* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: December 07, 2021**
Judgment pronounced on: December 15, 2021

\+ W.P.(C) 3261/2021, CM APPLs. 32220/2021, 41811/2021, 43360/2021, 43380/2021

NITIN JAIN LIQUIDATOR PSL LIMITED ..... Petitioner

Through: Mr. Kirti Uppal, Sr. Adv. with Mr. Aditya Gauri, Mr. Amar Vivek and Ms. Riya Gulati, Advs.
Ms. Maneesha Dhir, Ms. Varsha Banerjee, Mr. Kanishk Khetan, Advs. for applicant.

versus

ENFORCEMENT DIRECTORATE THROUGH: RAJU PRASAD MAHAWAR, ASSISTANT DIRECTOR PMLA ..... Respondent

Through: Mr. Zoheb Hossain, Standing Counsel with Ms. Tulika Gupta, Adv. for ED.
Mr. Neeraj Malhotra, Sr. Adv. with Mr. R. P. Agrawal, Ms. Manisha Agrawal, Mr. Priyal Modi, Mr. Ujjaval Kumar and Mr. Nimish Kumar, Advs. for Edelweiss Asset Reconstruction Company Ltd.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

For the purposes of convenience and ease of reference, this judgment is being divided into the following Sections detailed below:-

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A. PREFACE

1. The principal question which falls for determination in this writ petition is whether the authorities under the Prevention of Money Laundering Act, 2002[1], would retain the jurisdiction or authority to proceed against the properties of a corporate debtor once a liquidation measure has come to be approved in accordance with the provisions made in the Insolvency and Bankruptcy Code, 2016[2]. The Petitioner is the Liquidator appointed by the National Company Law Tribunal[3][the Adjudicating Authority under the IBC] to administer the affairs and the estate of M/S PSL Ltd.[4] The petition has been preferred seeking the following reliefs: -

> "1) Allow the present petition;
>
> 2) Issue a Writ of Mandamus of any other appropriate Writ, restraining the Respondent from giving directions to the Liquidator for stopping E-Auction Process and not to take any coercive steps against the Petitioner for performing his duties under the Code, and/or;
>
> 3) Allowing the Liquidator to conduct the process of Liquidation, including the e-auction of assets of the corporate debtor as per the Code and/or;

[1] PMLA
[2] IBC
[3] NCLT
[4] Corporate Debtor

4) Issue a writ of Mandamus or any other appropriate Writ restraining the Respondent from passing any attachment Orders in respect of assets of the corporate debtor and/or;

5) Pass any other order(s) may kindly be passed, which this Hon'ble Court deems fit and proper, towards the ends of equity, justice and good conscience."

2. It appears that the Liquidator was compelled to approach this Court upon a receipt of summons issued by the respondent who was investigating the affairs of the corporate debtor under the provisions of the PMLA. When the petition initially came up for consideration before the Court on 17 March 2021, a learned Judge upon hearing counsels for respective parties proceeded to pass the following order: -

"**CM APPL. 9943/2021 (for exemption)**

1. Allowed, subject to all just exceptions. Application is disposed of.

WP(C) 3261/2021

2. The present petition has been preferred by the Petitioner, who has been appointed as the Liquidator of M/s PSL Limited/Corporate Debtor *(hereinafter, 'Corporate Debtor').*

3. The Petitioner was initially appointed as the Resolution Professional on 30th August, 2019. After the Committee of Creditors proposed a Liquidator, vide order dated 11th September, 2020, the NCLT passed orders directing liquidation of the Corporate Debtor. The process of liquidation was under way when the Petitioner received summons dated 15th January 2021, issued by the Directorate of Enforcement *(hereinafter, 'ED')*. The said summons was, thereafter, followed up by an email dated 25thJanuary, 2021, by which the Assistant Director (PMLA), Delhi Zonal Office, called upon the Petitioner not to dispose of the assets of the said company. The said email reads as under:-

"Kind Attention to :-Mr. Nitin Jain, Official Liquidator of M/s. PSL Limited. It issatated that a case has been recorded under PMLA, 2002 against M/s. PSL Limited and Others. It has came to the notice of this

office that you have been appointed as Official Liquidator of M/s PSL Limited and auctioning the assets of this company.

You are hereby requested to not disposed off these assets as the matter is pending under PMLA, 2002 which has overriding effect over IPC (sic IBC) and other laws governing such transactions.

Raju Prasad Mahawar
Assistant Director)PMLA)
Delhi Zonal Office."

4. The Petitioner, therefore, prays for setting aside the said directions of the ED.

5. Mr. Kirti Uppal, ld. Sr. Counsel submits that there is no proceeding presently pending against the Corporate Debtor or any of its promoters. There is not even a provisional attachment order (hereinafter, 'PAO') at this stage. Accordingly, the said notice is completely untenable, especially in light of the recent decision of the ld. Supreme Court in ***Opto Circuit India Ltd. v. Axis Bank &Ors., 2021 SCC OnLine SC 55***. Mr. Zoheb Hossain, ld. Standing Counsel, confirms the fact that there is no PAO at this point.

6. Recently, the ld. Supreme Court in ***Opto Circuit (supra)*** dealing with the scheme of the Prevention of Money Laundering Act, 2002 (hereinafter, 'PMLA') observed as under:-

> *"16 This Court has time and again emphasized that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. Among others, in a matter relating to the presentation of an Election Petition, as per the procedure prescribed under the Patna High Court Rules, this Court had an occasion to consider the Rules to find out as to what would be a valid presentation of an Election Petition in the case of Chandra Kishor Jha v. Mahavir Prasad (1999) 8 SCC 266 and in the course of consideration observed as hereunder:*
>
> > *"It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner"*

17. Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law. We have found fault with the Authorised Officer and declared the action bad only in so far as not following the legal requirement before and after freezing the account. This shall not be construed as an opinion expressed on the merit of the allegation or any other aspect relating to the matter and the action initiated against the appellant and its Directors which is a matter to be taken note in appropriate proceedings if at all any issue is raised by the aggrieved party."

7. A perusal of the email issued by the ED clearly shows that the same is not on the basis of any proceedings initiated under Section 5 or 8 of the PMLA. The admitted position is that though investigation is going on, no PAO has been issued against the corporate debtor. Accordingly, the impugned e-mail and any other direction issued by the Respondent against the Liquidator shall remain stayed. In order to maintain a balance and to ensure that there is no prejudice caused, the Liquidator shall proceed in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter, 'IBC'). However, if any moveable/immovable assets are disposed of by the Liquidator, the monetary sums recovered from the same shall be placed in a separate bank account and an affidavit stating the recovered amount shall also be placed before this Court. If any amounts are to be disbursed to any of the creditors, an application shall be moved before this Court seeking permission to disburse.

8. The question as to whether the moveable/immovable assets of the Corporate Debtor and the sale thereof during the liquidation process would be permitted under Section 32A of the IBC, would require consideration by this Court.

9. Both parties are permitted to approach this Court if any further clarification is required.

10. Let the counter affidavit, along with a written note of arguments on the scheme of the IBC in respect of Section 32A and its applicability to

the facts, be placed on record within four weeks, by both parties. Rejoinder, if any, be filed within four weeks thereafter.

11. List on 21st May, 2021."

3. The learned Judge noted the undisputed fact that although investigation was continuing under the PMLA, no provisional order of attachment had been issued against the corporate debtor. The Court accordingly proceeded to place the impugned e-mail and communications addressed by the respondent to the Liquidator in abeyance. While permitting the petitioner to continue with the liquidation process, it further provided that the proceeds received from any sale of movable or immovable assets of the corporate debtor which may be disposed of by the Liquidator shall be placed in a separate bank account and an affidavit be filed before this Court with respect to the amounts that may be received. The Court further provided that the question of whether the movable or immovable assets and their sale during the liquidation process would be permissible under Section 32A of the IBC, would be taken up for consideration further.

B. THE BACKGROUND OF THESE PROCEEDINGS

4. The records bear out that the corporate debtor was admitted to the Corporate Insolvency Resolution Process[5] by an order of 15 February 2019. The petitioner here came to be appointed as a Resolution Professional by the Committee of Creditors. Expressions of Interest are

[5] CIRP

stated to have been invited on more than four occasions during the CIRP. Since no viable expression of interest was received, the Committee of Creditors in its meeting of 06 January 2020, passed a resolution recommending the liquidation of the corporate debtor. That resolution was backed by 93.43% of the creditors opining that the corporate debtor was liable to be liquidated in accordance with the provisions made in that regard under the IBC. It is admitted to parties that while the CIRP remained open and was conducted over the maximum statutorily permissible period of 330 days, no viable proposal for the resolution of the debts of the corporate debtors or its resurrection were received. It was in the aforesaid backdrop that the application made by the petitioner here for liquidation of the corporate debtor pursuant to the resolution of the Committee of Creditors came be allowed by the Adjudicating Authority in terms of its order of 11 September 2020. Undisputedly, it is the date of this order passed by the Adjudicating Authority which is liable to be viewed as the "liquidation commencement date" as defined in Section 5 (17) of the IBC.

5. Upon the petitioner being appointed as the Liquidator, the first sale notice is stated to have been issued on 27 November 2020. However, the same did not culminate in any offer coming to be accepted. On 15 January 2021, the Liquidator is stated to have received the first summons from the respondent. This was followed by an e-mail of 25 January 2021 which is impugned in the writ petition. A second summons came to be issued by

the Enforcement Directorate on 27 January 2021. The writ petition came to be filed around 5 March 2021. The interim order came to be passed on the petition on 17 March 2021.

6. Pursuant to the directions issued in the order of 17 March 2021, the petitioner moved CM Application No. 32220/2021 before this Court disclosing that the assets and properties of the corporate debtor were placed for disposal by way of an e-auction initiated in accordance with the provisions of the IBC and after due sanction of the Adjudicating Authority. The Liquidator apprised the Court that, amongst the various options of sale prescribed, the sale of the corporate debtor as a going concern was the recourse adopted. It was further disclosed that the first sale notice came to be issued on 27 November 2020. However, since no concrete offers were received, a revised sale Notice of 19 March 2021 came to be published and the same has also been placed on the record. In the sale which was ultimately conducted on 09 April 2021, a bid of Rs.425.50 crores was received from M/s Lucky Holdings Private Limited which proposed to take over the assets of the corporate debtor and continue its functioning as a going concern. Upon finding that the said bid was the highest, a Letter of Intent came to be issued in favour of M/s Lucky Holdings Private Limited on 19 April 2021. The aforesaid successful bidder is stated to have deposited Rs.5 crores immediately upon acceptance of bid and subsequently on 23 April 2021, deposited a further sum of Rs.30 crores. The petitioner further apprises the Court that

the balance amount of Rs.390.5 crores plus any other additional net current operational liabilities would have to be deposited by the successful bidder in accordance with the provisions made in the IBC as well as the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016[6]. The sale as conducted by the Liquidator was approved by the Adjudicating Authority in terms of its order of 08 September 2021. The Adjudicating Authority while passing the aforesaid order and while approving the sale as conducted by the petitioner here also took note of the order of this Court of 17 March 2021 and consequently provided that the distribution of assets would abide by the terms of that order and the provisions of Section 53 of the IBC. The CM aforenoted seeks the disbursal of amounts representing workmen's dues and proceeded on the premise that since no provisional order of attachment has been issued, the provisions of Section 32A of the IBC would clearly apply and consequently no fetter operates upon the power of the Liquidator to proceed further and to distribute the sale proceeds as received in accordance with the provisions made in the IBC. The CM also sets forth a tentative list of distribution of the sale proceeds amongst the various secured and operational creditors as well as the workers of the corporate debtor in accordance with the priorities specified in Section 53 of the IBC. It has accordingly been prayed that the Liquidator be permitted to distribute the proceeds as received out of the liquidation sale

[6] Liquidation Regulations, 2016

and presently placed in escrow in terms of the order of this Court of 17 March 2021. The order approving the sale was subsequently modified by the Adjudicating Authority by an order of 5 October 2021 in certain respects and the same has been brought on the record by way of CM 41811/2021

7. Post the aforesaid developments taking place, the petition was called on subsequent dates and ultimately taken up for hearing on 24 November 2021 when upon hearing parties at some length, the matter was placed for further hearing on 03 December 2021. It becomes relevant to note that when the matter was taken up for consideration on 24 November 2021, till that date no order of provisional attachment had admittedly been issued. However, on 03 December 2021, the Court was apprised by Mr. Zoheb Hossain, learned counsel appearing for the Enforcement Directorate that an order of provisional attachment has come to be issued on 2 December 2021. It was further pointed out that the assets of the corporate debtor to the extent to Rs. 274.60 crores alone have been provisionally attached under the PMLA since upon investigation it was found that the same would represent proceeds of crime. On 03 December 2021, this Court passed the following order:-

> "Mr. Zoheb Hossain, learned counsel appearing for the Enforcement Directorate apprises the Court that a Provisional Attachment Order has now been issued with respect to the properties of the Corporate Debtor.
>
> Mr. Kirti Uppal, learned Senior Counsel appearing for the petitioner is instructed to state that the aforesaid order is taken under advisement

and that in any case the passing thereof shall not affect the consideration of the reliefs that are sought in the present writ petition.

List for further hearing on 06.12.2021."

8. As noted above, the sale conducted by the petitioner and in which M/s Lucky Holdings Private Limited was identified as the successful auction bidder, was ultimately approved by the Adjudicating Authority on 08 September 2021. The Adjudicating Authority confirmed the sale subject to the following salient conditions: -

"1) Prayer "B" and "C" have been allowed in terms of our findings in para 23 hereinbefore and liquidation process period stands extended in terms of such findings.

2) We hereby approve the sale of the Corporate Debtor as a going concern as prayed by the Liquidator for consideration of Rs. 425.50 Crores plus net Current Operational Liabilities (Cap upto Rs. 25 lakh). The Successful Bidder shall complete the sale process by paying balance consideration amount within 30 days from the date of this order and upon payment of entire sale amount all the rights and title and interest in whole and every part of the Corporate Debtor including but not limited to intellectual property rights continue to vest in the Corporate Debtor.

3) Permission is accorded to the Liquidator to issue sale certificate to the Successful Auction Bidder in lieu of consideration of Rs. 425.50 Crore being received for sale of Corporate Debtor as a going concern to the Successful Action Bidder.

4) We direct that the Liquidator shall disburse the amount so received to all stakeholders/beneficiaries in terms of provisions of Section 53 of IBC, 2016 after necessary approval by the Hon'ble Delhi High Court……"

9. It is only thereafter that the Liquidator moved this Court seeking permission for disbursal of part of the sale proceeds which had been received.

C. PETITIONER'S CONTENTIONS

10. The petitioner assails the action taken by the respondent in purported exercise of powers conferred by the PMLA principally on the anvil of Section 32A. According to Mr. Uppal, learned Senior Advocate who has addressed submissions on behalf of the petitioner, the validity of Section 32A has undisputedly been upheld by the Supreme Court in the matter of **Manish Kumar v. Union of India**[7]. Mr. Uppal contends that the jurisdiction and authority of the respondent under the PMLA is legislatively mandated to cease once a resolution plan is approved by the Adjudicating Authority or the sale of liquidation assets commences. It is further contended that Section 32A clearly mandates that no action shall be taken against the properties of the corporate debtor, once a resolution plan comes to be approved or the corporate debtor undergoes liquidation. Mr. Uppal has also referred to the Report of the Insolvency and Law Committee and more particularly paragraphs 17.10 and 17.11 thereof in order to highlight the underlying objective of the introduction of Section 32A. Those paragraphs are extracted hereinbelow: -

> "G. That the Insolvency and Law Committee in its Report dated 20.02.2020 has observed that –
>
> *17.10.* Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bona fide bidder in liquidation under the Code, should be protected from such enforcement action, and the new Section discussed in paragraph 17.7 should provide for the same. Here too, the Committee

[7] (2021) 5 SCC 1

> agreed that the protection given to the corporate debtor's assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor that may have been involved in the commission of such criminal offence.
>
> *17.11*. By way of abundant caution, the Committee also recognized and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor's assets would have to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence along with the corporate debtor."

