NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

(APPELLATE JURISDICTION)

COMPANY APPEAL (AT)(INSOLVENCY) NO.817/2021

('Appeal' arising out of Order dated 31.12.2020 in IA 81/2020 in CP(IB)No.397/NCLT/ AHM/2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court No.2)

In the matter of:

Kiran Shah,
'Resolution Professional' of KSL and Industries Ltd
608, Sakar-I, NR. Ganddhigram Rly Station,
Ashram Road,
Ahmedabad 380009 Appellant

Versus

Enforcement Directorate, Kolkata
Through Shri Sheo Dayal Chand, Joint Director
Govt of India,
CGO Complex
3rd MSO Building
6th Floor,
DF Block
Salt Lake,
Kolkata 700064 Respondent

Present:

Mr Ramji Srinivasan, Sr. Advocate with Ms Ranjana Roy Gawai, Ms Vasudha Sen, Mr. Ujjwal Jain, Ms Rajshree and Mr. Shikher Upadhyay, Advocates,

Mr. Kiran Shah, CA, 'Resolution Professional' in Person

Mr. Zoheb Hossain and Ms Tulika Gupta, Advocates for Respondent.

JUDGEMENT

VIRTUAL MODE

JUSTICE M. VENUGOPAL,

BACKGROUND:

The 'Appellant'/Resolution Professional has preferred the instant Company Appeal (AT)(Ins) No.817/2021 as an 'Aggrieved Person' being dissatisfied with the order dated 31.12.2020 in IA 81/2020 in CP(IB)No.397/NCLT AHM/2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court No.2).

2. Earlier, the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court No.2) while passing the impugned order in IA 81/2020 in CP(IB)No.397/NCLT AHM/2018 (Filed by the Anil Kumar, IRP of KSL & Industries Ltd under Sections 14, 18, 25 and 60(5) of the I&B Code 2016) at paragraph 11 to 14 had observed the following:-

> *11."The Hon'ble High Court of Madras has recently dealt with the issue, in the matter of Deputy Director, Office of the Joint Director, Directorate of Enforcement Vs. Asset Reconstruction Company)India_ Ltd and others (Writ Petition No.29970 of 2019 and WMP Nos 29872 & 34971 of 2019), wherein, the Hon'ble High Court of Madras, observed that "NCLT has no jurisdiction to go into the matters governed under the Prevention of Money Laundering Act, 2001 (PMLA) and, therefore, Section 14, having consequent upon an order passed by the Adjudicating Authority declaring moratorium, would not apply to the PMLA which is a distinct*

and special statute having its own objective and as such Section 14 would not bar a proceeding under the Act."

For the sake of brevity, para 8, 9 and 10 of the said judgement is reproduced hereinbelow:

> *Para 8. Section 14 of the IBC speaks of moratorium. A declaration has to be made through an order by the Adjudicatory Authority in this regard. If one carefully goes through the said section, there is no way professional attachment order passed under the provisions of the PMLA would automatically invite a moratorium. This provision only speaks about the consequence for institution of the suit, for continuance and other proceedings against the Corporate Debtor. Therefore, Section 14 of the IBC is consequent upon an order passed by the Adjudicative Authority declaring moratorium. This would not apply to a special enactment which travels on its own path. After all, one cannot presume a conflict between two enactments having it distinct roles with their objections. As stated, it only speaks about the follow up action over a property, which is subject matter of the proceedings before the National Company Law Tribunal under the IBC. Thus, Section 14 would not bar a proceeding under the PMLA.*
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> *Para 9. Section 32-A of the IBC deals with the liability for prior offences. This provision would get attracted in a case where the resolution plan has been approved by the Adjudicating Authority under Section 31 of the IBC. Therefore, when no such http://www.judis.nic.in*

W.P.No.29970 of 2019 & WMP Nos.29872 & 34971 of 2019 approval has taken place, the Adjudicating Authority will not have any power or authority to exercise the power under Section 32-A of the IBC. We may note, this insertion by way of an amendment came into being with effect from 28.12.2019 onwards.

Para 10. Section 60 of the IBC comes under Chapter VI.

Chapter VI of the IBC deals with the Adjudicating Authority for corporate persons. Section 65 of the IBC gives jurisdiction to the Tribunal to entertain and dispose of any application on proceeding by or against the Corporate Debtor. Even this proceeding would not apply to a statutory Authority in another enactment and that too, a special one. As observed, the scope of enquiry under PMLA is rather wide and comprehensive.

