madras High Court, they being *Dr. V. M. Ganesan* v. *Joint Director, Directorate of Enforcement* [2014] SCC Online Mad 10702 ; *C. Chellamuthu* v. *Deputy Director, Prevention of Money-Laundering Act* MANU/TN/4087/2015, decided on October 14, 2015 ; and *Assistant Commissioner (CT)* v. *Indian Overseas Bank* [2016] SCC Online Mad 10030 [FB] ; [2017] 202 Comp Cas 226 (Mad) [FB] ; AIR 2017 Mad 67 [FB] ; besides one decision each of the Bombay High Court and Andhra Pradesh High Court, they being *Bhoruka Steel Ltd.* v. *Fairgrowth Financial Services Ltd.* [1996] SCC Online Bom 717 ; [1997] 89 Comp Cas 547 (Bom (Special TORTS)) and *B. Rama Raju* v. *Union of India* [2011] 164 Comp Cas 149 (AP) ; [2011] SCC Online AP 152. The decision of the Appellate Tribunal shows that it has treated the other enactments like SARFAESI Act and RDDBFI Act (since rechristened as RDBA) to be prevailing over the PMLA on account of amendments brought into the former two legislations by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (Act No. 44 of 2016). By the said amendment of 2016, section 26E was inserted in the SARFAESI Act with similar provision contained in section 31B being added to the RDBA, both declaring the claim of "secured creditors" to have priority over certain other claims as specified by the law.

75 The case of *Sanjay Bhandari* v. *CBI* [2015] SCC Online Delhi 10079 ; [2015] 222 DLT (CN) 5 related to a petition under section 482 of the Cr.P.C. praying for criminal proceedings to be quashed on account of settlement of the dispute against the backdrop of prosecution involving offences punishable under sections 120B of the IPC read with sections 420, 467, 468, 471 of the IPC and section 13(1)(d)(ii) read with section 13(2) of the Prevention of Corruption Act. The relevance of this decision in the context of issues before the Appellate Tribunal cannot be comprehended.

76 In *United Bank of India* v. *Satyawati Tondon* [2010] 158 Comp Cas 251 (SC) ; [2010] 8 SCC 110, the Supreme Court had made observations against serious adverse impact on the rights of banks and other financial institutions to recover their dues under the RDDBFI Act (or RDBA) and SARFAESI Act on account of intervention by the High Court under article 226 of the Constitution of India, pointing out that the said enactments had brought into existence "special procedural mechanism for speedy recovery of dues of banks and financial institutions" ensuring that the defaulting

borrowers were "not able to invoke the jurisdiction of the civil courts". This decision has no relevance to the issues that arise in the present matters.

77 In *B. Rama Raju* v. *Union of India* [2011] 164 Comp Cas 149 (AP) ; [2011] SCC Online AP 152, the petitioner before the Andhra Pradesh High Court was accused of having indulged in certain acts of omission or commission constituting the offence of money-laundering as defined in section 3 of the PMLA. His property had been provisionally attached by the enforcement officer in the course of investigation. He had challenged the vires of the PMLA in so far as it would permit such attachment. While dealing with such prayer, the learned single judge of the said High Court observed thus (page 227 of 164 Comp Cas) :

> "Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence, where a person satisfies the adjudication authority by relevant material and evidence having a probative value that his acquisition is bona fide, legitimate and for fair market value paid therefor, the adjudicating authority must carefully consider the material and evidence on record (including the reply furnished by a noticee in response to a notice issued under section 8(1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in the acquisition of the property) ; and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional attachment by declining to pass an order of confirmation of the provisional attachment ; either in respect of the whole or such part of the property provisionally attached in respect whereof bona fide acquisition by a person is established, at the stage of section 8(2) process. A further opportunity of establishing bona fide acquisition of property or that the property in question is not proceeds of crime involved in money-laundering is available and mandated, prior to the adjudicating authority passing an order of confiscation, under section 8(6)."

78 Clearly, *B. Rama Raju* v. *Union of India* [2011] 164 Comp Cas 149 (AP) ; [2011] SCC Online AP 152 has not much relevance here since the matters before this court involve claim of third parties.