11. Mr. Uppal has sought to highlight the underlying objective of Section 32A which according to him has essentially been placed on the statute book to ensure that a *bona fide* bidder in liquidation is protected from enforcement action. It has also been contended that the specter of attachment or a recognition of the right of the respondent to proceed against the assets of the corporate debtor either after a resolution plan has been approved or where liquidation has commenced, would clearly impact the value of the property as well as the interest that may be evinced by prospective applicants. Mr. Uppal, in support of his contentions, has also placed reliance upon the judgment rendered by NCLAT in **JSW Steel v. Mahender Kumar Khandelwal**[8]. Mr. Uppal has relied upon the following extracts of that decision, which are reproduced hereunder:-

> "44. A plain reading of Section 32A(1) and (2) clearly suggests that the Directorate of Enforcement/ other investigating agencies do not have the powers to attach assets of a 'Corporate Debtor', once the

[8] 2020 SCC Online NCLAT 104

'Resolution Plan' stands approved and the criminal investigations against the 'Corporate Debtor stands abated. Section 32A of the 'I&B Code' does not in any manner suggest that the benefit provided thereunder is only for such resolution plans which are yet to be approved. Further, there is no basis to make distinction between a resolution applicant whose plan has been approved post or prior to the promulgation of the Ordinance.

45. Further, even prior to the passing of the Ordinance, the 3rd Respondent i.e. Union of India through Ministry of Corporate Affairs in its 'Affidavit in Reply' dated 10th October, 2019, had categorically stated that:

> "5) It is submitted that if any Corporate Debtor is undergoing investigation by the Central Bureau of Investigation ("CBI"), Serious Fraud Investigation Office ("SFIO") and/ or the Directorate of Enforcement ("ED"), such investigations are separate and independent of the Corporate Insolvency Resolution Process ("CIR Process") under the IBC and both can run simultaneously and independent of each other. It is further submitted that the erstwhile management of a company would be held responsible for the crimes, if any, committed under their regime and the new management taking over the company after going through the IBC process cannot be held responsible for the acts of omission and commission of the previous management. In other words, no criminal liability can be fixed on the successful resolution applicant or its officials.
>
> 6) In so far as the corporate debtor of its assets are concerned, after the completion of the CIR process, i.e., a statutory process under the IBC, there cannot be any attachment of confiscation of the assets of the Corporate Debtor by any enforcement agencies after approval of the Resolution Plan.
>
> 7) Resolution Plan submitted by the interested Resolution Applicants are duly examined and validated by the Resolution Professional and the Committee of Creditors ("CoC"). Once the Resolution Plan is voted upon and approved by the CoC, it is submitted to the Ld. Adjudicating Authority for its approval. The Ld. Adjudicating Authority after hearing the objections, if any, and being satisfied that the Resolution Plan is in compliance with the provisions of the law, approved the Plan.

The CIR Process is desired to ensure that undesirable persons do not take control of the Corporate Debtor by virtue of Section 29A of the IBC. The purpose and scheme of the CIR Process is to hand over the company of the corporate debtor to a bona fide new resolution applicant. Any threat of attachment of the assets of the corporate debtor or subjecting the corporate debtor to proceedings by investigating agencies for wrong doing of the previous management will defeat the very purpose and scheme of CIR Process, which inter-alia includes resolution of insolvency and revival of the company, and the efforts of the bank to realize dues from their NPAs would get derailed. Otherwise too, the money realised by way of resolution plan is invariably recovered by the banks and public financial institutions and other creditors who have lent money to the erstwhile promoters to recover their dues which they have lent to the erstwhile management for creation of moveable or immoveable assets of the corporate debtor in question and therefore, to attach such an asset in the hands of new promoters of resolution applicant would only negate the very purpose of IBC and eventually destroy the value of assets.

8) In light of the above, the ED while conducting investigation under PMLA is free to deal with or attach the personal assets of the erstwhile promoters and other accused persons, acquired through crime proceeds and not the assets of the Corporate Debtor which have been financed by creditors and acquired by a bona fide third party Resolution Applicant through the statutory process supervised and approved by the Adjudicating Authority under the IBC. In so far as a Resolution Applicant is concerned, they would not be in wrongful enjoyment of any proceeds of crime after acquisition of the Corporate Debtor and its assets, as a Resolution Applicant would be a bona fide asset acquired through a legal process. Therefore, upon an acquisition under a CIR Process by a Resolution Applicant, the Corporate Debtor and its assets are not derived or obtained through proceeds of crime under the Prevention of Money Laundering Act, 2002 (PMLA") and need not be subject to attachment by the ED after approval of Resolution Plan by the Adjudicating Authorities."

46. The Union of India had unequivocally stated that after the completion of the 'Corporate Insolvency Resolution Process', there cannot be any threat of criminal proceedings against the 'Corporate

> Debtor', or attachment or confiscation of its assets by any investigating agency, after approval of the 'Resolution Plan. In any event, by virtue of Section 238 of the 'I&B Code', the 'I&B Code' has an overriding effect over anything inconsistent therewith in any other law. Accordingly, it is clear that subsequent promulgation of the Ordinance is merely a clarification in this respect. Therefore, it is ex facie evident that the Ordinance being clarification in nature, must be made applicable retrospectively."

12. Referring to the provisions engrafted in Section 238 of the IBC, Mr. Uppal contends that the resolution or liquidation of a corporate debtor would be subjects which must necessarily be recognized as being exclusively governed by the provisions of the IBC and consequently orders passed in connection with the aforesaid must be held to prevail over proceedings initiated or pending under any other laws for the time being in force. It has lastly been contended that the Court must ensure that the rights of *bona fide* creditors are not impaired or prejudiced for the misdeeds of the erstwhile management of a corporate debtor. In support of the aforesaid proposition, Mr. Uppal has also relied upon the judgment rendered by the Appellate Tribunal constituted under the PMLA in the matter of **State Bank of India v. Deputy Director Directorate of Enforcement**[9] in this respect.

D. SUBMISSIONS OF THE RESPONDENT DIRECTORATE

13. The contesting respondent, the Enforcement Directorate, has filed a reply affidavit in this petition and has referred to the preliminary facts

[9] 2017 SCC OnLine ATPMLA 4

which have come to the fore in the course of the investigation undertaken by it and which according to them establishes diversion of funds and payments received by the corporate debtor. The respondent has asserted that not only was the corporate debtor guilty of diversion of funds, it also caused a loss of Rs.274.60 crores to the Bank of Baroda, a public financial institution. The respondent has also sought to assail the manner in which the auction was conducted by the petitioner here. Additionally, alluding to the provisions made in the PMLA, it is contended that IBC cannot be an "amnesty route" for the accused under the PMLA and that if such sales under the IBC were permitted to hold, the entire confiscation regime under the PMLA and its objectives would be defeated. It is further contended that as has been consistently held, economic offences must necessarily be tried and tested on a separate and distinct pedestal and that the action taken by the petitioner would clearly result in the proceedings initiated and presently pending under the PMLA being frustrated. The respondent in this affidavit has also contended that the provisions of the IBC cannot be accorded any primacy over the PMLA and that, consequently, notwithstanding the steps taken under that enactment by the petitioner here, the right of the respondent as conferred by the PMLA to move against the assets of the corporate debtor, to follow the proceeds of crime and consequently confiscate properties stands preserved.

14. Mr. Hossain, learned counsel appearing for the Directorate, has at the outset, raised a preliminary objection to the maintainability and

continuance of the writ petition in the backdrop of the provisional order of attachment having come to be issued on 02 December 2021. Mr. Hossain contends that once the properties of the corporate debtor have come to be provisionally attached under the PMLA, the only recourse available to the petitioner here is to assail the same in accordance with the procedure prescribed under the PMLA. In any case, it was contended in the absence of a formal challenge to the provisional order of attachment, nothing further remains to be considered or decided on the writ petition which has for all purposes rendered infructuous.

15. Mr. Hossain has then taken the Court in some detail through the various provisions of the IBC for the scheme and its underlying objectives being appreciated. It was principally contended that the right of the statutory authorities under PMLA cannot be hindered by the provisions of the IBC bearing in mind the fact that both statutes operate in separate and distinct fields. Mr. Hossain contends that PMLA is essentially concerned with the investigation and trial of offences relating to money laundering. It was submitted that the powers of attachment and confiscation as conferred in terms of that statute cannot be viewed as being subservient to the IBC. It was submitted that the power to attach and to move against the assets of the corporate debtor and which represent proceeds of crime stands preserved notwithstanding the commencement of liquidation proceedings against it.

16. It was then argued that till such time as the sale of the liquidation assets is completed and a sale certificate issued, the power of the authorities to proceed against the properties of the corporate debtor under the PMLA remains unfettered. The principal foundation of this argument addressed by Mr. Hossain, was premised on the perceived distinction between a resolution process which is undertaken under Chapter II of the IBC in contradistinction to the process of liquidation which is initiated under Chapter III. Mr. Hossain referring to the various provisions incorporated in Chapter II has contended that the treatment and disposal of the assets of a corporate debtor under Chapter II follows a completely separate track and therefore the provisions of Section 32A of the IBC as may come to be attracted in the case of a CIRP, cannot ipso facto be applied to a case of sale of liquidation assets under Chapter III. According to Mr. Hossain, the resolution and liquidation processes not only constitute two separate tracks, the provisions of Section 32A also provide distinct trigger points for their application. Mr. Hossain contends that while in the case of a resolution process undertaken under Chapter II, the bar raised by Section 32A would stand attracted the moment a resolution plan is approved, the same does not extend to a case where a process of liquidation is being undertaken in respect of a corporate debtor. In order to buttress his submissions and to highlight the situations in which Section 32A would come to operate, Mr. Hossain has also referred to the provisions contained in Sections 14 and 33(5) of the IBC. It was contended that prior to the insertion of Section 32A, the only restraint

which operated in respect of institution of suits or continuation of suits and proceedings against a corporate debtor stood enshrined in Section 14**.**

17. Mr. Hossain drew the attention of the Court to Section 14 in this respect and highlighted that upon the commencement of CIRP, an omnibus restraint on the institution or continuation of suits and legal proceedings comes into force and that it also bars any action to foreclose recover or enforce security interests created by the corporate debtor in respect of its property including any action in respect thereof under SARFAESI. Turning then to Section 33(5) of the IBC, Mr. Hossain submitted that the injunction against the institution of a suit or other legal proceeding against the corporate debtor would spring into operation only once an order of liquidation had come to be passed. Continuing further in this regard, it was then submitted that the moment a resolution plan comes to be approved, the Resolution Applicant steps into the shoes of the erstwhile management. Contrary to the above, it was submitted that sale of liquidation assets is not complete till such time as a sale certificate comes to be issued on payment of the entire sale consideration. It was submitted that as would be evident from the provisions made in the Liquidation Regulations, 2016 and Schedule 1 thereof, the liquidation of the assets of a corporate debtor was to proceed through various stages till the sale could be said to have fructified upon deposit of the entire sale consideration and a certificate in evidence thereof coming to be issued. It was submitted that undisputedly although the sale has been confirmed in

favour of the successful bidder, the entire sale consideration is yet to be received and that consequently the bar as contemplated in Section 32A does not stand attracted. Seeking to highlight the clear and distinct fields in which the PMLA and IBC operate, Mr. Hossain has then placed reliance on various judgments which are noticed hereinafter. Referring to the recent decision handed down by the Supreme Court in **Manish Kumar,** Mr. Hossain pressed into aid the following observation as appearing in the report:-

> "317. Section 32-A has been divided into three parts consisting of sub-sections (1) to (3). Under sub-section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both these immunities are subject to the following conditions:
>
> 317.1. A resolution plan, in regard to the corporate debtor, must be approved by the adjudicating authority under Section 31 of the Code.
>
> 317.2. The resolution plan, so approved, must result in the change in the management or control of the corporate debtor.
>
> 317.3. The change in the management or control, under the approved resolution plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor.
>
> 317.4. The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant investigating authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a report before the relevant authority or the Court. This last limb may require a little more demystification. The person, who comes to acquire the management and control of the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by

the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a resolution plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32-A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely, abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected.

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

327. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject-matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor."

18. Mr**.** Hossain has then placed reliance upon the following principles as laid down by a learned Judge in **Deputy Director Directorate of Enforcement Delhi Vs. Axis Bank[10]:-**

> "106. Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as "*tainted property*" in as much as there would assumably be evidence to *prima facie* show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of "*moneylaundering*" being its projection as "*untainted property*" (Section 3). This would include such property as may have been obtained or acquired by using the tainted property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue advantage and dishonestly gained, is tainted property acquired "*directly*" by a scheduled offence and consequently "*proceeds of crime*". Any other property acquired using such bribe as consideration is also "*proceeds of crime*", it having been obtained "*indirectly*" from a prohibited criminal activity within the meaning of first limb of the definition.
>
> 112. Chronologically speaking, RDBA (in its original form and moniker RDDBFI Act)was enacted in 1993, followed by SARFAESI Act coming on the statute book in 2002, the PMLA being enacted in 2002, commencing in 2005, the Insolvency Code 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*".
>
> 141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "*proceeds of crime*" concerns a property the value whereof is "*debt*" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so

[10] 2019 SCC OnLine Del 7854

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.

145. Noticeably, the effect of Insolvency Code on PMLA was not in issue before the Supreme Court in the aforesaid case, the prime concern being the conflict arising out of claims of revenue under Income Tax Act, 1961 vis-à-vis proceedings under the Insolvency Code. For the same reasons, the ruling of the full bench of the Madras High Court in *Indian Overseas Bank* (supra) also would have no effect here.

146. A Resolution Professional appointed under the Insolvency Code does not have any personal stake. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of Section 14 of Insolvency Code cannot come in the way of the statutory authority conferred by PMLA on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route. After all, a person indulging in 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 such assets are not lawfully his to claim.

164. Though the sequitur to the above conclusion is that the *bonafide third party claimant* has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the order of attachment under PMLA, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in such situations as above (third party interest being prior to criminal activity) the order of attachment under PMLA would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party.

167. As has been highlighted earlier, the provisional order of attachment is subject to confirmation by the adjudicating authority. The order of the adjudicating authority, in turn, is amenable to appeal to the appellate tribunal. The said forum (i.e. the appellate tribunal) may pass such orders as it thinks fit "*confirming, modifying or setting aside the order appealed against*" [Section 26(4)]. Undoubtedly, an aggrieved party is entitled in law to invoke the said jurisdiction of the appellate

> tribunal to bring a challenge to the orders of attachment (as confirmed) but, the law in PMLA, 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.
>
> 168. An argument, however, was raised, by the appellants that the respondent herein should have approached the special court, instead of the appellate tribunal, for consideration of their respective claims.
>
> 169. In view of above-noted legislative scheme, it must be clarified that 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 PMLA has commenced, the claim of a party asserting to have acted *bonafide*or having legitimate interest will have to be inquired into and adjudicated upon only by the special court."