12. While dealing with the issue, the Hon'ble High Court of Madras (Supra) also referred the judgement so pronounced by the Hon'ble Apex Court in Embassy Property Development (P) Ltd with regard to the same issue:

Jurisdiction and the powers of the High Court under Article 226

13. What is recognized by Article 226(1) is the power of every High Court to issue (i) directions, (ii) orders or (iii) writs. They can be issued to (i) any person or (ii) authority including the Government. They may be issued (i) for the enforcement of any

of the rights conferred by Part III and (ii) for any other purpose. But the exercise of the power recognized by Clause (1) of Article 226, is restricted by the territorial jurisdiction of the High Court, determined either by its geographical location or by the place where the cause of action, in whole or in part, arose. While the nature of the power exercised by the High Court is delineated in Clause (1) of Article 226, the jurisdiction of the High Court for the exercise of such power, is spelt out in both Clauses (1) and (2) of Article 226.

24. Therefore in so far as the question of exercise of the power conferred by Article 226, despite the availability of a statutory alternative remedy, is concerned, Anisminic cannot be relied upon. The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article 226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.

28. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court *which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific*

functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as observed by this court in Sub Committee on Judicial Accountability Vs Union of India (1991) 4 SCC 699, flows from the concept of a higher law, namely the Constitution. Paragraph 61 of the said decision captures this position as follows:

"But where, as in this country and unlike in England, there is a written Constitution which constitutes the fundamental and in that sense a "higher law" and acts as a limitation upon the legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited government'. Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the Constitution and that the judicial wing is the interpreter of the Constitution and, therefore, of the limits of authority of the different organs of the State. It 24 (1991) 4 SCC 699 is to be noted that the British Parliament with the Crown is supreme and its powers are unlimited and courts have no power of judicial review of legislation."

29. The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT."

Scope of Section 60 of IBC:-

"37. From a combined reading of Subsection (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 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.

13. The learned single Judge of the Delhi High Court in the Deputy Director, Directorate of Enforcement Delhi and others V. Axis Bank and others (Manu/DE/1120/2019) has dealt with the similar issue in extenso. Ultimately, the following conclusion has been arrived at.

"171.(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…..

(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.....

(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.....

(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."

Thus, we have no hesitation in holding that the NCLT has got no jurisdiction to go into the matters governed under the PMLA.

13.Thus, on going through the above decision and view taken by the Hon'ble Madras High Court, as of now, it is clear that this Adjudicating Authority has no jurisdiction under Section 60(5) and/or 32A(2) of the IB Code or under Rule 11 of the NCLT, to quash and/or set aside the order so passed by a Competent Authority of Enforcement Directorate (ED) under the PMLA. This Adjudicating Authority is not vested with the power of judicial review over administrative action or is sitting as an Appellate Authority for the order so passed by the Competent Authority.

14. Further, Section 32A of the IBC does not envisages any rights upon this Adjudicating Authority to interfere in order passed by some Competent Authority. For this purpose, Applicant may approach the Appellate/Higher Authority of the concerned Competent Authority, who has passed the order in question. In view of this, we are of the opinion that the Applicant may put

forward the grievances before the concerned authority, who has passed the order and/or their Higher/Appellant Authority, as the case may be."

and dismissed the 'Application' as 'not maintainable', but without costs.

RESUME OF FACTS

3. Three First Information Reports dated 12.08.2015, 13.05.2016 and 25.05.2016 were filed by numerous Banks under Section 120-B r/w 420 of the Indian Penal Code and 13(2) r/w 13(1) of the Prevention of Corruption Act, 1988 against M/s ACTIF Corporation Ltd, M/s Jaybharat Textiles, M/s Krishna Knitwear Technology Ltd and M/s Eskay Knot (India) Ltd and the same were forwarded to the CBI BS&FC Cell through letter dated 26.08.2016.

4. According to the Respondent, the 'First Information Reports' revealed that the said Group Companies of the Tayal Group had acquired loan facilities aggregating Rs.524.61 crores wherein the funds were laundered through a maze of fictitious companies. Based on the 'First Information Reports' the Respondent had recorded ECIR No. KLZO/14/2016 dated 19.10.2016 and initiated an investigation under the Prevention of Money Laundering Act, 2002.