79 In *C. Chellamuthu* v. *Deputy Director, Prevention of Money-Laundering Act* MANU/TN/4087/2015, the case before the Madras High Court was of an accused who was alleged to have committed predicate offences including that of cheating, on the basis of which he had acquired certain monetary benefits which was subject-matter of investigation from the perspective of money-laundering. The court noted the provisions relation to

"presumption in inter-connected transactions" under section 23 of the PMLA and of "burden of proof" under section 24 of the PMLA and, on facts, held the appellant to have rebutted the said presumption and the charge. Again, unlike the cases at hand, the matter involved claim of the person accused of money-laundering to the property that had been attached.

Confiscation : Forfeiture

Unlike PMLA, certain other criminal laws use the expression "forfeiture" **80**
of property as one of the statutorily permitted sanctions. The expression "confiscation" has been held to have similar meaning and effect as the word "forfeiture". For clarity in this regard, the following observations of the Supreme Court in *Gunwant Lal Godawat* v. *Union of India* [2018] 12 SCC 309 should suffice :

> "39. The expression 'confiscation' is not defined in the Rules. It had roots in the Latin word Confiscare—to consign to fiscus, i. e., transfer to treasury, as a punishment or in enforcement of law. Though, the expression is generally understood as having implications associated with a crime . . . *The words 'forfeiture' and 'confiscation' have come to be used interchangeably*. The General Clauses Act, 1897 does not employ the word 'confiscation'. On the other hand, it employs the word 'forfeiture' in section 6(d). Having regard to the long history of the usage of those two expressions, we are of the opinion that *'forfeiture' is an expression which takes within its sweep 'confiscation' also for the purpose of law* (*Rajah Salig Ram* v. *Secy. of State of India* [1872] SCC Online PC 43)." (emphasis[1] supplied)

Forfeiture (confiscation) : Nature of sanction

Some argument was raised to urge that the process of attachment (for **81**
confiscation) under the PMLA is in the nature of punishment for an offence and so cannot precede determination of guilt or adjudication of value of proceeds of crime by the court. It is essential to dispel this impression.

The Indian Penal Code, 1860 (IPC), by section 53 (fifthly), provides for **82**
"forfeiture of property" as one of the permissible "punishments". Though in IPC, as initially enforced, a number of offences attracted such punishment, prescription of this nature in some of them (e. g., sections 121 and 122 of the IPC) having since been omitted, a few (e. g., sections 126 and 127 of the IPC) still retain forfeiture of property as one of the possible punishments, this giving it a flavour of criminal sanction. Interestingly, the

1. Here printed in italics.

act of unlawful purchase of, or bidding for, property by a public servant, under certain circumstances, is not only punishable offence under section 169 of the IPC but also entails such property, if purchased, to be "confiscated".

83 The Code of Criminal Procedure, 1973 (Cr.P.C.) replaced the then existing procedural law governing criminal investigations and trials, it being the Code of Criminal Procedure, 1898 (old Cr.P.C.). Both the said laws have carried provisions for attachment of property of an accused, the objective whereof, however, has been to compel appearance. In case the criminal court has reasons to believe that a person against whom warrant (of arrest) issued by it has "absconded" or is concealing himself, subject to certain other conditions being fulfilled, it may while issuing, or following the issuance of, proclamation (under section 82 of the Cr.P.C.) requiring his appearance, proceed to order "attachment" of property (movable or immovable) of such person by issuance of a warrant under section 83 Cr.P.C. (corresponding to section 88 of the old Cr.P.C.). Pertinent to note the objective of such attachment (under section 83 of the Cr.P.C.) being to compel appearance, the attachment is lifted and the property released in the event of appearance within the period specified in law.

84 Conversely, in the event of continued default beyond the specified period, the property is placed by the criminal court "at the disposal of the State Government", though the right for its disposal (except in case the property is subject to speedy and natural decay) is deferred for a period of six months. Meanwhile, a third party claiming interest may approach the criminal court by objections that his "interest" in the property is "not liable to attachment", such objection requiring inquiry and adjudication (section 84 of the Cr.P.C.).

85 The absconder, in any case, must come up "within two years from the date of the attachment" to claim restoration of the property or net proceeds of its sale, or residue thereof, by showing and proving to the satisfaction of the criminal court that he had not absconded to evade the process. After two years, the criminal court virtually becomes functus officio in the matter. In these provisions under the general law, however, the core issue that the court is to inquire into is the connection, if any, between the absconder and the property. The property of a third person cannot be attached under section 83 to compel the appearance of an accused.