19. Mr. Hossain then contended that the validity of the orders passed or proceedings initiated under the PMLA cannot be scrutinized or subjected to challenge in proceedings undertaken under the IBC. In support of the aforesaid contention, reliance has been place on the following observations as made by the Supreme Court in **Embassy Property Developments Pvt. Ltd. vs. The State of Karnataka**[11]:-

> "37. From a combined reading of sub-section (4) and sub-section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the Government under the provisions of the MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (*c*) of sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to

[11] 2020 13 SCC 308

insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "*arising out of or in relation to the insolvency resolution*" appearing in clause (*c*) of sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(*c*) of the IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260-A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results. [It will be a different matter, if proceedings under statutes like Income Tax Act had attained finality, fastening a liability upon the corporate debtor, since, in such cases, the dues payable to the Government would come within the meaning of the expression "*operational debt*" under Section 5(21), making the Government an "*operational creditor*" in terms of Section 5(20). The moment the dues to the Government are crystallised and what remains is only payment, the claim of the Government will have to be adjudicated and paid only in a manner prescribed in the resolution plan as approved by the adjudicating authority, namely, the NCLT.]

38. It was argued by all the learned Senior Counsel on the side of the appellants that an Interim Resolution Professional is duty-bound under Section 20(1) to preserve the value of the property of the corporate debtor and that the word *"property" is interpreted in Section 3(27) to include even actionable claims as well as every description of interest, present or future or vested or contingent interest arising out of or incidental to property* and that therefore the Interim Resolution Professional is entitled to move the NCLT for appropriate orders, on the basis that lease is a property right and NCLT has jurisdiction under Section 60(5) to entertain any claim by the corporate debtor."

20. Mr. Hossain has also referred to a decision of the NCLAT as rendered in **Varrsana Ispat Limited vs. Deputy Director, Directorate of Enforcement**[12]**:-**

[12] 2019 SCC OnLine NCLAT 236

> "12. From the aforesaid provisions, it is clear that the 'Prevention of Money-Laundering Act, 2002' relates to 'proceeds of crime' and the offence relates to 'money laundering' resulting confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto. Thus, as the 'Prevention of Money Laundering Act, 2002' or provisions therein relates to 'proceeds of crime', we hold that Section 14 of the 'I&B Code' is not applicable to such proceeding.
>
> 13. In so far as penalty is concerned, offence of money-laundering is punishable with rigorous imprisonment which is not less than three years and has nothing to do with the 'Corporate Debtor'. It will be applicable to the individual which may include the Ex-Directors and Shareholders of the 'Corporate Debtor' and they cannot be given protection from the 'Prevention of Money Laundering Act, 2002' and such individual cannot take any advantage of Section 14 of the 'I&B Code'. This apart, we find that the attachments were made by the Deputy Director of Directorate of Enforcement much prior to initiation of the 'Corporate Insolvency Resolution Process', therefore, the 'Resolution Professional' cannot derive any advantage out of Section 14.
>
> 14. As the 'Prevention of Money Laundering Act, 2002' relates to different fields of penal action of 'proceeds of crime', it invokes simultaneously with the 'I&B Code', having no overriding effect of one Act over the other including the 'I&B Code', we find no merit in this appeal. It is accordingly dismissed. No costs."

21. Mr. Hossain then lastly drew the attention to the Court to the fact that in terms of the provisional order of attachment, properties of the corporate debtor valued at Rs. 274.60 crores alone had come to be attached. It was submitted that the respondent raises no claim over and above the aforesaid, on any sums that may have been received as an outcome of the liquidation sale initiated and completed by the petitioner.

E. THE PRELIMINARY OBJECTION

22. It would be apposite to pause here and deal with the preliminary objection which was raised at the outset. Insofar as the maintainability of the writ petition post the passing of the provisional attachment order is concerned, the Court takes note of the reliefs as claimed in the writ petition. It becomes pertinent to note that insofar as relief (4) is concerned, that appears to have rendered infructuous consequent to the respondent having passed an order of attachment during the pendency of the writ petition. It is relevant to note that when the matter was heard on 24 November 2021 at that stage the admitted position was that no order of attachment had been passed and it was in the aforesaid backdrop that learned counsels for parties had proceeded to address submissions. The order of attachment admittedly came to be made only on 2 December 2021 just a day before the matter was posted for further hearing. It was only upon the passing of the order of attachment that Mr. Hossain contended that the writ petition is liable to be dismissed as having become infructuous and that in any case nothing further survived for consideration in the absence of a formal challenge being laid to the order of provisional attachment. Additionally, it was contended on behalf of the respondent that even if the order of attachment was to be assailed, it cannot be questioned directly by way of a writ petition since adequate alternative statutory remedies exist and the petitioner must be held liable to invoke the same if the order of attachment was chosen to be challenged.

23. Since the petitioner has chosen not to lay any formal challenge to the order of attachment, the question of the writ petition being dismissed on the ground of alternative remedy clearly does not arise. That only leaves the Court to consider whether it is otherwise liable to be dismissed as having become infructuous.

24. Bearing in mind the reliefs that are claimed in the writ petition, the Court finds itself unable to accept the objection taken by the respondent in this respect for the following reasons. Relief (2) as framed seeks the issuance of a direction restraining the respondent from stopping the e-auction process and to not take any coercive steps against the petitioner while discharging his functions as the Liquidator. Similarly, relief (3) seeks the issuance of an appropriate direction permitting the Liquidator to complete the liquidation process as per the IBC. On a conjoint reading of reliefs (2) and (3) this Court is of the considered opinion that the writ petition would not merit dismissal on grounds urged by the respondent. A comprehensive reading of those reliefs clearly establishes that the petitioner seeks this Court to hold that the Liquidator is entitled in law to complete the process of liquidation in accordance with the provisions of the IBC notwithstanding the pendency of proceedings under the PMLA. It is in the course of consideration of the aforesaid issue, that learned counsels have addressed elaborate submissions on the interplay between the IBC and the PMLA as well as the application and scope of Section 32A. Both sides have also argued at length on the question of which of the

two enactments must be accorded primacy. The mere issuance of a provisional order of attachment cannot detract from the right of the petitioner to urge that the process of liquidation in law must be permitted to continue notwithstanding the pendency of investigation and proceedings under the PMLA. It remains open for the petitioner to argue that once the sale of the liquidation assets stands approved by the Adjudicating Authority, the respondent stands denuded of the jurisdiction and authority to take coercive action under the PMLA against the properties of the corporate debtor including by way of attachment. In any case, the jurisdiction of this Court to rule on the aforesaid questions cannot be held to stand eclipsed merely on account of the issuance of a provisional order of attachment.

25. It also becomes pertinent to note that when the writ petition was initially taken up for hearing, the principal question which arose was whether the prayers made in the miscellaneous applications for release of the sums received by the Liquidator to meet the dues of the workmen in the interim and in the absence of an order of provisional order of attachment could be stalled. It may be noted that at that stage it was candidly admitted by learned counsel for the respondent that an objection to an interim release may not sustain in the absence of a provisional attachment order having been served. For the sake of completeness of the record, it also becomes pertinent to note that initially the respondent appeared to labour under the impression that the interim

order of 17 March 2021 restrained them from proceeding further under the PMLA. During the course of the initial hearing of the writ petition, this impression was dispelled upon the Court observing and drawing the attention of Mr. Hossain, learned counsel, to the terms of that order and pointing out that no such restraint had been entered by the learned Judge. It is only thereafter that the respondent appears to have proceeded to pass the provisional order of attachment. Notwithstanding the above and for reasons aforenoted, this Court is of the considered opinion that the writ petition is not liable to be dismissed on account of the preliminary objection as urged on behalf of the respondent.

26. Having dealt with the preliminary objection as raised, the Court proceeds further to notice the submissions addressed on behalf of the secured creditors and the successful auction bidder.

F. ARGUMENTS OF THE SECURED CREDITORS

27. Mr. Malhotra, learned senior counsel appearing for the secured Creditor, places reliance on the observation made in Axis Bank in support of his contention that proceedings, under Section 5 & Section 8 of the PMLA, are to be construed to be purely civil in nature. Learned Senior Counsel has referred to the following paragraphs of that decision which are reproduced hereunder: -

> "90. In *Gunwant Lal Godawat* (supra), the Supreme Court held that "*the liability for confiscation of property could be purely civil in nature*

as a consequence of the violation of some prescription of law commonly described as "forfeiture".

91. In the present context, particularly under PMLA regime, the confiscation of property (which is akin to forfeiture of property) is definitely not envisaged as a criminal sanction, this for the reason that the objective of the legislature clearly is to deprive the offender (of money-laundering) the enjoyment of "illegally acquired" fruits of crime by taking away his right over property thereby acquired, it affecting his civil rights. All the more so, because the jurisdiction to order attachment of the property is vested in the executive and its confirmation is left to decision of the quasi-judicial body i.e. adjudicating authority.

93. The provision for "*provisional attachment*" and its confirmation, pending trial before court (wherein the issue of confiscation would come up at the time of determination of guilt in criminal case), is similar to the one for "*attachment before judgment*" in civil law. The law conceives of possibility of disposal of ill-gotten assets to "*frustrate*" the objective. The argument to the contrary is thus repelled. Ultimately, the confiscation is left to the special court. But then, the order to such effect only follows the determination of the guilt in the criminal trial on the charge for offence of money-laundering. This view is in *sync* with the rulings in the cases of *S.K. Ghosh* (supra) and *Biswanath Bhattacharya* (supra) in context of Ordinance of 1944 and SAFEMA quoted above."

28. Mr. Malhotra has further contended that rights created in favour of the Enforcement Directorate must be recognised to be subject to the rights of secured creditors. It is submitted by learned senior counsel that on acquiring an interest in the property, any directions for attachment of property under the PMLA will be valid and operative subject to the satisfaction of the claims of such third parties. He further submits that the claim of the Directorate on that third party's property will be restricted to such part of the value of the property as in excess of the claim of the third

party. In support of his submission learned senior counsel relied on the following observations as entered by the learned Judge in Axis Bank:-

> "FORFEITURE (CONFISCATION): CERTAIN OTHER LAWS
>
> 94. As was brought out at the hearing, similar provisions for attachment and forfeiture of property are also made in certain other enactments including Unlawful Activities (Prevention) Act, 1967 ("UAPA", for short), Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act", for short), the Prohibition of Benami Property Transactions Act, 2002 ("the Benami Property Act", for short) and the Fugitive Economic Offenders Act, 2018 ("the Fugitive Economic Offenders Act", for short). It would be of advantage to have a brief look at the same to ascertain the safeguards against unjust effect of such power vis-à-vis third party claimants.
>
> 102. Generally speaking, the civil sanction of forfeiture (for confiscation) of property is thus directed by all the above-mentioned enactments against property with which there is a *link* or *nexus* of the criminal offence. A *bonafide* 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.
>
> SUMMARISING THE CONCLUSIONS
>
> 171. It will be advantageous to summarise the conclusions reached by the above discussion, as under:—
>
> (i). The process of attachment (leading to confiscation) of proceeds of crime under PMLA is in the nature of civil sanction which runs parallel to investigation and criminal action vis-a-vis the offence of money-laundering.
>
> (ii). 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.
>
> (iii). The empowered enforcement officer has the authority of law in PMLA 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.

(iv). If the "*tainted property*" respecting which there is evidence available to show the same to have been derived or obtained as a result of criminal activity relating to a scheduled offence is not traceable, or the same for some reason 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 take over by the government of illicit gains of crime.

(v). 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.

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

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

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

(ix). If the property of a person other than the one accused of (or charged with) the offence of money-laundering, i.e. a third party, is sought to be attached and there is evidence available to show that such

property before its acquisition was held by the person accused of money-laundering (or his abettor), or it was involved in a transaction which had interconnection with transactions concerning money-laundering, the burden of proving facts to the contrary so as to seek release of such property from attachment is on the person who so contends.

(x). The charge or encumbrance of a third party in a property attached under PMLA cannot be treated or declared as "*void*" unless material is available to show that it was created "*to defeat*" the said law, such declaration rendering such property available for attachment and confiscation under PMLA, free from such encumbrance.

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

(xii). An order of attachment under PMLA 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 RDBA and SARFAESI Act. Similarly, mere issuance of an order of attachment under PMLA 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 PMLA attachment being dependent on its *bonafides*.

(xiii). If it is shown by cogent evidence by the *bonafide third party claimant* (as aforesaid), staking interest in an *alternative attachable property* (or *deemed tainted property)*, claiming that it had acquired the same at a time around or after the commission of the proscribed criminal activity, in order to establish a legitimate claim for its release from attachment it must additionally prove that it had taken "*due diligence*" (e.g. taking reasonable precautions and after due inquiry) to ensure that it was not a tainted asset and the transactions indulged in were legitimate at the time of acquisition of such interest.

(xiv). If it is shown by cogent evidence by the *bonafide third party claimant* (as aforesaid), staking interest in an *alternative attachable property* (or *deemed tainted property)* claiming that it had acquired the

same at a time anterior to the commission of the proscribed criminal activity, the property to the extent of such interest of the third party will not be subjected to confiscation so long as the charge or encumbrance of such third party subsists, the attachment under PMLA being valid or operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

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

(xvi). In the situations covered by the preceding two sub-paragraphs, the *bonafide third party claimant* shall be accountable to the enforcement authorities for the "*excess*" value of the property subjected to PMLA attachment.

(xvii). 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 PMLA has commenced, the claim of a party asserting to have acted *bonafide* or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court."

29. Mr. Malhotra then contended that a difference must be drawn between "confirmation of sale" and "completion of sale" when interpreting the expression "sale of liquidation of assets" under section 32A(2) of the IBC. He further submits that an auction sale is substantially

different from a private sale. It is submitted by him that under Section 32A(2) of the IBC, once the statutory authority confirms the sale, it must be construed that the sale stands completed. Referring to the different modes of sale as prescribed in Schedule 1, Mr. Malhotra places reliance on Clause 12 to contend that the power to cancel itself indicates that the sale is deemed to be complete and concluded.

30. Mr. Malhotra further submitted that a public sale conducted after due publicity and once confirmed, should not be interfered with. In support of his submission, he pressed in aid the decision of the Supreme Court in **Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd**[13] and to the following principles enunciated therein**: -**

> "11. It may be noted that the auction-sale was done after adequate publicity in well-known newspapers. Hence, if anyone wanted to make a bid in the auction he should have participated in the said auction and made his bid. Moreover, even after the auction the sale was confirmed by the High Court only on 30-7-2003, and any objection to the sale could have been filed prior to that date. However, in our opinion, entertaining objections after the sale is confirmed should not ordinarily be allowed, except on very limited grounds like fraud, otherwise no auction-sale will ever be complete.
>
> 28. If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction-sale was done after wide

[13] (2008) 9 SCC 299

> publicity, then setting aside the sale after its confirmation will create huge problems. When an auction-sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction-sale is finalised, say for Rs 1 crore, and subsequently somebody turns up offering Rs 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers Rs 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.
>
> 29. In the present case we are satisfied that there is no fraud in the auction-sale. It may be mentioned that auctions are of two types — (1) where the auction is not subject to subsequent confirmation, and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held."

31. Mr. Malhotra learned senior counsel further argued that the principles underlying Order XXI Rule 91 and 94 of the Civil Procedure Code, 1908 further fortify his submission that the sale upon confirmation attains finality and that the issuance of a sale certificate is merely a ministerial act.