5. It is the version of the Respondent that during the course of investigation it came to light that M/s KSL & Industries was a 'Group Company of Tayal Group' and the 'Competent Authority' passed a 'Provisional Attachment Order' (PAO) on 08.05.2019 as per Section 5 of the Prevention of Money Laundering Act, 2002 thereby 'Express Mall' (Single Property) valued Rs. 483,16,35,696/- was attached being the 'Equivalent Value' of the

proceeds of crime. Further, an application in CP(IB) No.397/7/NCLT AHM/2018 was filed (under Section 7 of the I&B Code 2016) by(I) M/s Abhinandan Multitrade Pvt Ltd (ii) Express Suitings Pvt Ltd/Operational Creditors against the KSL & Industries/Corporate Debtor and that the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad) had admitted the application on 06.09.2019.

6. It comes to be known that a Prosecution Complaint in OC NO.1150/2019 was filed before the 'Adjudicating Authority', 'PMLA' and the Provisional Attachment Order dated 08.05.2019 was affirmed in respect of the property of the Corporate Debtor, through an order dated 24.10.2019, which according to the Appellant, the same was done inspite of the imposition of moratorium under the I&B Code, 2016 and the objections raised by the 'Erstwhile Interim Resolution Professional'.

7. The Appellant/Resolution Professional had filed an 'Appeal' No.3387/2019 on 27.12.2019 before the Appellate Tribunal, PMLA, and not resting on that, preferred an **IA 81/2020 in CP(IB)No.397/NCLT/ AHM/2018** before the 'Adjudicating Authority' praying to set aside the 'Provisional Attachment Order' dated 8.5.2019 and the confirmation order dated 24.10.2019 passed by the 'Adjudicating Authority' (PMLA) and the said Application came to be rejected on 31.12.2020 by the 'Adjudicating Authority' (NCLT Ahmedabad) as 'not maintainable'. Hence, the Appellant/Resolution Professional of KSL & Industries Ltd has filed the instant Company Appeal (AT)(Ins) No.817/2021 before this 'Appellate Tribunal'.

APPELANT'S SUBMISSIONS:

8. Assailing the correctness, validity and legality of the impugned order dated 31.12.2020 in IA 81/2020 in CP(IB)No.397/NCLT AHM/2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court No.2), the Learned Counsel for the Appellant submits that the impugned order is bad in law, since the attachment proceedings and its consequent order under the Prevention of Money Laundering Act. 2002 being a 'Civil Proceedings' ought to have been stayed because of the 'Moratorium' in terms of Section 14 of the I&B Code, 2016.

9. According to the Learned Counsel for the Appellant, the 'Adjudicating Authority' had failed to appreciate that upon admission of the 'Application' seeking initiation of the CIRP on 06.09.2019, the 'moratorium' had commenced, thereby imposing 'stay' on any kind of proceedings. As such, it is the plea of the Appellant that the 'Attachment Proceedings' and its resultant order under PMLA being Civil Proceedings should have been stayed with effect from 06.09.2019.

10. The Learned Counsel for the Appellant proceeds to point out that the Appellate Tribunal, PMLA in Bank of India V. the Deputy Director of Enforcement of Mumbai, reported in 2019 SCC OnLine ATPMLA 23 at paragraph 44 to 46 had observed the following:-

> 44."*This Tribunal is of the considered opinion that the proceeding u/s 8 of the PMLA , 2002 before the Adjudicating Authority is a civil proceeding and the Adjudicating Authority should have stayed the proceedings on passing of the moratorium order by the NCLT. The continuation of the*

proceedings from the date of commencement of the moratorium order is contrary to the intention of the legislature hence the consequential order of confirmation of PAO is contrary to law. In the facts of the present case, it appears that hurdle has been created in the process after passing the order of NCLT which ought not to have been done. The question of registering ECIR does not arise. The passing of provisional attachment order was not application of mind and without consulting the facts and law.

45. It is a matter of fact that ED has registered the ECIR and passed the provisional attachment order after the moratorium order is passed byh the NCLT. Thus, on the face of record, it is evident that the ED and the Adjudicating Authority have not understood the legal issues involved rather they have ignored the settled law and passed the impugned order. The serious situation is that ED has registered ECIR on the basis of FIR which was registered at the request of banks' complaint as borrowers who failed to pay the loan amount. The banks have now become victim. Therefore, both the impugned order and provision attachment order are set aside qua the appellant bank.