86 The Criminal Law Amendment Ordinance, 1944 ("the 1944 Ordinance") is one of the earliest legal measures put in position to take away the ill-gotten wealth, in case of public servants engaging in corrupt practices. The said law continues to operate till date, the jurisdiction to enforce it having

been conferred on the Special Judge appointed under the Prevention of Corruption Act, 1988, inter alia, by section 5(6), as reinforced by a new provision (section 18A in Chapter IVA) on the subject of "attachment and forfeiture of property", added by the Prevention of Corruption (Amendment) Act, 2018. The Ordinance focuses on "money or other property" believed to have been "procured by means of" an offence under the said law, the persons "claiming an interest" in the subject property or any portion thereof having been given (by section 4) the right to object and be heard against such sanction. As in the case of certain other enactments (e. g., SAFEMA), the property to be attached or forfeited must have "nexus" with the corrupt practice constituting the offence.

87 In *State of West Bengal* v. *S. K. Ghosh*, AIR 1963 SC 255, as referred to in *Gunwant Lal Godawat* v. *Union of India* [2018] 12 SCC 309, in the context of section 13(3) of the 1944 Ordinance, it had been observed thus (page 263 of AIR 1963 SC) :

> "15. The argument for the respondent is apparently based on the use of the word 'forfeited' in section 13(3) and also on the use of the word 'forfeiture' in section 53 of the Indian Penal Code. There is no doubt that forfeiture in section 53 of the Indian Penal Code is a penalty but when section 13(3) speaks of forfeiting . . . the amount of money or value of the other property procured by the accused by means of the offence, it in effect provides for recovery by the Government of the property belonging to it, which the accused might have procured by embezzlement, etc. *The mere use of the word 'forfeited' would not necessarily make it a penalty. The word 'forfeiture' has been used in other laws without importing the idea of penalty or punishment within the meaning of article 20(1)*. Reference in this connection may be made to section 111(g) of the Transfer of Property Act (4 of 1882) which talks of determination of a lease by forfeiture. We are therefore of opinion that forfeiture provided in section 13(3) in case of offences which involve the embezzlement, etc., of Government money or property . . . as compared to a suit which it is not disputed the Government could bring for realizing the money or property and is not punishment or penalty within the meaning of article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realise the fine that may have been imposed by a criminal court in connection with the offence." (emphasis[1] supplied)

88 The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 ("SAFEMA", for short) came on the statute book with the

1. Here printed in italics.

avowed objective of meeting the challenge of "serious threats to the economy and the security of the nation" posed by activities in the nature of smuggling, foreign exchange manipulations and violation of certain laws (income-tax, wealth tax, etc.) by malpractices resulting in augmenting of ill-gotten gains and accumulation of ill-gotten wealth, it having become necessary to assume powers "to deprive such persons of their illegally acquired properties". The enactment thus focused on forfeiture of "illegally acquired property". It defines, by section 2(2), the "person" to whom the law is to apply to include not only every person who has been held guilty and convicted for offences (involving specified amounts of money) under specified laws (i. e., Customs Act, 1962, Foreign Exchange Regulation Act, 1947, Foreign Exchange Regulation Act, 1973, Sea Customs Act, 1878) and those against whom order of detention is made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), also taking in its sweep others including "every person who is a relative (as specified by second *Explanation*, of such convict"), "every associate (as specified by third *Explanation*, of such convict or detenue)" and, what turned out to be the cause of conflict, "any holder (hereinafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration". The definition of the expression "illegally acquired property" under the SAFEMA required a clear "nexus" between the prohibited activities and acquisition of such asset as indeed the means (including the consideration paid) employed in that regard and, in the event of the third party being the holder, carved out an exception if he had acquired it "in good faith" and "for adequate consideration", the onus to prove such elements obviously being on him.

89 The case of *Biswanath Bhattacharya* v. *Union of India* [2014] 4 SCC 392 arose out of SAFEMA. The Supreme Court dealing with similar issue referred to the regime of forfeiture of property prevalent in this country at least from 1944 and accepted the argument that the forfeiture contemplated under the said law was not a "penalty" within the meaning of article 20 of the Constitution of India but "only a deprivation of property of a legislatively identified class of persons—in the event of their inability to explain (to the satisfaction of the State) that they had legitimate sources of funds for the acquisition of such property", holding inter alia, that "the property which is determined to be illegally acquired property" only could