32. Lastly, Mr. Malhotra refers to the judgment of **Pattam Khader Khan v. Pattam Sardar Khan**[14] to submit that the sale certificate which is to be issued relates back to the date of confirmation of sale. He has referred to the following extracts of that decision: -

[14] (1996) 5 SCC 48

"10. Now to the spirit of it. A court sale is a compulsory sale, conducted by or under orders of the court. The title to the property sold does not vest in the purchaser immediately on the sale thereof unlike in the case of a private sale. The law requires that it does not become absolute until sometime after the sale; a period of at least 30 days must expire from the date of sale before the sale can become absolute. In that while, the sale is susceptible of being set aside at the instance of the judgment-debtor on the ground of irregularity in publication or conduct of the sale or on defalcation as regards deposit of money etc., as envisaged in Rules 89 and 90 of Order 21. Where no such application is made, as is the case here, the court was required, as indeed it did, to make an order, confirming the sale and it is upon such confirmation that the sale becomes, and became, absolute in terms of Order 21 Rule 92. After the sale has become absolute, a certificate is required to be granted by the court to the purchaser, termed as "certificate of sale" in Order 21 Rule 94. Such certificate bears the date as on which the sale became absolute. It is on the sale becoming absolute that the property sold vests in the purchaser. The vesting of the property is thus made to relate back to the date of sale as required under Section 65 CPC.

11. Order 21 Rule 95 providing for the procedure for delivery of property in occupation of the judgment-debtor etc., requires an application being made by the purchaser for delivery of possession of property in respect of which a certificate has been granted under Rule 94 of Order 21. There is nothing in Rule 95 to make it incumbent for the purchaser to file the certificate along with the application. On the sale becoming absolute, it is obligatory on the court though, to issue the certificate. That may, for any reason, get delayed. Whether there be failure to issue the certificate or delay of action on behalf of the court or the inaction of the purchaser in completing the legal requirements and formalities, are factors which have no bearing on the limitation prescribed for the application under Article 134. The purchaser cannot seek to extend the limitation on the ground that the certificate has not been issued. It is true though that order for delivery of possession cannot be passed unless sale certificate stands issued. It is manifest therefore that the issue of a sale certificate is not "sine qua non" of the application, since both these matters are with the same court. The starting point of limitation for the application being the date when the sale becomes absolute i.e. the date on which title passed, the evidence of title, in the form of sale certificate, due from the court, could always be supplied later to the court to satisfy the requirements of Order 21

> Rule 95. See in this regard *Babulal Nathoolal v. Annapurnabai* [AIR 1953 Nag 215 : ILR 1953 Nag 557] , which is a pointer. It therefore becomes clear that the title of the court auction-purchaser becomes complete on the confirmation of the sale under Order 21 Rule 92, and by virtue of the thrust of Section 65 CPC, the property vests in the purchaser from the date of sale; the certificate of sale, by itself, not creating any title but merely evidence thereof. The sale certificate rather is a formal acknowledgement of a fact already accomplished, stating as to what stood sold. Such act of the court is pristinely a ministerial one and not judicial. It is in the nature of a formalisation of the obvious."

G. SUBMISSIONS OF LUCKY HOLDINGS

33. Ms Maneesha Dhir, learned counsel appearing for M/s Lucky Holdings Pvt Ltd., referred to the order of the Adjudicating Authority of 08 September 2021 to submit that the objections urged by the respondent here have been duly considered and taken note of. She also laid emphasis on the fact that the aforesaid order has not been challenged by the respondent till date. It was submitted that once the sale is approved by the Adjudicating Authority, Sections 35(1)(n) read with Sec 60(5)(c) of the IBC come into play and the same consequently becomes binding on all stakeholders and the implementation process starts. It was argued that any interference with the implementation of the plan as approved if recognised to be permissible in law would cause irreparable loss and prejudice to the resolution applicant. Ms. Dhir has also placed reliance on the principles enunciated in Manish Kumar to submit that the action of the respondent is in clear violation of the protection accorded to the resolution applicant by Section 32A(2).

34. In order to appreciate the rival submissions which have been noticed above, it would be apposite to firstly notice the scheme and the relevant provisions of the IBC and the PMLA. This would also enable the Court to answer the question whether one of the two competing statutes must be recognised to prevail over the other and, if so, in which situations and eventualities.

H. SCHEME OF THE IBC

35. As is manifest from a reading of the preamble of the IBC, the aforesaid enactment is guided by the aim to consolidate and amend all laws relating to reorganization and insolvency resolution of corporate persons. The resolution process commences upon the submission of an application either by a financial creditor whether acting together or with others, an operational creditor or the corporate debtor in accordance with the provisions falling in Chapter II of the IBC. Section 7 of the IBC empowers a financial creditor either itself or jointly approaching the Adjudicating Authority by way of an application for initiation of the CIRP against a corporate debtor when a default has occurred. A similar right is conferred upon an operational creditor to set in motion a process for initiation of CIRP. An identical right to move the Adjudicating Authority is also provided to a corporate applicant. Upon the submission of such an application and on the same being admitted by the Adjudicated Authority, the CIRP is deemed to have commenced. The statute further empowers the Adjudicating Authority upon admission of an application made under

Sections 7, 9 or 10 of the IBC to declare a moratorium for the purposes referred to in Section 14 and for a public announcement being made informing all of the initiation of CIRP. The Act then envisages the appointment of an Interim Resolution Professional[15]. From the date the IRP is appointed, the management and the affairs of the corporate debtor stand vested in that professional in terms of the provisions made in Section 17 of the IBC. The IRP is obliged to manage the affairs of the corporate debtor and to make all endeavours to protect and preserve the value of the property of the corporate debtor.

36. The IBC also places the said professional under the obligation to continue to manage the operations of the corporate debtor as a going concern. In terms of Section 18, the IRP is required to collect all information relating to the assets, finances and operations of the corporate debtor, receive and collate claims submitted by creditors pursuant to the public announcement that is made, to constitute a Committee of Creditors and to manage and monitor the assets of the Corporate Debtor until a Resolution Professional[16] is appointed by the Committee of Creditors.

37. The Committee of Creditors in its first meeting then proceeds to appoint a RP. From here onwards, it is the RP who is obliged to conduct the entire process of insolvency resolution and to manage the affairs of the Corporate Debtor during the CIRP. Section 25 of the IBC enjoins the RP

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[15] IRP
[16] RP

to take immediate custody and control of the assets of the corporate debtor, represent and act on its behalf, prepare the information memorandum as contemplated in Section 29 and to invite prospective resolution applicants to present resolution plans which may resolve the insolvency faced by the corporate debtor.

38. The resolution plan essentially must make provision for the payment of debts of the corporate debtor owed to financial and operational creditors, workmen and others specified in Section 53 of the IBC. The resolution plans which may be received by the RP are then placed before the Committee of Creditors for their consideration. In terms of Sub-Section (4) of Section 30, a resolution plan may be approved if it is passed by a vote of not less than sixty percent of the voting share of the financial creditors in a meeting of the Committee of Creditors. The resolution plan as approved by the Committee of the Creditors is then placed before the Adjudicating Authority who upon being satisfied that the same meets the requirements as placed by Section 30(2) of the IBC, approve the same. Upon such a resolution plan as passed by the Committee of Creditors coming to be approved by the Adjudicating Authority, it binds the corporate debtor, its employees, members and other creditors.

39. By virtue of Amending Act 26 of 2019, a significant amendment came to be introduced in sub-Section (1) of Section 31 and in terms thereof, it now stands clarified that the plan as approved by the

Adjudicating Authority, would also bind the Central and State Governments or any local authority to whom a debt is owed. The provisions as introduced and incorporated in terms of Act 26 of 2019 have been upheld and judicially recognised to be declaratory in character by the Supreme Court in **Ghanashyam Mishra and Sons Pvt. Ltd. V. Edelweiss Asset Reconstruction Company**[17]**.**

I. SECTION 32A AND THE LEGISLATIVE INTENT

40. For the purposes of evaluating the rival submissions, it would be appropriate to extract Section 32A hereunder:-

> "**32A.** (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—
>
> (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
>
> (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:
>
> Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor,

[17]2021 SCC OnLine SC 313

it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

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

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

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

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

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

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

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

41. In order to answer the question that arises for determination in this particular petition, it is essential and vitally important to bear in mind the objectives underlying the introduction of Section 32A. The provision was contained in Clause 10 of the Insolvency and Bankruptcy Code [Second Amendment] Bill, 2019. The Standing Committee on Finance while dealing with that Bill and the proposed Section 32A noted as under: -

"2.5. The Committee note that the Insolvency and Bankruptcy Code, 2016 (IBC) was promulgated on concepts such as promoting maximisation of value of assets, transparent and predictable insolvency resolution framework, avoiding destruction of value of the debtor, and recognising the difference between malfeasance and business failure. The Committee further note that even though the IBC has been globally recognized as a paradigm shift in India's insolvency resolution process, many areas have required judicial and legislative interventions to enable the process to achieve the desired results. The Committee understand that the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 seeks to remove some of these bottlenecks and streamline the corporate insolvency resolution process further.

2.6. While acknowledging the role played by IBC in arresting the growth of NPAs, it is expected that effective measures within the ambit of IBC would be taken to realize better results from the process. The

Committee note that out of claims of around Rs 8.4 lakh crore, the realizable amount is around Rs. 3.57 lakh crore i.e. around 43% from the IBC process so far. Also, the average time taken for resolution has come down to 394 days. The Committee hope that the recovery percentage increases significantly in the near future and the time taken for resolution conforms to the timeline prescribed in the Code. The Committee would like to reiterate its recommendation made in previous reports about increasing the number of benches in National Company Law Tribunal (NCLT) and establishing e-courts for faster disposal of cases and speedy resolution. The Committee understand that a draft Bill on Cross Border Insolvency is in the pipeline. These types of cases have already resulted in uncertain recoveries for creditors. The Committee would like this Bill to be introduced in Parliament as soon as possible in order to further strengthen the insolvency framework.

3.7. Clause 10 reads as under: After section 32 of the principal Act, the following section shall be inserted, namely:— "32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not— (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court: Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled: Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the

commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this subsection. (2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not— (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court. "Explanation.—For the purposes of this sub-section, it is hereby clarified that,— (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor; (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable. (3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and cooperation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process".

3.8. The stakeholders on the above clause furnished the following suggestion:- "Though the Bill gives immunity to the corporate debtor (company as a legal entity) from prior offences, the individuals responsible for committing such offences on behalf of the debtor will

still be held liable. The question is whether the debtor should be absolved of all kinds of prior offences with such a blanket immunity.

3.9. The Secretary, Ministry of Corporate Affairs during the sitting held on 15th January, 2020 remarked:- "If the bidder, who is coming and participating under the court-supervised competitive process, does not get security and is not indemnified, there may be a problem.

3.10. Further, the Ministry furnished the following comment on the above suggestion: "…this provision would only apply where the CIRP culminates in a change in control to a completely unconnected resolution applicant. As such, a resolution applicant has nothing to do with the commission of any pre-CIRP offence whatsoever, and the corporate debtor is now fundamentally not the same entity as the one that committed the crime.

3.11. The Committee are in agreement with the intent of this amendment to safeguard the position of the Resolution Applicant(s) by ring-fencing them from prosecution and liabilities under offences committed by erstwhile promoters etc. The Committee understand the need for treating the company or the Corporate Debtor as a cleansed entity for cases which result in change in the management or control of the corporate debtor to a person who was not a promotor or in the management control of the corporate debtor or related party of such person, or to a person against whom there are material evidence and pending complaint or report by the investigating authority filed in relation to the criminal offence. The Committee agree that this provision is essential to provide the Resolution Applicant(s) a fair chance to revive the unit which otherwise would directly go into liquidation, which may not be as beneficial to the economy. The Committee believe that this ring-fencing is essential to achieve revival or resolution without imposing additional liabilities on the Resolution Applicant, arising from malafide acts of the previous promoter or management."

42. The SOA of Act 1 of 2020 also alludes to the need to ensure that the successful bidder is kept immune from the liabilities attached to the commission of an offense by the corporate debtor prior to the commencement of the CIRP under certain

circumstances. The SOA in more explicit terms alludes to Section 32A when it records that it is intended *"to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions.*"

43. In **Ghanashyam Mishra**, the Supreme Court also took note of the statement of the Hon'ble Finance Minister in the Rajya Sabha on 29 July 2019 which also sheds light on the shift in legislative policy and the perceived imperative for guaranteeing that auction and sale processes under the IBC are sequestered from actions and prosecution. This is evident from the following extract of that speech which is reproduced below:-

> "IBC has actually an overriding effect. For instance, you asked whether IBC will override SEBI. Section 238 provides that IBC will prevail in case of inconsistency between two laws. Actually, Indian courts will have to decide, in specific cases, depending upon the material before them, but largely, yes, it is IBC.
> There is also this question about indemnity for successful resolution applicant. The amendment now is clearly making it binding on the Government. It is one of the ways in which we are providing that. The Government will not raise any further claim. The Government will not make any further claim after resolution plan is approved. So, that is going to be a major, major sense of assurance for the people who are using the resolution plan. Criminal matters alone would be proceeded against individuals and not company. There will be no criminal proceedings against successful resolution applicant. There will be no criminal proceedings against successful resolution applicant for fraud by previous promoters. So, I hope that is absolutely clear. I would want all the Hon'ble Members to recognise this message and communicate further that this Code, therefore, gives that comfort to all new bidders. *So now, they need not be scared that the taxman will come*

> *after them for the faults of the earlier promoters. No*. Once the resolution plan is accepted, the earlier promoters will be dealt with as individuals for their criminality but not the new bidder who is trying to restore the company. So, that is very clear."

44. The SOA as well as the contemporaneous material referred to above, indubitably establish a conscious adoption of a legislative measure to insulate the resolution applicant from the prospect of prosecution in respect of offenses that may have been committed by the erstwhile management of the corporate debtor prior to commencement of the CIRP. This legislative guarantee stands enshrined in Section 32A (1). Similarly, the provision unmistakably also insulates the property of the corporate debtor from any action that may otherwise be taken in respect thereof for an offense committed prior to the commencement of the CIRP. A close reading of Section 32A (1) and (2) establishes that the legislature in its wisdom has erected two unfaltering barriers. It firstly prescribes that the offense, which may entail either prosecution of the debtor or proceedings against its properties, must be one which was committed prior to the commencement of the CIRP. Secondly the cessation of liability for the offense committed is to occur the moment when a resolution is approved by the Adjudicating Authority or upon sale of liquidation assets. The provision in unequivocal terms terminates the prospect of prosecution or coercive action against properties on the happening of either of two critical events: -

(a) the date from which a resolution plan comes to be approved by the Adjudicating Authority, or

(b) the sale of liquidation assets.

45. The constitutional validity of 32A came to be challenged before the Supreme Court in **Manish Kumar**. The Court while evaluating the merits of the challenge that was raised took note of the following contemporaneous material which was placed before it in order to discern the legislative policy and intent underlying the introduction of that provision:-

> "316.3. Reliance is also placed on the report of the Insolvency Law Committee. Relevant extracts which have been relied on are as follows:
>
> "PREFACE
>
> v. Liability of corporate debtor for offences committed prior to initiation *of CIRP*—In order to address the issue of liability that falls upon the resolution applicant for offences committed prior to commencement of CIRP, it has been recommended that a new section should be inserted which provides that when the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise.
>
> The newly inserted section as mentioned above shall also include protection of property from enforcement action when taken by successful resolution applicant. Also, it was recommended that cooperation and assistance to authorities investigating the offences committed prior to commencement of CIRP shall be continued by any person who is required to provide such assistance under the applicable law.
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Chapter 1 : Recommendations Regarding the Corporate Insolvency Resolution Process

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17. Liability of corporate debtor for offences committed prior to initiation of CIRP [Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.]