46. The period of continuation of proceedings before the Adjudicating Authority, PMLA, and before this Tribunal till the passing of present judgment and order, from the date of commencement of the moratorium order, be treated as excluded while calculating limitation of the period of completion of the Corporate Insolvency Resolution Process."

and, therefore, the proceedings before the Adjudicating Authority under the 'Prevention of Money Laundering Act, 2002' as regards the 'Attached Properties' is a 'Civil Proceeding' and further that, the 'Adjudicating Authority' under the 'Prevention of Money Laundering Act' does not have jurisdiction to 'attach the properties of the Corporate Debtor' undergoing the 'Corporate Insolvency Resolution Process'. As such, the impugned proceedings initiated under the Prevention of Money Laundering Act, 2002 by the Respondent during the pendency of 'CIRP' are illegal.

11. The Learned Counsel for the Appellant forcefully contends that Section 63 of the I&B Code bars any Civil Court having jurisdiction over the matter exclusively under the domain of 'National Company Law Tribunal' and the National Company Law Appellate Tribunal. Further, the stand of the Appellant is that the 'Adjudicating Authority' '(National Company Law Tribunal)' had lost sight of the fact that as per Section 18(1)(f) of the Code, the 'Interim Resolution Professional' is under an obligation to take control of all the 'Assets of the Corporate Debtor,' including those assets which may not be in the possession of the 'Corporate Debtor' which shall thereafter, vest with the 'Resolution Professional' as per Section 23 (2) of the I&B Code, 2016.

12. The Learned Counsel for the Appellant takes a stand that the 'Adjudicating Authority' (National Company Law Tribunal) had failed to appreciate that the 'Object of Attachment' as per Section 5 of the Prevention of Money Laundering Act, 2002 is only to prevent the 'Management of the Corporate Debtor', from creating any third party right. Moreover, it is projected on the side of the Appellant that once 'CIRP' is initiated, the

IRP/'Resolution Professional' takes 'Control of the Properties of the Corporate Debtor'. Besides this, no third party right can be created after the commencement of 'CIRP' without adhering to the specified procedure, as envisaged under the Code.

13. The Learned Counsel for the Appellant projects an argument that the 'Non-Obstante Clause' contained in the I&B Code, 2016, shall prevail over the Prevention of Money Laundering Act, 2002, as the I&B Code, 2016 being a 'later statute' and refers to the decision of the Hon'ble Supreme Court in Solidaire India Ltd V Fair Growth Financial Services Pvt Ltd reported in (2001) 3 SCC 71 wherein it is observed as under:

> *''Coming to the second question, there is no doubt that the 1985 Act is a special Act. Section 32(1) of the said Act reads as follows:*
>
> *"32. Effect of the Act on other taws-(l) The provisions of this Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973, 1973 (46 of 1973) and the Urban Land (Ceilling and Regulation) Act, 1976 (33 of 1976) for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than this Act."*
>
> *The effect of this provision is that the said Act will have effect notwithstanding anything inconsistent therewith contained in any other law except to the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, , 1976. A similar non-obstante provision is contained in Section 13 of the Special Court Act which reads as follows:*
>
> *"13. Act to have overriding effect-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any: instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority."*
>
> *It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows:Maharashtra Tubes Ltd V. State Industrial & Investment Corporation of Maharashtra Ltd & Anr., [1993] 2 SCC 144;Sarwan Singh & Anr V Kasturi Lal, [1977] 2 SCR 421;Allahabd Bank V.*

Canara Bank & Anr., [2000] 4 SCC 406 and Shri Ram Narain V. The Simla Banking Industrial Co Ltd., [1956] SCR 603.

We may notice that the Special Court had in another case dealt with a similar contention. In Bhoruka Steel Ltd V. Fairgrowth Financial Services Ltd [1997] v. 89 Company Cases 547, it had been contended that recovery proceedings under the Special Court Act should be stayed in view of the provisions of the 1985 Act. Rejecting this contention, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The head-note which brings out succinctly the ratio of the said decision is as follows :

"Where there are two special statutes which contain non-obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non-obstante clause. If the Legislature still confers the later enactment with a non-obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply."

14. The Learned Counsel for the Appellant relies on the Judgement in Punjab National Bank Vs. Dy. Director, Directorate of Enforcement, Raipur (Decided on 02.01.2019) reported in 2019 SCC OnLine ATPMLA 5 wherein at paragraph 67 and 68 it is observed as under:-

67. "This Tribunal is of the considered opinion that the proceeding u/s 8 of PMLA,2002 before the Adjudicating Authority is a civil proceeding and the Adjudicating Authority should have stayed the proceedings on passing of the moratorium order by the NCLT. The continuation of the proceedings from the date of commencement of the moratorium order is contrary to the intention of the legislature hence the consequential order of confirmation of PAO is contrary to law. In the facts of the present case, it appears that hurdle has been created in the process after passing the order of NCLT which ought not to have been done. The question of registering ECIR does not arise. The passing of provisional attachment

order was not application of mind and without consulting the facts and law.

68. It is a matter of fact that ED has registered the ECIR and passed the provisional attachment order after the moratorium order is passed by the NCLT. Thus, on the face of record, it is evident that the ED and the Adjudicating Authority have not understood the legal issues involved rather they have ignored the settled law and passed the impugned order. The serious situation is that ED has registered ECIR on the basis of FIR which was registered at the request of banks' complaint as borrowers who failed to pay the loan amount. The banks have now become victim. Therefore, both the impugned order and provision attachment order are set-aside qua the appellant bank."

15. The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court in Manish Kumar Vs. Union of India 2021 5 SCC Page 1 wherein the constitutional validity of Section 32A of the I&B Code was upheld after detailed deliberations on the aim and objective of the Code.

16. The Learned Counsel for the Appellant refers to the Judgement of the Hon'ble Supreme Court dated 19.01.2019 in Manish Kumar's Case (WP(C)No.26/2020) wherein at paragraph 252 to 259 it is observed as under;

252. Section 32A 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: i. A Resolution Plan, in regard to the corporate debtor, must be approved by the Adjudicating Authority under Section 31 of the Code; ii. The Resolution Plan, so approved, must result in the change in the management or control of the corporate debtor; 329 iii. 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; iv. 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 330 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 32A 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.;

253. The first proviso in sub-Section (1) declares that if there is approval of a Resolution Plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-Section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved Resolution plan, 331 there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub Section (1), however, the designated partner in respect of the liability partnership or the Officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, incharge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-

Section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or 332 indirectly involved in the commission of such offence, in terms of the Report submitted and Report filed by the Investigating Authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. Thus, the combined reading of the various limbs of sub-Section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in in-charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

254. Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the Resolution Plan. The further requirement is that a Resolution Plan must be approved by the Adjudicating Authority and,

finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in 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:

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

(ii) The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence;

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

the Code. The other part of the clarification, under the Explanation, is found in the second sub-clause of the Explanation

(ii). Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person.

Thus, reading sub-Section (1) and sub Section(2) together, two results emerge –

(i) subject to the requirements embedded in subSection (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease;

(ii) The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated. The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process.

(iii) The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in subSection (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

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

256. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, the PMLA) are pressed before us. It 337 is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a Resolution Plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stake holders.

257. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial 338 review. Having

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

258. 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 340 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. 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 judgement 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. 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 judgement and if seemingly the legislature in its 341 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.

259. There is no basis at all to impugn the Section on the ground that it violates Articles 19, 21 or 300A.

17. The Learned Counsel for the Appellant seeks in aid of the decision of the Hon'ble Supreme Court in P. Mohanraj & Others V. Shah Brothers Ispat Pvt Ltd 2021 SCC OnLine SC 152 wherein at paragraph 29 to 32 it is observed as under:

"OBJECT OF SECTION 14 OF THE IBC

29. This then brings us to the object sought to be achieved by Section 14 of the IBC. The Report of the Insolvency Law Committee of February, 33 2020 throws some light on Section 14. Paragraphs 8.2 and 8.11 thereof read as follows:

"8.2. The moratorium under Section 14 is intended to keep the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default. Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings. The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate." xxx xxx xxx

"8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute "money claims or recovery" proceedings. In this regard, the Committee also noted that in some jurisdictions, laws allow regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety to be continued during the moratorium period."

30.It can be seen that paragraph 8.11 refers to the very judgment under appeal before us, and cannot therefore be said to throw any light on the 34 correct position in law which has only to be finally settled by this Court. However, paragraph 8.2 is important in that the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor. Also, the judgment of this Court in Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17 states the raison d'être for Section 14 in paragraph 28 as follows: "

> *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,

31…

32. Viewed from another point of view, clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur."

18. The Learned Counsel for the Appellant refers to the judgment of this Tribunal in Directorate of Enforcement Vs Manoj Kumar Aggarwal and Others 2021 SCC OnLine NCLAT 121 wherein at paragraph 61, 62 it is observed as under:-