17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29-A, read with Section 35(1)(*f*), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

LIABILITY WHERE A RESOLUTION PLAN HAS BEEN APPROVED

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the

resolution plan it had submitted for approval of the adjudicating authority. Without relief from imposition of such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower *on an average*, even where the corporate debtor did not commit any offence and was not subject to investigation, due to *adverse selection* by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

17.5. The Committee noted that the proceedings under the Code, which are designed to ensure maximisation of value, generally require transfer of the corporate debtor to bona fide persons. In fact, Section 29-A casts a wide net that disallows any undesirable person, related party or defaulting entity from acquiring a corporate debtor. Further, the Code provides for an open process, in which transfers either require approval of the adjudicating authority, or can be challenged before it. Thus, the CIRP typically culminates in a change of control to resolution applicants who are unrelated to the old management of the corporate debtor and step in to resolve the insolvency of the corporate debtor following the approval of a resolution plan by the adjudicating authority.

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the

corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29-A.

17.7. Thus, the Committee agreed that a new section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased.

ACTIONS AGAINST THE PROPERTY OF THE CORPORATE DEBTOR

17.9. The Committee also noted that in furtherance of a criminal investigation and prosecution, the property of a company, which continues to exist after the resolution or liquidation of a corporate debtor, may have been liable to be attached, seized or confiscated. For instance, the property of a corporate debtor may have been at risk of attachment, seizure or confiscation where there was any suspicion that such property was derived out of proceeds of crime in an offence of money laundering. It was felt that taking actions against such property, after it is acquired by a resolution applicant, or a bidder in liquidation, could be contrary to the interest of value maximisation of the corporate debtor's assets, by substantially reducing the chances of finding a willing resolution applicant or bidder in liquidation, or lowering the price of bids, as discussed above.

17.10. Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bona fide bidder in liquidation under the Code, should be protected from such enforcement action, and the new section discussed in Para 17.7 should provide for the same. Here too, the Committee agreed that the protection given to the corporate debtor's assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, that may have been involved in the commission of such criminal offence.

17.11. By way of abundant caution, the Committee also recognised and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor's assets would have to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence, and was not involved in the commission of such criminal offence along with the corporate debtor.

COOPERATION IN INVESTIGATION

17.12. While the Committee felt that the corporate debtor and bona fide purchasers of the corporate debtor or its property should not be held liable for offences committed prior to the commencement of insolvency, *the Committee agreed that the corporate debtor and any person who may be required to provide assistance under the applicable law should continue to provide assistance and cooperation to the authorities investigating an offence committed prior to the commencement of the CIRP. Consequently, the Committee recommended the new section should provide for such continued cooperation and assistance*.".

316.4. The Additional Solicitor General also places reliance on the Sixth Report of the Standing Committee of Lok Sabha made in March 2020. The relevant portions according to the learned ASG are as follows:

"3.8. The stakeholders on the above clause furnished the following suggestion:

'Though the Bill gives immunity to the corporate debtor (company as a legal entity) from prior offences, the individuals responsible for committing such offences on behalf of the debtor will still be held liable. The question is whether the debtor should be absolved of all kinds of prior offences with such a blanket immunity.'

3.9. The Secretary, Ministry of Corporate Affairs during the sitting held on 15-1-2020 remarked:

'If the bidder, who is coming and participating under the court supervised competitive process, does not get security and is not indemnified, there may be a problem.'

3.10. Further, the Ministry furnished the following comment on the above suggestion:

'…this provision would only apply where the CIRP culminates in a change in control to a completely unconnected resolution applicant. As such, a resolution applicant has nothing to do with the commission of any pre-CIRP offence whatsoever, and the corporate debtor is now fundamentally not the same entity as the one that committed the crime.'

3.11. The Committee is in agreement with the intent of this amendment to safeguard the position of the resolution applicant(s) by ring-fencing them from prosecution and liabilities under offences committed by erstwhile promoters, etc. The Committee understands the need for treating the company or the corporate debtor as a cleansed entity for cases which result in change in the management or control of the corporate debtor to a person who was not a promotor or in the management or control of the corporate debtor or related party of such person, or to a person against whom there is material evidence and pending complaint or report by the investigating authority filed in relation to the criminal offence. The Committee agrees that this provision is essential to provide the resolution applicant(s) a fair chance to revive the unit which otherwise would directly go into liquidation, which may not be as beneficial to the economy. The Committee believes that this ring-fencing is essential to achieve revival or resolution without imposing additional liabilities on the resolution applicant, arising from mala fide acts of the previous promoter or management."

46. Proceeding then to rule upon the validity of the provision itself the Supreme Court held: -

> "326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.
>
> "327. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject-matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was

directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor.

328. The corporate debtor and its property in the context of the scheme of the Code constitute a distinct subject-matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgment of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximisation of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial veto on the ground of violation of Article 14.

329. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgment and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some, it cannot unless it strikingly ill squares with some constitutional mandate, suffer invalidation.

330. There is no basis at all to impugn the section on the ground that it violates Articles 19, 21 or 300-A."

47. It is equally important to recollect the doctrine of a "clean" or a "fresh slate" as was originally propounded by the Supreme Court in **Committee of Creditors of Essar Steel Ltd Vs. Satish Kumar Gupta**[18] in the following terms: -

"107. For the same reason, the impugned Nclat judgment [*Standard Chartered Bank* v. *Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the

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> rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, Nclat judgment must also be set aside on this count."

48. The learned Judges of the Supreme Court in **Manish Kumar** reiterated the principal objective of maximization of value under the IBC and the corresponding requirement of ensuring that the resolution applicant is freed of the ghost of past offenses committed by the corporate debtor.

49. Undisputedly and as has been explained in the decisions of the Supreme Court noticed above, maximization of value would be clearly impacted if a resolution applicant were asked to submit an offer in the face of various imponderables or unspecified liabilities. The amendment to sub-Section (1) of Section 31 and the introduction of Section 32A undoubtedly seek to allay such apprehensions and extend an assurance of the resolution applicant being entitled to take over the corporate debtor on a fresh slate. Section 32A assures the resolution applicant that it shall not be held liable for any offense that may have been committed by the corporate debtor prior to the initiation of the CIRP. It similarly extends

that warranty in respect of the properties of the corporate debtor once a resolution plan stands approved or in case of a sale of liquidation assets.

50. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered.

51. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the adjudicating authority approving the course of action to be finally adopted in relation to the corporate debtor. The Supreme Court in Manish Kumar also took note of the sufficient safeguards and the prerequisite conditions that stand attached to the cessation of liabilities to ultimately come to the conclusion that the Legislature had undertaken a well-considered balancing exercise to ensure that larger public interest was subserved.

J. LIQUIDATION UNDER THE IBC

52. IBC essentially seeks to put in place a unitary platform on which all matters relating to insolvency resolution of a corporate debtor may be

decided. The legislation is a measure forged out of the experience of liquidation proceedings dragging on for years resulting in further losses to the creditors of the corporate debtor and deterioration in the value of the liquidation estate or even its dissipation. It was accordingly thought expedient to put in place a structured mechanism which would explore the possibility of revival of the corporate debtor, the liquidation of the liabilities of creditors and workmen as even taxes and other dues owed to appropriate governments or local authorities. In furtherance of the aforesaid objectives, the IBC stipulates adherence to regimented timelines guiding each process and step of insolvency resolution so as to ensure the resolution of the affairs of the corporate debtor or its liquidation with due dispatch. The time frames as put in place, be it in the case of resolution under Chapter II or liquidation in Chapter III, are motivated by the fundamental objectives of ensuring a timely conclusion of the entire process and obtaining the maximum value for the assets of the corporate debtor.

53. IBC in Chapter III then proceeds to lay in place provisions which deal with the eventuality where either a resolution plan does not meet the approval of the Committee of Creditors or where no plan at all is received within the maximum period prescribed for completion of the CIRP. Where a resolution plan is not approved within the stipulated time frame as prescribed in Chapter II or where a resolution plan has come to be rejected, the process of liquidation ensues against the corporate debtor.

The Adjudicating Authority upon being moved by the RP in this respect and on being informed either that a resolution plan has not been received at all or that one that may have been received has come to be rejected or upon being apprised that the Committee of Creditors have opined that no resolution is possible, may proceed to pass an order of liquidation. The date on which such an order is passed is defined under Section 5(17) of the Act to mean the "liquidation commencement date". Amongst the various powers and duties that stand conferred upon the Liquidator, is the power to sell the moveable and immoveable assets of the corporate debtor. This power stands invested in the Liquidator by virtue of Section 35(1)(f), which reads thus: -

> "35. (1) Subject to the directions of the Adjudicating Authority, the Liquidator shall have the following powers and duties, namely:—
>
> (f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;
>
> Provided that the Liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."

54. The Liquidator in terms of the provisions engrafted in Section 36 is obliged to form a corpus comprising of various assets of the corporate debtor which constitutes the "liquidation estate". The Liquidator is then by law mandated to collect and consolidate all claims of creditors that may be received pursuant to the public announcement of its liquidation.

The functions of the Liquidator and the various steps that he is obliged to take are more elaborately spelt out in the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016[19]. Regulation 5 spells out the initial steps that the Liquidator is supposed to take upon being appointed as under:-

> "5. **Reporting**.
>
> (1) The Liquidator shall prepare and submit:
> (a) a preliminary report;
> (b) an asset memorandum;
> (c) progress report(s);
> (d) sale report(s);
> (e) minutes of consultation with stakeholders; and
> (f) the final report prior to dissolution to the Adjudicating Authority in the manner specified under these Regulations.
>
> (2) The Liquidator shall preserve a physical as well as an electronic copy of the reports and minutes referred to in sub-regulation (1) for eight years after the dissolution of the corporate debtor.
>
> (3) Subject to other provisions of these Regulations, the Liquidator shall make the reports and minutes referred to sub-regulation (1) available to a stakeholder in either electronic or physical form, on receipt of-
>
> (a) an application in writing;
>
> (b) costs of making such reports and minutes available to it; and
>
> (c) an undertaking from the stakeholder that it shall maintain confidentiality of such reports and minutes and shall not use these to cause an undue gain or undue loss to itself or any other person."

55. Regulation 12 of the Liquidation Regulations, 2016 sets forth the further steps required to be taken by the Liquidator and reads as follows:-

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[19] Liquidation Régulations, 2016

"12. **Public announcement by Liquidator.**

(1) The Liquidator shall make a public announcement in Form B of Schedule II within five days from his appointment.

[(2) The public announcement shall-

(a) call upon stakeholders to submit their claims or update their claims submitted during the corporate insolvency resolution process, as on the liquidation commencement date; and

(b) provide the last date for submission or updation of claims, which shall be thirty days from the liquidation commencement date.]

(3) The announcement shall be published-

(a) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the Liquidator, the corporate debtor conducts material business operations;

(b) on the website, if any, of the corporate debtor; and

(c) on the website, if any, designated by the Board for this purpose."

56. Regulation 32 prescribes the various modes that may be explored and initiated in order to realise the assets of the corporate debtor facing liquidation. It reads as under: -

"32. Sale of Assets, etc.-

The Liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively;

(d) the assets in parcels;

(e) the corporate debtor as a going concern; or

(f) the business(s) of the corporate debtor as a going concern:

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate."

57. Regulations 32(A) and 33 of the Liquidation Regulations, 2016 which deal with the mode of sale of the corporate debtor read as follows: -

"**32A. Sale as a going concern-**

(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the Liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

(2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

(4) If the Liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.

33. Mode of sale.

(1) The Liquidator shall ordinarily sell the assets of the corporate debtor through an auction in the manner specified in Schedule I.

(2) The Liquidator may sell the assets of the corporate debtor by means of private sale in the manner specified in Schedule I when-

(a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately;

(c) the asset is sold at a price higher than the reserve price of a failed auction; or

(d) the prior permission of the Adjudicating Authority has been obtained for such sale:

Provided that the Liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

(a) a related party of the corporate debtor;

(b) his related party; or

(c) any professional appointed by him.

(3) The Liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties."

58. The subject of distribution of the proceeds that may be received upon the sale of the assets of the corporate debtor is provided for in Regulation 42 of the Liquidation Regulations, 2016 which reads as under:-

"**42. Distribution.**

(1) Subject to the provisions of section 53, the Liquidator shall not commence distribution before the list of stakeholders and the asset memorandum has been filed with the Adjudicating Authority.

(2) The Liquidator shall distribute the proceeds from realization within 22[ninety days] from the receipt of the amount to the stakeholders.

(3) The insolvency resolution process costs, if any, and the liquidation costs shall be deducted before such distribution is made."

59. For the purposes of considering the issues which arise in the present petition, it would be pertinent to note the provisions made in Regulation 44 which reads thus:-

> "44. **Completion of liquidation**.
>
> (1) The Liquidator shall liquidate the corporate debtor within a period of one year from the liquidation commencement date, notwithstanding pendency of any application for avoidance of transactions under Chapter III of Part II of the Code, before the Adjudicating Authority or any action thereof:
>
> Provided that where the sale is attempted under sub-regulation (1) of regulation 32A, the liquidation process may take an additional period up to ninety days.
>
> (2) If the Liquidator fails to liquidate the corporate debtor within 24[one year], he shall make an application to the Adjudicating Authority to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation."

60. Regulation 47 of the Liquidation Regulations, 2016 puts in place a model time frame for completion of the liquidation process. That Regulation is extracted hereunder:-

> "**47. Model time-line for liquidation process**-
>
> The following Table presents a model timeline of liquidation process of a corporate debtor from the liquidation commencement date, assuming that the process does not include compromise or arrangement under section 230 of the Companies Act, 2013 (18 of 2013) or sale under regulation 32A:

Model Timeline for Liquidation Process

Sl. No.	Section / Regulation	Description of Task	Norm	Latest Timeline

				(Days)
(1)	(2)	(3)	(4)	(5)
1	Section 33 and 34	Commencement of liquidation and appointment of Liquidator	LCD	0 = T
2	Section 33 (1) (b) (ii) / Reg. 12 (1, 2, 3)	Public announcement in Form B	Within 5 days of appointment of Liquidator.	T + 5
3	Reg. 35 (2)	Appointment of registered valuers	Within 7 days of LCD	T + 7
4	Section 38 (1) and (5), Reg. 17, 18 and 21A	Submission of claims; Intimation of decision on relinquishment of security interest	Within 30 days of LCD	T + 30
5	Section 38 (5)	Withdrawal/ modification of claim	Within 14 days of submission of claim	T + 44
6	Reg. 30	Verification of claims received under regulation 12(2)(b)	Within 30 days from the last date for receipt of claims	T + 60
7	Reg. 31A	Constitution of SCC	Within 60 days of LCD	T + 60
8	Section 40 (2)	Intimation about decision of acceptance/ rejection of claim	Within 7 days of admission or rejection of claim	T + 67
9	Reg.31(2)	Filing the list of stakeholders and announcement to public	Within 45 days from the last date of receipt of claims	T + 75

10	Section 42	Appeal by a creditor against the decision of the Liquidator	Within 14 days of receipt of such decision	T + 81
11	Reg. 13	Preliminary report to the AA	Within 75 days of LCD	T + 75
12	Reg. 34	Asset memorandum	Within 75 days of LCD	T + 75
13	Reg. 15 (1), (2), (3), (4) and (5), and 36	Submission of progress reports to AA; Asset Sale report to be enclosed with every Progress Report, if sales are made	First progress report	Q1 + 15
			Q-2	Q2 + 15
			Q-3	Q3 + 15
			Q-4	Q4 + 15
			FY: 1 Audited accounts of Liquidator's receipt & payments for the financial year	15th April
14	Proviso to Reg. 15 (1)	Progress report in case of cessation of Liquidator	Within 15 days of cessation as Liquidator	Date of cessation + 15
15	Reg. 37 (2, 3)	Information to secured creditors	Within 21 days of receipt of intimation from secured creditor	Date of intimation + 21
16	Reg. 42 (2)	Distribution of the proceeds to the stakeholders	Within 3 months from the receipt of amount	Date of Realisation + 90
17	Reg.10 (1)	Application to AA for Disclaimer of onerous property	Within 6 months from the LCD	T + 6 months

18	Reg.10 (3)	Notice to persons interested in the onerous property or contract	At least 7 days before making an application to AA for disclosure.	
19	Reg. 44	Liquidation of corporate debtor.	Within one year	T + 365
20	Reg. 46	Deposit the amount of unclaimed dividends and undistributed proceeds	Before submission of application under sub-regulation (3) of regulation 45	
21	Sch-1 Sl. No 12	Time period to H1 bidder to provide balance sale consideration	Within 90 days of the date of invitation to provide the balance amount.]	