61.If this Section is perused, the provisions of this Code would have effect notwithstanding anything inconsistent therewith contained "in any other law" for the time being in force. Section 238 of IBC does not give over riding effect merely to Section 14. The other provisions also are material, and will 44 Company Appeal (AT)(Insolvency) No.575 and 576 of 2019 have

effect if there is anything inconsistent therewith contained in any other law for the time being in force. Thus if the Authorities under PMLA on the basis of the attachment or seizure done or possession taken under the said Act resist handing over the properties of the Corporate Debtor to the IRP/RP/Liquidator the consequence of which will be hindrance for them to keep the Corporate Debtor a going concern till resolution takes place or liquidation proceedings are completed, the obstructions will have to be removed. We have already referred to the various Acts required to be performed by IRP/RP/Liquidator to achieve the aims and objects of IBC in time bound manner. If properties of Corporate Debtor would not be available to keep it a going concern, or to get the properties valued without which Resolution/Sale would not be possible, the obstruction will have to be removed. To take over properties of Corporate Debtor, and manage the same, and keep Corporate Debtor a going concern are acts which fall within purview of IBC. IRP/RP/Liquidator under IBC have duty and right to take over and manage assets of Corporate Debtor as long as the assets are property of the Corporate Debtor, so that the other duties conferred on them by the statute are performed. These are issues relating to resolution/liquidation. If hindrance is being created by the attachment or by taking over the possession, it would be a question of priority arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor and such question can be decided by the Adjudicating Authority under Section 60 (5) (c) of IBC which reads as under:

"60.....

(5)....

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

62. In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the

property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A."

19. The Learned Counsel for the Appellant urges before this 'Tribunal' that 'Non-Obstante Clause' contained in the I&B Code, 2016 being a subsequent Statute shall prevail over the Non-Obstante Clause contained in Section 71 of the Prevention of Money Launder Act, 2002.

20. The Learned Counsel for the Appellant contends that in the instant case the Resolution Plan took into account the subject asset viz. Empress Mall in Nagpur, was already approved by the Committee of Creditors in exercise of its commercial wisdom and an appropriate application was filed before the Adjudicating Authority seeking approval of the Resolution Plan. Further, if the Resolution Plan would be approved by the Adjudicating Authority, the Resolution Applicant and the Company/Corporate Debtor would automatically benefit from the immunity provided under Section 32A of the I&B Code.

21. The Learned Counsel for the Appellant comes out with a plea that the Insolvency & Bankruptcy Code, 2016 is a complete Code in itself but a 'Special Statute' being promulgated later to the Prevention of Money Laundering Act, 2002. Hence, the moratorium imposed under Section 14 of the I&B Code will apply even on the Respondent and actions initiated under the Prevention of Money Laundering Act, 2002.

22. The Learned Counsel for the Appellant points out that the order dated 24.10.2019 passed by the 'Adjudicating Authority', (Prevention of Money Laundering Act, 2002) affirming the Provisional Attachment which was

passed after the commencement of 'CIRP' in the Company, is a nullity and non est in Law, in the light of Sections 14(1), 63 and 238 of the I&B Code.

RESPONDENT'S CONTENTIONS

23. The Learned Counsel for the Respondent submits that the 'National Company Law Appellate Tribunal' has no jurisdiction to entertain a challenge by the 'Appellant/Resolution Professional' seeking to set aside the 'Provisional Attachment Order' dated 8.5.2019, as affirmed by the 'Adjudicating Authority' (PMLA) on 06.06.2019.

24. Advancing his argument, the Learned Counsel for the Respondent contends that the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court No.2) as an 'Authority' under the I&B Code cannot examine the validity and correctness of the decision by a co-equal and coordinate 'Adjudicating Authority' under the PMLA Act, 2002. As such the 'Adjudicating Authority' (NCLT Ahmedabad Bench, Court 2, Ahmedabad) has rightly rejected the 'Application' directing the Resolution Professional to approach the 'Competent Appellate Forum' being the 'PMLA Appellate Tribunal'.

25. The Learned Counsel for the Respondent adverts to the Judgement of the Hon'ble Supreme Court in the matter of Embassy Property Development Pvt Ltd Vs State of Karnatka & Ors reported in 2019 SCC OnLine SC 1542 wherein at paragraph 37 to 43 it is observed as under:-

"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 MMDR Act, 1957

And the Rules issued thereunder. The only provisions 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 © 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 insolvency resolution . But a decision taken by the government or a statutory authority in relations to a matter which is in the realm of public law, cannot, for any stretch of imagination , be brought within the fold of the phrase "arising out of or in relations to the insolvency resolution" appearing in Clause © 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 IBC is interpreted to include all question 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 260A 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.

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. .

39. But the said argument cannot be sustained for the simple reason that the duties of a resolution professional are entirely different from the jurisdiction and powers of NCLT. In fact Section 20(1) cannot be read in isolation, but has to be read in conjunction with Section 18(f)(vi) of the IBC, 2016 together with the Explanation thereunder. Section 18 (f) (vi) reads as follows:

"18.Duties of Interim Resolution Professional.

The interim resolution professional shall perform the following duties, namely:

(a) …

(b)…

(c) …

(d)…

(e)…

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including-

(i)…

(ii)…

(iii)…

(iv) …

(v)…

(vi) assets subject to the determination of ownership by a court or authority;

(g) …

Explanation. For the purposes of this section, the term 'assets' shall not include the following namely;

(a)assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

40.If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. IN fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term 'assets' under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions are the word 'assets', while Section 20(1) uses the word 'property' together with the word 'value'. Section 18 and 25 do not use the expression 'property'. Another important aspect is that under Section 25(2)(b) of IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial, and arbitration proceedings. Section 25(1) and 25(2)(b) reads as follows: "25. Duties of resolution professional –

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of subsection (1), the resolution professional shall undertake the following actions:

(a)…….

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi judicial and arbitration proceedings." This shows that wherever the corporate debtor has to exercise rights in judicial, quasijudicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).

41.Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

42. In fact the Resolution Professional in this case appears to have understood this legal position correctly, in the initial stages. This is why when the Government of Karnataka did not grant the benefit of deemed extension, even after the expiry of the lease on 25.05.2018, the Resolution Professional moved the High Court by way of a writ petition in WP No. 23075 of 2018. The prayer made in WP No. 23075 of 2018 was for a declaration that the mining lease should be deemed to be valid upto 31.03.2020. If NCLT was omnipotent, the Resolution Professional would have moved the NCLT itself for such a declaration. But he did not, as he understood the legal position correctly.

43.After the filing of the first writ petition (WP No. 23075 of 2018), the Government of Karnataka passed an order dated 26.9.2018 rejecting the claim. Therefore the Resolution Professional, representing the Corporate Debtor filed a memo before the High Court seeking

withdrawal of the writ petition "with liberty to file a fresh writ petition". However the High Court, while dismissing the writ petition by order dated 28.09.2018 was little considerate and it disposed of the writ petition as withdrawn with liberty to take recourse to appropriate remedies in accordance with law. Perhaps taking advantage of this liberty, the Resolution Professional moved the NCLT against the order of rejection passed by the Government of Karnataka. If NCLT was not considered by the Resolution Professional, in the first instance, to be empowered to issue a declaration of deemed extension of lease, we fail to understand how NCLT could be considered to have the power of judicial review over the order of rejection."

26. The Learned Counsel for the Respondent points out that the Resolution Professional had already approached the 'PMLA Appellate Tribunal in Appeal' No. 3387/2019 on 27.12.2019 against the order of the 'Adjudicating Authority, PMLA' and no interim relief was granted. As such, it is contended on behalf of the Respondent that the Appellant cannot claim the same relief before the two 'Appellate Tribunals'.

27. The Learned Counsel for the Respondent cites the decision of the Hon'ble Supreme Court in Prestige Lights Ltd V. State Bank of India reported 2007 8 SCC Page 449 wherein at paragraph 35 it is observed as follows:-

35. "It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous

litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

28. According to the Learned Counsel for the Respondent, in view of the fact that the Resolution Professional had already approached the 'Appellate Tribunal' under 'PMLA' the instant Company Appeal (AT)(Ins) No.817/2021 is barred by the 'Doctrine of Election of Remedy' and falls back upon decision of Hon'ble Supreme Court in Mumbai International Airport Pvt Ltd V. Golden Chariot Airport and Anr. reported in (2010) 10 SCC at Page 422 Special Page 435 wherein at paras 44 to 48 it is observed as under:

44. "Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?