[AA: Adjudicating Authority, LCD: Liquidation Commencement Date, SCC: Stakeholders' Consultation Committee]

61. Since the principal submission advanced at the behest of the respondent has rested heavily on Schedule 1 of these Regulations, it would be pertinent to extract the same hereinbelow:-

"**SCHEDULE I**

MODE OF SALE

(Under Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016)

1. AUCTION

(1) Where an asset is to be sold through auction, a Liquidator shall do so the in the manner specified herein.

(2) The Liquidator shall prepare a marketing strategy, with the help of marketing professionals, if required, for sale of the asset. The strategy may include-

(a) releasing advertisements;

(b) preparing information sheets for the asset;

(c) preparing a notice of sale; and

(d) liaising with agents.

(3) The Liquidator shall prepare terms and conditions of sale, including reserve price, earnest money deposit as well as pre-bid qualifications, if any.

(4) The reserve price shall be the value of the asset arrived at in accordance with regulation 35.

> (4A) Where an auction fails at the reserve price, the Liquidator may reduce the reserve price by up to twenty-five percent of such value to conduct subsequent auction.
>
> (4B) Where an auction fails at reduced price under clause (4A), the reserve price in subsequent auctions may be further reduced by not more than ten percent at a time.

(5) The Liquidator shall make a public announcement of an auction in the manner specified in Regulation 12(3); Provided that the Liquidator may apply to Adjudicating Authority to dispense with the requirement of Regulation 12(3)(a) keeping in view the value of the asset intended to be sold by auction.

(6) The Liquidator shall provide all assistance necessary for the conduct of due diligence by interested buyers.

(7) The Liquidator shall sell the assets through an electronic auction on an online portal, if any, designated by the Board, where the interested buyers can register, bid and receive confirmation of the acceptance of their bid online.

(8) If the Liquidator is of the opinion that a physical auction is likely to maximize the realization from the sale of assets and is in the best interests of the creditors, he may sell assets through a physical auction after obtaining the permission of the Adjudicating Authority. The Liquidator may engage the services of qualified professional auctioneers specializing in auctioning such assets for this purpose.

(9) An auction shall be transparent, and the highest bid at any given point shall be visible to the other bidders.

(10) If the Liquidator is of the opinion that an auction where bid amounts are not visible is likely to maximize realizations from the sale of assets and is in the best interests of the creditors, he may apply, in writing, to the Adjudicating Authority for its permission to conduct an auction in such manner.

(11) If required, the Liquidator may conduct multiple rounds of auctions to maximize the realization from the sale of the assets, and to promote the best interests of the creditors.

(12) On the close of the auction, the highest bidder shall be invited to provide balance sale consideration within ninety days of the date of such demand:

Provided that payments made after thirty days shall attract interest at the rate of 12%: Provided further that the sale shall be cancelled if the payment is not received within ninety days.

(13) On payment of the full amount, the sale shall stand completed, the Liquidator shall execute certificate of sale or sale deed to transfer such assets and the assets shall be delivered to him in the manner specified in the terms of sale.

2. PRIVATE SALE

(1) Where an asset is to be sold through private sale, a Liquidator shall conduct the sale in the manner specified herein

(2) The Liquidator shall prepare a strategy to approach interested buyers for assets to be sold by private sale.

(3) Private sale may be conducted through directly liaising with potential buyers or their agents, through retail shops, or through any other means that is likely to maximize the realizations from the sale of assets.

(4) The sale shall stand completed in accordance with the terms of sale.

(5) Thereafter, the assets shall be delivered to the purchaser, on receipt of full consideration for the assets, in the manner specified in the terms of sale."

K. STATUTORY PROVISIONS UNDER PMLA

62. Having traversed the IBC and the salient provisions of that code, it would now be pertinent to advert to the relevant provisions of the PMLA.

63. The PMLA essentially represents the commitment of the Union to frame a comprehensive legislation to deal with the pernicious crime of money laundering as flowing from the Political Declaration and Global Programme of Action as adopted by the General Assembly of the United Nations on 23 February 1990, the Political Declaration adopted in the Special Session of the U.N. between 8 to 10 June 1998, the Financial Action Task Force held in Paris from 14 to 16 July 1989. Taking cognizance of the scourge of money laundering faced by governments across the globe and the legitimization of moneys derived from criminal activities as well as the imperative need to deprive the perpetrators of such action of the fruits derived from such activities, lead to the Government introducing the Prevention of Money- laundering Bill, 1998 in Parliament. The PMLA ultimately came to be enforced with effect from 1 July 2005.

64. As is manifest from a reading of the long title of the PMLA, it has essentially been promulgated to prevent money laundering and to provide for confiscation of property derived from or involved in the crime of money laundering. The expression "proceeds of crime" has been defined in Section 2(u) of the PMLA to mean any property derived or obtained whether directly or indirectly by a person as a result of criminal activity

relating to a scheduled offence or the value of any such property and where such property is taken or held outside the country, then property equivalent in value thereto.

65. The word property has been defined to mean assets of every description whether corporeal or incorporeal, tangible or intangible, movable or immovable and includes deeds and instruments evidencing title to or interest in such property or assets wherever located. The scheduled offences stand enumerated in parts A and B of the Schedule appended to the enactment.

66. Section 3 of PMLA creates the offence of money laundering and reads as under: -

> "**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 [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.
>
> *Explanation.*—For the removal of doubts, it is hereby clarified that,—
>
> (*i*) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
> (a) concealment; or
> (*b*) possession; or
> (*c*) acquisition; or
> (*d*) use; or
> (*e*) projecting as untainted property; or
> (*f*) claiming as untainted property, in any manner whatsoever;

(*ii*) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever."

67. The punishment for the offence of money laundering is then specified in Section 4 which provides that a person who commits that offence shall be punishable with rigorous imprisonment for a term of not less than three years which may extend to seven years and shall also be liable to the imposition of a fine. Section 5 of PMLA incorporates provisions relating to attachment, adjudication and confiscation. That provision is in the following terms: -

"**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 1[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."

68. As is evident from a reading of the aforesaid provision, the competent authority, if it has reason to believe that any person is in possession of proceeds of crime, and that such proceeds are likely to be concealed, transferred or dealt with so as to frustrate proceedings relating to confiscation, it may by an order, in writing, provisionally attach such property for a period not exceeding 180 days from the date of that order. The first Proviso to Section 5(1) of PMLA mandates that no order of provisional attachment shall be made unless a report in relation to the scheduled offence has been forwarded to a Magistrate under Section 173 of the Criminal Procedure Code, 1973 or a complaint is filed by a person authorized to investigate offences specified in the Schedule before a Magistrate. Sub-Section 3 then prescribes that the provisional order of attachment shall cease to have effect upon the expiry of the period of 180 days unless an order confirming the same is passed in accordance with the provisions made under Section 8 of the PMLA.

69. Section 6 of the PMLA constructs the hierarchy of adjudicating authorities for the purposes of carrying out the functions of the Act. The adjudicating authority is enjoined to exercise its powers in accordance with the procedure prescribed in Section 8 which reads as follows:-

"**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 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 three hundred and sixty-five 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];]

Explanation.—For the purposes of computing the period of three hundred and sixty-five days under clause (*a*), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

(*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."

70. In terms of sub-Section (3) of Section 8, the adjudicating authority is obliged in law to confirm any provisional order of attachment that may have been made under Section 5(1) as also to direct the retention of property or record ceased or frozen under Sections 17 or 18 of the PMLA. The order of the Adjudicating Authority confirming the provisional order

of attachment is to continue during the period of investigation and not exceeding 365 days or during the pendency of proceedings relating to any offence committed under the Act before a Court. That order of attachment attains finality once the property comes to be confiscated in terms of sub-Section (5) or sub-Section (7) of Section 8**.** Similarly, the order of attachment attains finality once that property comes to be confiscated in terms of orders passed by a Special Court under Sections 58B or Section 60. Section 8(5) of the PMLA prescribes that if upon conclusion, the Special Court comes to hold that the offence of money laundering is established to have been committed, it shall order its confiscation in favor of the Union Government. The property upon confiscation comes to vest absolutely in the Union Government free from all encumbrances as provided in Section 9.

71. Section 24 of the PMLA raises and constructs a reverse burden of proof upon the accused and is extracted herein below: -

> "**[24. Burden of proof.—**In any proceeding relating to proceeds of crime under this Act,—
>
> (*a*) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and
>
> (*b*) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.]"

72. All orders passed by the adjudicating authority can be assailed in appeal in terms of Section 25 which prescribes that the Appellate Tribunal

constituted under SAFEMA shall also act as the Appellate Tribunal for the purposes of the PMLA. Any person aggrieved by a decision or order of the Appellate Tribunal has the right to appeal to the High Court in accordance with the provisions of Section 42. Offences committed under the PMLA are triable by Special Courts which may be constituted in accordance with the provisions made in Chapter VII. Section 71 engrafts a non-obstante clause by providing that the provisions of the PMLA shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

L. ISSUE OF PRIMACY

73. The discussion on the issue of the overriding effect of the two competing statutes as urged by respective parties, must be prefaced with the acknowledgment of the fact that both the PMLA as well as IBC employ non obstante clauses by virtue of Sections 71 and 238 respectively. Both statutes, admittedly, are legislations promulgated by Parliament in 2005 and 2016. Both enactments have undergone recent amendments with PMLA seeing the passing of Finance (No.2) Act, 2019 and the IBC which was amended by virtue of Act 1 of 2020 pursuant to which Section 32A came to be included in the statute book. It, therefore, cannot possibly be presumed that the legislature was oblivious of the reach and ambit of the two enactments. The submissions canvassed by respective sides on this score must be evaluated firstly on the well settled precept of the Court identifying the core and fundamental purport and

object of the statutes. This principle obliges the Court to examine and decipher the intent and objective of the statute, the essential subject of legislation and the field of activities that it seeks to regulate. While discharging that burden, especially when dealing with two statutes which may independently employ a legislative command for their provisions to have effect notwithstanding anything to the contrary contained in any other law, the first question that must be answered is whether there is in fact an element of irreconcilability and incompatibility in the operation of the two statutes which cannot be harmonized. The issue of incompatibility in the operation of two statutes should not be answered on a mere perceived or facial examination of their provisions, but on a deeper and meticulous scrutiny and evaluation of the operation of the competing provisions and the subject that is sought to be regulated.

74. Having spelt out the fundamental principles which must be borne in consideration, the Court proceeds to consider the scheme and objects of the IBC. As explained by the Supreme Court, the IBC represented a paradigm shift in the way issues of insolvency and indebtedness were liable to be addressed. It could be aptly described as an economic measure marking a significant departure from the way debt was treated for centuries by statutes prevalent in the country. IBC is firstly envisaged to be an umbrella legislation dealing with varied aspects aimed at speedy insolvency resolution. It also ushered in a regimen where the erstwhile management which earlier continued to hold onto the reigns of the indebted entity as it sunk deeper into debt, now became liable to be

removed from control and the corporate debtor taken over by a professional who would take over the management and administration of the debtor pending its insolvency resolution. The third important objective of the IBC was to achieve maximization of value with the assets of the debtor being taken over and being disposed of by adoption of fair and transparent means. These aspects were highlighted by the Supreme Court in **Innoventive Industries Ltd. Vs. ICICI Bank**[20] with the Court explaining the backdrop of the legislation as under: -

> "13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190 countries on the ease of resolving insolvency based on various indicia."

75. The principal objectives of the IBC were lucidly explained by the Supreme Court in **Swiss Ribbons (P) Ltd. Vs. Union of India**[21] as follows: -

> "27. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When,

[20] (2018) 1 SCC 407
[21] (2019) 4 SCC 17

therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the Liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal* [*ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1] at para 83, fn 3).**"**and **–**

"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.**"**

76. The primary objectives were again highlighted in two recent decisions of the Supreme Court and which would even otherwise be

relevant for deciding the question that falls for our consideration here. The Court deems it apposite to extract the following parts of the decision of the Supreme Court in **Manish Kumar** and more particularly paragraph 237 of the report: -

> "237. The object of the law is clear. A radical departure was contemplated from the erstwhile regime, which was essentially contained in the Sick Industrial Companies (Special Provisions) Act, 1985, and which manifested a deep malaise, which impacted the economy itself. To put it shortly, the procedures involved under the Act, simply meant procrastination in matters, where speed and dynamic decisions were the crying need of the hour. The value of the assets of the company in distress, was wasted away both by the inexorable and swift passage of time and tardy rate at which the forums responded to the problem of financial distress. The Code was an imperative need for the nation to try and catch up with the rest of the world, be it in the matter of ease of doing business, elevating the rate of recovery of loans, maximisation of the assets of ailing concerns and also, balancing the interests of all stakeholders. The Code purports to achieve the object of maximisation of the assets of corporate bodies, inter alia, which have slipped into insolvency. Present a default, which, no doubt, is not barred by time (subject to the power of the Authority under Section 5 of the Limitation Act), the insolvency resolution process can be triggered. It falls into two stages. In the first stage or the calm period, every attempt is contemplated to rescue the corporate debtor from falling into liquidation. No doubt the moratorium under Section 14 is inevitable. "

77. The imperatives of the implementation of the insolvency resolution process within stipulated time frames was underlined by the Supreme Court in **Ghanashyam Mishra** with their Lordships observing: -

> "71. Perusal of the SOR would reveal, that one of the prime objects of I&B Code was to provide for implementation of insolvency resolution process in a time bound manner for maximisation of value of assets in order to balance the interests of all stakeholders. However, it was noticed, that in some cases there was extensive litigation causing undue delays resultantly hampering the value maximisation. It was also found

> necessary to ensure, that all creditors are treated fairly. It was therefore in view of the various difficulties faced and in order to fill the critical gaps in the corporate insolvency framework, it was necessary to amend certain provisions of the I&B Code. Clause (f) of para 3 of the SOR of the Insolvency and Bankruptcy Code (Amendment) Bill, 2019 would amply make it clear, that the legislative intent in amending sub-section (1) of Section 31 of I&B Code was to clarify, that the resolution plan approved by the Adjudicating Authority shall also be binding on the Central Government, any State Government or any local authority to whom a debt is owed in respect of payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, including tax authorities."

78. The interplay between the provisions of the IBC and PMLA and whether primacy could be accorded to one of the two enactments directly fell for consideration before a learned Judge of this Court in **Directorate of Enforcement Vs. Axis Bank**[22]. The Court in that matter was dealing with appeals brought by the Enforcement Directorate against the decision delivered by the Appellate Tribunal under the PMLA which had held that the rights of banks and financial institutions as recognised under SARFESI, RDB or the IBC would rank superior and that the PMLA would have to take a back seat. While a number of other important aspects pertaining to the provisions of the PMLA have also been considered, we are, for the purposes of the present matter, concerned only insofar as the said decision deals with the question posited above.

79. Dealing with the interplay of the statutes concerned, the learned Judge held: -

[22] 2019 SCC OnLine DEL. 7854

"139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, SARFAESI Act (with added chapter on registration of secured creditor) 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 Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.

144. The respondent have referred to the following observations of the Supreme Court in order dated 10.08.2018 in Special Leave to Appeal (Civil) No. 6483/2018, *Principal Commissioner of Income Tax* v. *Monnet Ispat and Energy Limited*:—

> *"Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.*
>
> *We may also refer in this connection to* Dena Bank *v.* Bhikhabhai Prabhudas Parekh and Co. *(2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons."*

145. Noticeably, the effect of Insolvency Code on PMLA was not in issue before the Supreme Court in the aforesaid case, the prime concern being the conflict arising out of claims of revenue under Income Tax Act, 1961 vis-à-vis proceedings under the Insolvency Code. For the same reasons, the ruling of the full bench of the Madras High Court in *Indian Overseas Bank* (supra) also would have no effect here.

146. A Resolution Professional appointed under the Insolvency Code does not have any personal stake. He only represents the interest of creditors, their committee having appointed and tasked him with certain responsibility under the said law. The moratorium enforced in terms of Section 14 of Insolvency Code cannot come in the way of the statutory

authority conferred by PMLA on the enforcement officers for depriving a person (may be also a debtor) of the proceeds of crime. A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route. After all, a person indulging in 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 such assets are not lawfully his to claim.

147. To sum up on the issue, the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA."

80. Dealing with the effect of an order of attachment on the rights of creditors or persons in whose favour interests in property may have been created bona fide, the learned Judge proceeded to hold as follows: -

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

149. An order of attachment under PMLA, if it meets with the statutory pre-requisites, is as lawful as an action initiated by a bank or financial institution, or a *secured creditor*, for recovery of dues legitimately claimed or for enforcement of *secured interest* in accordance with RDBA or SARFAESI Act. An order of attachment under PMLA is not rendered illegal only because a *secured creditor* has a prior *secured interest* (charge) in the subject property. Conversely, mere issuance of an order of attachment under PMLA cannot, by itself, render illegal the

prior charge or encumbrance of a *secured creditor*, this subject to such claim of the third party (*secured creditor*) being *bonafide*. In these conflicting claims, a balance has to be struck. On account of exercise of the prerogative of the State under PMLA, the lawful interest of a third party which may have acted *bonafide*, and with due diligence, cannot be put in jeopardy. The claim of *bonafide third party claimant* cannot be sacrificed or defeated. A contrary view would be unfair and unjust and, consequently, not the intention of the legislature. The legislative scheme itself justifies this view. To illustrate, reference may be made to sub-section (8) of Section 8 PMLA where-under a power is conferred on the special court to direct the Central Government to "*restore*" a property to the claimant with a legitimate interest even after an order of confiscation has been passed**.**

161. The law conceives of possibility of third party interest in property of a person accused of money-laundering being created legitimately or, conversely, with ulterior motive "*to frustrate*" or "*to defeat*" the objective of law against money-laundering. In case of *tainted asset* - that is to say a property acquired or obtained as a result of criminal activity - the interest acquired by a third party from person accused of money-laundering, even if *bona fide*, for lawful and adequate consideration, cannot result in the same being released from attachment, or escaping confiscation, since the law intends it to "*vest absolutely in the Central Government free from all encumbrances*", the right of such third party being restricted to sue the wrong-doer for damages, the encumbrance, if created with the objective of defeating the law, being treated as void (Section 9).

162. But, in case an otherwise untainted asset (i.e. *deemed tainted property*) is targeted by the enforcement authority for attachment under the second or third part of the definition of "*proceeds of crime*", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest in such property was acquired *bona fide* and for lawful (and adequate) consideration, there being no intent, while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering**.**

> 163. Having regard to the above scheme of the law in PMLA, it is clear that if a bonafide third party claimant had acquired interest in the property which is being subjected to attachment at a time anterior to the commission of the criminal activity, the product whereof is suspected as proceeds of crime, the acquisition of such interest in such property (otherwise assumably untainted) by such third party cannot conceivably be on account of intent to defeat or frustrate this law. In this view, it can be concluded that the date or period of the commission of criminal activity which is the basis of such action under PMLA can be safely treated as the cut-off. From this, it naturally follows that an interest in the property of an accused, vesting in a third party acting bona fide, for lawful and adequate consideration, acquired prior to the commission of the proscribed offence evincing illicit pecuniary benefit to the former, cannot be defeated or frustrated by attachment of such property to such extent by the enforcement authority in exercise of its power under Section 8 PMLA."

81. As is evident from a reading of paragraph 147 of the report in the matter of Axis Bank, the argument of IBC or for that matter RBD or SARFESI having an unbridled or overarching effect over the PMLA was unequivocally rejected. The learned Judge while recording his conclusions in paragraph 147 of the report, took into consideration the scheme and the objects of the IBC and the PMLA and held that the two operated in distinct spheres. In any case, Axis Bank clearly holds that there is no inconsistency between the two enactments since the *".....purpose, text and context are different."*

82. Dealing with the question of attachment of properties in which third parties may have legitimately acquired an interest *bona fide,* without there being an intent to defeat or frustrate the law, the learned Judge held that it would be open to that party to approach the adjudicating authority to seek its release. The learned Judge further went on to hold that the date or the

period of commission of offense under PMLA can be safely treated as a "cut off" thus saving any third-party interests that may have stood created prior thereto.

83. Regard must be had to the fact that Axis Bank came to be decided prior to the insertion of Section 32A in the IBC. Therefore, the propositions and the tests enunciated in the aforesaid decision and reflected in paragraphs 162 to 164 of the report may have to yield to the extent that they now stand impacted or eclipsed by Section 32A.

84. As would be evident upon a consideration of the decisions aforenoted, the IBC is primarily concerned with the subject of restructuring of indebted corporate debtors, adoption of means for their revival, securing the interests of creditors and for adoption of steps for effective and timely resolution of corporate insolvency. The PMLA, on the other hand, is a statute fundamentally concerned with trying offenses relating to money laundering, following the proceeds of crime and for confiscation of properties obtained in the course of commission of those offenses or connected therewith. It sets up an investigative and adjudicatory mechanism in respect of offenses committed, attachment of tainted properties and other related matters. It sets up Special Courts for trial of offenses and to bring the guilty to book.

85. Viewed in that backdrop, it is evident that the two statutes essentially operate over distinct subjects and subserve separate legislative

aims and policies. While the authorities under the IBC are concerned with timely resolution of debts of a corporate debtor, those under the PMLA are concerned with the criminality attached to the offense of money laundering and to move towards confiscation of properties that may be acquired by commission of offenses specified therein. The authorities under the aforementioned two statutes consequently must be accorded adequate and sufficient leeway to discharge their obligations and duties within the demarcated spheres of the two statutes.

86. In a case where in exercise of their respective powers a conflict does arise, it is for the Courts to discern the legislative scheme and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations to the extent that the same does not impinge or encroach upon a facet which stands reserved and legislatively mandated to be exclusively controlled and governed by one of the competing statutes. The aspect of legislative fields of IBC and PMLA and the imperative to strike a correct balance was rightly noticed and answered by the learned Judge in Axis Bank.

87. In any event, this Court is of the firm view that the issue of reconciliation between the IBC and the PMLA insofar as the present petition is concerned, needs to be answered solely on the anvil of Section 32A. Once the Legislature has chosen to step in and introduce a specific provision for cessation of liabilities and prosecution, it is that alone which must govern, resolve and determine the extent to which powers under the

PMLA can be permitted in law to be exercised while a resolution or liquidation process is ongoing.

88. Having traversed the scheme and objectives of the two legislations, the significant decisions rendered and the legislative backdrop in which Section 32A came to be inserted, the stage is now set to deal with the principal contention as urged on behalf of the respondent. Before proceeding to do that, it would be pertinent to note the respondent proceeded to issue an order of attachment as late as 2 December 2021 even though no restraint as such operated on the exercise of power otherwise vesting in them in terms of the PMLA. Mr. Hossain learned counsel appearing for the respondent concedes that a provisional order of attachment cannot be issued under PMLA once a resolution plan comes to be approved in terms of the provisions contained in Chapter II of the IBC. The submission, however, was that in a case where the corporate debtor is undergoing liquidation, the power to attach provisionally can be exercised till such time as the sale becomes final. Mr. Hossain would contend that a distinction must clearly be drawn between the processes envisaged under Chapters II and Chapter III of the IBC. According to learned counsel, a comprehensive reading of the aforesaid Chapters in the IBC together with the Liquidation Regulations, 2016 would establish that a sale is complete only when a certificate in respect thereof comes to be issued upon payment of the entire consideration. According to learned counsel, since the sale is not liable to be viewed as having reached fruition till such time

as that certificate is issued, the right of the respondent to invoke Section 5 of the PMLA stands secured. According to Mr. Hossain, the expression "sale of liquidation assets" as occurring in Section 32A(2) must be understood and interpreted accordingly.

M. THE RESOLUTION AND LIQUIDATION CAUSEWAYS

89. There cannot be any dispute with respect to the contention of Mr. Hossain that "resolution" and "liquidation" constitute two separate and distinct tracks under the IBC. While the former is governed by the provisions enshrined in Chapter II, the process of liquidation is to be initiated and completed in accordance with Chapter III. The process of resolution envisages the identification of a resolution applicant whose proposal is found viable to resurrect the corporate debtor and complies with the statutory prerequisites set forth in Section 30 of the IBC. The resolution plan must necessarily provide for the payment of the insolvency resolution costs, the debts owed to operational and other creditors, provide for the management of the affairs of the corporate debtor and is otherwise found to conform to other requirements that may be specified and does not contravene the provisions of the law. Once that plan is accepted by the requisite majority of the Committee of Creditors as contemplated under Section 30(4), it is placed before the Adjudicating Authority for its approval in terms of Section 31 of the IBC. Since the provisions engrafted therein would have some bearing on the issue that

falls for consideration, it would be pertinent to extract the same hereunder: -

> "31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.
>
> (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section *(1),* it may, by an order, reject the resolution plan.
>
> (3) After the order of approval under sub-section (1),—
>
> (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
>
> (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database."

90. As would be evident upon a reading of the aforesaid section, the Adjudicating Authority, upon being satisfied that the plan is compliant with the provisions of Section 30(2), shall approve the same. That plan upon being accorded the seal of approval, comes to bind the corporate debtor, its employees, members, creditors as well as the appropriate governments and local authorities. The approval of the resolution plan also brings the moratorium order to an end. This would necessarily, as was highlighted by Mr. Hossain, also result in the restraint against institution or continuation of suits and legal proceeding involving the

corporate debtor, the statutory injunct against the transfer, alienation or disposal of assets of the corporate debtor and the action to foreclose, recover or enforce a security interest, ceasing to operate. Of some significance for our purpose is sub section (4) of Section 31 which mandates that the resolution applicant shall, within a period of 1 year or within such extended period as may be permissible in law, obtain all approvals as may be independently required in respect of the various measures forming part of the resolution plan. The import of Section 31(4) shall be elaborated in the subsequent parts of this decision.

91. The conduct of the CIRP is further detailed in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[23]. The RP in terms of Regulation 36 of the Resolution Regulations, 2016 upon his appointment is required to firstly draw up an Information Memorandum containing particulars such as the assets and liabilities of the corporate debtor, its financial statements, its creditors and the number of workers and employees. Expressions of Interest are then invited in terms of Regulation 36A. Upon completion of a due diligence exercise, a provisional list of eligible resolution applicants comes to be published in accordance with Regulation 36A(10). The prospective resolution applicants who stand included in that list are then extended a request for submission of their respective resolution plans. Regulations 37 and 38 specify the details which must be specified and

[23] Resolution Regulations, 2016

incorporated in the resolution plans that may be submitted. Those Regulations are extracted hereinbelow:-

"**37. Resolution plan.**

A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:-

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;
(b) sale of all or part of the assets whether subject to any security interest or not;
(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
(d) satisfaction or modification of any security interest;
(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
(f) reduction in the amount payable to the creditors;
(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
(h) amendment of the constitutional documents of the corporate debtor;
(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
(j) change in portfolio of goods or services produced or rendered by the corporate debtor;
(k) change in portfolio of goods or services produced or rendered by the corporate debtor;
(l) obtaining necessary approvals from the Central and State Governments and other authorities.

38. Mandatory contents of the resolution plan.

(1) A resolution plan shall identify specific sources of funds that will be used to pay the -

(a) insolvency resolution process costs and provide that the insolvency resolution process costs will be paid in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(2) A resolution plan shall provide:

(a) the term of the plan and its implementation schedule;
(b) the management and control of the business of the corporate debtor during its term; and
(c) adequate means for supervising its implementation.

(3) A resolution plan shall contain details of the resolution applicant and other connected persons to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.

Explanation : For the purposes of this sub-regulation,-

(i) 'details' shall include the following in respect of the resolution applicant and other connected person, namely:-

(a) identity;

(b) conviction for any offence , if any, during the preceding five years;

(c) criminal proceedings pending, if any;

(d) disqualification, if any, under Companies Act, 2013, to act as a director;

(e) identification as a willful defaulter, if any, by any bank or financial institution or consortium thereof in accordance with the guidelines of the Reserve Bank of India;

(f) debarment, if any, from accessing to, or trading in, securities markets under any order or directions of the Securities and Exchange Board of India,; and

(g) transactions, if any, with the corporate debtor in the preceding two years.

(ii) the expression 'connected persons' means-

(a) persons who are promoters or in the management or control of the resolution applicant;
(b) persons who will be promoters or in management or control of the business the corporate debtor during the implementation of the resolution plan;
(c) holding company, subsidiary company, associate company and related party of the persons referred to in items (a) and (b)."

92. The process of liquidation put in place under the Liquidation Regulations, 2016 also follows a similar course with it being provided that if it be ultimately found that resolution is not possible, the corporate debtor is put through the process of sale of assets as enumerated in Regulation 32. However, be it Regulation 37 under the Resolution Regulations 2016 or Regulation 32 of the Liquidation Regulations 2016, both enumerate similar measures that may be adopted in the course of resolution or liquidation, as the case may be. Both sanction the sale of the whole or part of the assets of the corporate debtor or its sale as a going concern. It becomes pertinent to note here that unlike a traditional liquidation process as was undertaken under the erstwhile company legislations which contemplated a mere sale of assets of the corporate

debtor and its ultimate dissolution, the Liquidation Regulations 2016, not only make provision for its sale as a going concern but also lay emphasis on that possibility being explored before steps for sale of assets is attempted as per Regulation 32A. If the corporate debtor facing liquidation be sold as a going concern, it would not be liable to be dissolved.

93. In any case, what needs to be appreciated and highlighted is that under both sets of regulations noticed above, the measures to be adopted under Regulation 32 or 37 in order to liquidate the debts of the corporate entity and to revive it if possible, cannot be accomplished or completed on the mere approval of the resolution plan or acceptance of one of the methods permissible under those Regulations. The sale of the whole or part of the assets, the restructuring of the corporate debtor, the acquisition or transfer of its shares, its merger or consolidation are neither envisaged nor mandated to be measures which must stand completed or accomplished on the date when the resolution plan is approved. This necessarily since the resolution plan is the repository of the steps or measures that are accepted and recommended by the Committee of Creditors and then placed for the approval of the Adjudicating Authority. It is only once that resolution plan stands approved that the question of further steps for implementation of the mode adopted would logically arise. This is further buttressed from the provisions contained in Section 31(4) which makes provision for a situation where the mode of resolution accepted and approved may require approval under an independent

statute. It is while factoring in that eventuality that sub section (4) proceeds to prescribe the outer timeline of one year from the date of approval of the resolution plan for obtaining all requisite approvals. A similar situation would obtain where a corporate debtor while in liquidation is sold as a going concern. Here also Regulation 44 of the Liquidation Regulations, 2016 provides for the completion of the liquidation process within one year from the date of its commencement or within further extended time as contemplated under the Proviso thereto and additionally under Regulation 44(2). The Court thus finds itself unable to accept the submission of Mr. Hossain that the on the date of approval of a resolution plan under Chapter II, the corporate debtor undergoes a transformational change or metamorphoses. In any case, it cannot be viewed as ceasing to exist in the eyes of law merely upon a resolution plan coming to be approved.

94. Identically, where a corporate debtor undergoing liquidation under Chapter III, it continues to exist as an entity till such time as it is fundamentally rearranged or altered consequent to the implementation of the procedure of settlement of its affairs as contemplated under the plan approved by the Adjudicating Authority. It would, in the considered view of this Court, be tenuous if not incorrect to premise a distinction between the procedures contemplated under Chapters II and III for the purposes of ascertaining the trigger point for Section 32A on lines suggested by Mr. Hossain. That then leads the Court to answer the principal issue which

falls for determination, namely, the meaning to be assigned to the phrase "sale of liquidation assets" as employed in Section 32A(2) of the IBC.

N. <u>SECTION 32A AND THE DEFINING MOMENT</u>

95. While Mr. Malhotra, learned senior counsel appearing for the secured creditors, has sought to invoke and draw sustenance from the provisions of Order XXI Rule 92 and 94 of the Civil Procedure Code to contend that the confirmation of the proposal for the settlement of the affairs of the corporate debtor should be held to be the determinative, the Court while not rejecting that submission completely is of the opinion that the answer to the same cannot rest on the pedestal of Order XXI. This since no pari materia provision stands engrafted in the IBC. It becomes apposite to note that Order XXI Rule 92 of the Civil Procedure Code unequivocally spells out and mandates that the sale shall become absolute upon its confirmation. The decisions cited by Mr. Malhotra in this respect are also not consequently being elaborately dealt with for the purposes of answering this particular issue.

96. This Court is of the opinion that the answer to determining when the bar under Section 32A would come into play must be answered bearing in mind the ethos of Section 32A and upon an interpretation of the provisions of the IBC and the Regulations framed thereunder. As is evident from a careful reading of Section 32A(2), the Legislature in its wisdom has provided that no action shall be taken against the properties of the corporate debtor in respect of an offense committed prior to the

commencement of the CIRP and once either a resolution plan comes to be approved or when a sale of liquidation assets takes place. The objective underlying the introduction of this provision has been eloquently explained by the Supreme Court in **Manish Kumar**. The intent of the mischief sought to be addressed is clearly borne out from the Committee Reports as well as the SOA. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the Adjudicating Authority approving the course of action to be finally adopted in relation to the corporate debtor. Section 32A legislatively places vital import upon the decision of the Adjudicating Authority when it approves the measure to be implemented in order to take the process of liquidation or resolution to its culmination. It is this momentous point in the statutory process that must be recognised as the defining moment for the bar created by Section 32A coming into effect. If it were held to be otherwise, it would place the entire process of resolution and liquidation in jeopardy. Holding to the

contrary would result in a right being recognised as inhering in the respondent to move against the properties of the corporate debtor even after their sale or transfer has been approved by the Adjudicating Authority. This would clearly militate against the very purpose and intent of Section 32A. It becomes pertinent to recollect that one of the primary objectives which informed the introduction of this provision was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor or from penalties connected with offenses committed prior thereto. The imperative for the extension of this legislative guarantee subserves the vital aspect of maximization of value.

97. The issue of creation of an offense or its nullification is a matter of legislative policy. An offense or a crime, on a jurisprudential or foundational plane, must be founded in law. **Manoj Kumar** has duly taken note of this aspect when it held that the creation or cessation of an offense is ultimately an issue of legislative policy. The Parliament upon due consideration deemed it appropriate and expedient to infuse the clean slate doctrine bearing in mind the larger economic realities of today. Regard must also be had to the fact the cessation of prosecution stands restricted to the corporate debtor and not the individuals in charge of its affairs. The PMLA as well as the IBC for that matter stand steadfast against its dilution against persons who were in control of the corporate debtor in respect of offenses committed prior to the commencement of the

CIRP. It was this delicate balance struck by the Legislature which met with approval in Manish Kumar.

98. As was observed earlier, Section 32A in unambiguous terms specifies the approval of the resolution plan in accordance with the procedure laid down in Chapter II as the seminal event for the bar created therein coming into effect. Drawing sustenance from the same, this Court comes to the conclusion that the approval of the measure to be implemented in the liquidation process by the Adjudicating Authority must be held to constitute the trigger event for the statutory bar enshrined in Section 32A coming into effect. It must consequently be held that the power to attach as conferred by Section 5 of the PMLA would cease to be exercisable once any one of the measures specified in Regulation 32 of the Liquidation Regulations 2016 comes to be adopted and approved by the Adjudicating Authority. The expression "sale of liquidation assets" must be construed accordingly. The power otherwise vested in the respondent under the PMLA to provisionally attach or move against the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority comes to approve the mode selected in the course of liquidation. To this extent and upon the Adjudicating Authority approving the particular measure to be implemented, the PMLA must yield. The Court also bears in mind that the bar that stands created under Section 32A operates and extends only insofar as the properties of the corporate debtor are concerned. That statutory injunct does not apply or extend to the persons in charge of the corporate debtor or the rights

otherwise recognised to exist and vested in the respondent to proceed against other properties as was explained by the learned Judge in Axis Bank.

O. <u>ANCILLARY ISSUES</u>

99. Before parting, it would be pertinent to record that Mr. Hossain also sought to touch upon infirmities in the manner in which the sale of the corporate debtor was approved by the Adjudicating Authority without adverting to the preconditions specified in Section 32A. Learned counsel sought to raise certain reservations with respect to the selection of the successful bidder and its eligibility to be chosen as such. However, this Court in the present matter is not called upon to rule on the validity of the order passed by the Adjudicating Authority. The Court is only called upon to answer the question of whether the liquidation process is liable to proceed further during the pendency of proceedings under the PMLA and notwithstanding the issuance of an order of attachment. The objections which are alluded to by the respondent are and shall remain available to be addressed before the competent forum in accordance with law.

100. In closing, it may be additionally noted that the Liquidator though obliged to administer and oversee the affairs of the corporate debtor in accordance with the provisions of the IBC, cannot strike a position of not cooperating with the competent authorities under the PMLA. Regard must be had to the fact that upon appointment, the Liquidator steps into the shoes of the erstwhile management and is the custodian of the properties

and all relevant papers and documents relating to the corporate debtor. That material and any other information that may be gathered and collated by the Liquidator may be of significance and import to the investigation being undertaken under the PMLA. Viewed in that background, it would be necessary to recognize the obligation of the Liquidator to provide such material and other information that may be required. The Liquidator cannot strike the position of being immune from answering to the requests for information that may be directed towards him by the investigating authorities under the PMLA.

P. <u>SUMMATION</u>

101. Upon a conspectus of the aforesaid discussion, the Court records the following conclusions: -

A. The Court notes that the reliefs as framed in the writ petition essentially seek a restraint against the respondent from interfering in the liquidation process which had been set in motion. That challenge cannot stand eclipsed merely on account of the issuance of the provisional order of attachment during the pendency of the writ petition. The authority of the respondent to move against the properties of the corporate debtor after the liquidation process has reached a stage where a particular measure has been approved by the Adjudicating Authority, is a question which would still arise and be open to be urged and contested.

B. The Court also notes that the challenge to the action of the respondent is raised on jurisdictional grounds by the petitioner. That issue cannot be recognised to stand interdicted merely on account of a provisional order of attachment coming to be issued in the interregnum and during the pendency of the writ petition. The preliminary objection is thus negatived.

C. When considering the rival submissions of primacy between the IBC and PMLA as urged by respective counsels, the Court bears in mind that when dealing with two statutes which may independently employ a legislative command for their provisions to have effect notwithstanding anything to the contrary contained in any other law, the first question that must be answered is whether there is in fact an element of irreconcilability and incompatibility in the operation of the two statutes which cannot be harmonized. The issue of incompatibility in the operation of two statutes should not be answered on a mere perceived or facial plane but on a deeper and meticulous examination of the operation of the competing provisions and the subject that is sought to be regulated.

D. The IBC can be aptly described as an economic measure marking a significant departure from the way debt was treated for centuries by statutes prevalent in the country. IBC is firstly envisaged to be an umbrella legislation dealing with varied aspects aimed at speedy insolvency resolution. It also ushered in a regimen where the erstwhile management which earlier continued to hold

onto the reigns of the indebted entity as it sunk deeper into debt, now became liable to be removed from control and the corporate debtor taken over by a professional who would take over the management and administration of the debtor pending its insolvency resolution. The third important objective of the IBC was to achieve maximization of value with the assets of the debtor being taken over and being disposed by adoption of fair and transparent means within strict and regimented time lines.

E. The PMLA on the other hand is a statute fundamentally concerned with trying offenses relating to money laundering, following the proceeds of crime and for confiscation of properties obtained in the course of commission of those offenses or connected therewith. It sets up an investigative and adjudicatory mechanism in respect of offenses committed, attachment of tainted properties and other related matters.

F. Viewed in that backdrop, it is evident that the two statutes essentially operate over distinct subjects and subserve separate legislative aims and policies. While the authorities under the IBC are concerned with timely resolution of debts of a corporate debtor, those under the PMLA are concerned with the criminality attached to the offense of money laundering and to move towards confiscation of properties that may be acquired by commission of offenses specified therein. The authorities under the aforementioned

two statutes must be accorded sufficient leeway to discharge their obligations and duties within the spheres of the two statutes.

G. In a case where in exercise of their respective powers a conflict does arise, it is for the Courts to discern the legislative scheme and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations to the extent that the same does not impinge or encroach upon a facet which stands reserved and legislatively mandated to be exclusively controlled and governed by one of the competing statutes. The aspect of legislative fields of IBC and PMLA and the imperative to strike a correct balance was rightly noticed and answered by the learned Judge in Axis Bank.

H. The issue of reconciliation between the IBC and the PMLA, in so far as the present cause is concerned, needs to be answered solely on the anvil of Section 32A. Once the Legislature has chosen to step in and introduce a specific provision for cessation of liabilities and prosecution, it is that alone which must govern, resolve and determine the extent to which powers under the PMLA can be permitted in law to be exercised while a resolution or liquidation process is ongoing.

I. The SOA as well as the contemporaneous material noted above, indubitably establishes a conscious adoption of a legislative measure to insulate the resolution applicant from the prospect of prosecution in respect of offenses that may have been committed by

the corporate debtor prior to the commencement of the CIRP. This legislative guarantee stands enshrined in Section 32A (1). Similarly, the provision unmistakably also insulates the properties of the corporate debtor from any action that may otherwise be taken in respect thereof for an offense committed prior to the commencement of the CIRP in terms of Section 32A (2).

J. Undisputedly and as has been explained in the decisions of the Supreme Court noticed above, maximization of value would be clearly impacted if a resolution applicant were asked to submit an offer in the face of various imponderables or unspecified liabilities. The amendment to sub-Section (1) of Section 31 and the introduction of Section 32A undoubtedly seek to allay such apprehensions and extend an assurance of the resolution applicant being entitled to take over the corporate debtor on a fresh slate. Section 32A assures the resolution applicant that it shall not be held liable for any offense that may have been committed by the corporate debtor prior to the initiation of the CIRP. It similarly extends that warranty in respect of the properties of the corporate debtor once a resolution plan stands approved or in case of a sale of liquidation assets.

K. A close reading of Section 32A (1) and (2) establishes that the legislature in its wisdom has erected two unfaltering barriers. It firstly prescribes that the offense, which may entail either prosecution of the debtor or proceedings against its properties, must

be one which was committed prior to the commencement of the CIRP. Secondly the cessation of liability for the offense committed is to occur the moment a resolution is approved by the Adjudicating Authority or upon sale of liquidation assets.

L. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered.

M. The Legislature in its wisdom has recognised a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the adjudicating authority approving the course of action to be finally adopted in relation to the corporate debtor.

N. Section 32A legislatively places vital import upon the decision of the Adjudicating Authority when it approves the measure to be implemented in order to take the process of liquidation or resolution to its culmination. It is this momentous point in the statutory process that must be recognised as the

defining moment for the bar created by Section 32A coming into effect. If it were held to be otherwise, it would place the entire process of resolution and liquidation in jeopardy. Holding to the contrary would result in a right being recognised as inhering in the respondent to move against the properties of the corporate debtor even after their sale or transfer has been approved by the Adjudicating Authority. This would clearly militate against the very purpose and intent of Section 32A.

O. It becomes pertinent to recollect that one of primary objectives which informed the introduction of this provision was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor. The imperative for the extension of this legislative guarantee subserves the vital aspect of maximization of value.

P. The issue of creation of an offense or its nullification is a matter of legislative policy. An offense or a crime on a jurisprudential or foundational plane must be founded in law. **Manoj Kumar** has duly taken note of this aspect when it held that the creation or cessation of an offense is ultimately an issue of legislative policy. The Parliament upon due consideration deemed it appropriate and expedient to infuse the clean slate doctrine bearing in mind the larger economic realities of today.

Q. Regard must also be had to the fact the cessation of prosecution stands restricted to the corporate debtor and not the individuals in charge of its affairs. The PMLA and its provisions stand steadfast and do not stand diluted in their rigour and application against persons who were in control of the corporate debtor. It was this delicate balance struck by the Legislature which met approval in **Manish Kumar**.

R. Section 32A in unambiguous terms specifies the approval of the resolution plan in accordance with the procedure laid down in Chapter II as the seminal event for the bar created therein coming into effect. Drawing sustenance from the same, this Court comes to the conclusion that the approval of the measure to be implemented in the liquidation process by the Adjudicating Authority must be held to constitute the trigger event for the statutory bar enshrined in Section 32A coming into effect. It must consequently be held that the power to attach as conferred by Section 5 of the PMLA would cease to be exercisable once any one of the measures specified in Regulation 32 of the Liquidation Regulations 2016 comes to be adopted and approved by the Adjudicating Authority.

S. The expression "sale of liquidation assets" must be construed accordingly. The power otherwise vested in the respondent under the PMLA to provisionally attach or move against the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority comes to approve the mode selected in the course of

liquidation. To this extent and upon the Adjudicating Authority approving the particular measure to be implemented, the PMLA must yield.

T. The Court thus comes to hold that from the date when the Adjudicating Authority came to approve the sale of the corporate debtor as a going concern, the cessation as contemplated under Section 32A did and would be deemed to have come into effect.

Q. <u>OPERATIVE DIRECTIONS</u>

102. Accordingly and for all the aforesaid reasons, this writ petition shall stand allowed in the following terms. The Liquidator is held entitled in law to proceed further with the liquidation process in accordance with the provisions of the IBC. The respondent shall hereby stand restrained from taking any further action, coercive or otherwise, against the liquidation estate of the corporate debtor or the corpus gathered by the Liquidator in terms of the sale of liquidation assets as approved by the Adjudicating Authority under the IBC. The Court grants liberty to the petitioner to move the Adjudicating Authority for release of the amounts presently held in escrow in terms of the interim order passed in these proceedings. Any application that may be made in this regard by the Liquidator shall be disposed of by the Adjudicating Authority bearing in mind the conclusions recorded hereinabove.

YASHWANT VARMA, J.

DECEMBER 15, 2021
Bh/neha