45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in Benjamin Scarf vs. Alfred George Jardine], wherein the learned Lord formulated

"...a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has

communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act...the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

46. In Tinkler vs. Hilder, Parke, B., stated that where a party had received a benefit under an Order, it could not claim that it was valid for one purpose and invalid for another. (See page 190)

47. In Clough vs. London and North Western Rail Co. the Court referred to Comyn's Digest, wherein it has been stated:-

"If a man once determines his election, it shall be determined forever." In the said case, the question was whether in a contract of fraud, whether the person on whom the fraud was practiced had elected to avoid the contract or not. The Court held that as long as such party made no election, it retained the right to determine it either way, subject to the fact that an innocent third party must not have acquired an interest in the property while the former party is deliberating. If a third party has acquired such an interest, the party who was deliberating will lose its right to rescind the contract. Once such party makes its election, it is bound to its election forever. (See page 652)

48. In Harrison vs. Wells, in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot

approbate and reprobate. The doctrine was further explained by Lord Justice Salmon by holding

"it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord". (See page 530)

29. Expatiating his submission, the Learned Counsel for the Respondent proceeds to point out that the remedy of the Appellant is to approach the Appellate Tribunal under the Prevention of Money Laundering Act, 2002, as per Section 26 of the Act, against the adverse findings of the 'Adjudicating Authority, PMLA.

30. It is represented on behalf of the Respondent that the Prevention of Money Launder Act, 2002 is a Special Legislation aimed at dealing with the offence of Money Laundering and hence it has a primacy over the I&B Code 2016 in proceedings relating to 'Money Laundering'

31. The Learned Counsel for the Respondent refers to the order dated 04.09.2020 of the Hon'ble High Court of Kolkata in WPA No.6575/2020 Directorate of Enforcement V. SH. Anil Kumar Goyal and another wherein it is observed as under:-

> "The petitioners raise a fundamental question of jurisdiction exercised by the National Company Law Tribunal (NCLT), Kolkata Bench vide its order dated 12th March, 2020 concerning the Respondent No.2/the Company in liquidation which is being also

proceeded against under the Prevention of Money Laundering Act, 2002 (for short the PML Act). Mr. Hossain, learned Counsel appearing for the petitioners, i.e. the Directorate of Enforcement submits that the Respondent Nos. 1 and 2/ representing the Company in liquidation, have earlier submitted themselves to the adjudicatory process under the PML Act and the law is now squarely settled in the case of Embassy Property Development Private Limited Vs. State of Karnataka reported in 2019 SCC Online SC 1542 that in the event two separate jurisdictions involving the NCLT and any other statutory authority, all issues concerning the Company in liquidation/the Corporate Debtor (CD) cannot fall into the single basket of the NCLT. On behalf of the Respondent No.1/Resolution Professional (RP), Ms. Bansal appears and submits that Section 32A of the IBC (the Code) protects the findings of the NCLT, Kolkata Bench dated 12th March, 2020 since the assets of the Company in liquidation are required to be dealt with appropriately by the RP, who is also the Official Liquidator. Having heard the parties and considering the materials placed at this stage, this Court is satisfied that the petitioners have made out a prima facie case for grant of an interim order."

32. The Learned Counsel for the Respondent submits that the 'Proceeds of Crime' attached by way of a 'Provisional Attachment Order' and affirmed by the 'Adjudicating Authority, PMLA' after taking into account of the Resolution Professional's objections, cannot be a subject matter of challenge before the 'National Company Law Appellate Tribunal', because of the fact that the 'Proceeds of the Crime' are not 'Debt' arising under any Law which is due or payable to the Government and as such, the 'Proceeds of Crime' already 'Attached' would not be the subject matter of 'Resolution' under the I&B Code, 2016.

33. The Learned Counsel for the Respondent relies on the Judgement of the Hon'ble High Court of Delhi in the matter of Deputy Director, Directorate of Enforcement Delhi V. Axis Bank and others reported in 2019 SCC Online Delhi 7854 wherein at paragraph 141, 143, 146 and 1476 it is observed as under:-

> *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 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.*
>
> *143. The proceeds of crime, there is no doubt, are not even remotely covered by the expressions "revenues, taxes, cesses" or other "rates". The word "revenue" is the controlling word, the expressions following (taxes, cesses, rates) taking the colour from the same. The word revenue, in the context of Government is to be understood to be conveying taxation [Gopi Pershad vs. State of Punjab, AIR 1957 Punjab 45 (DB)]. This is how the expression is defined by Black's Law Dictionary, Eighth Edition as also*

by Cambridge English Dictionary (accessible online). The reliance by the respondents on the use of the expression "non-tax revenue" with reference to PMLA under major accounting head "0047 Other Fiscal Services" in the list of Heads of Accounts of Union and States issued by Controller General of Accounts, Department of Expenditure in the Ministry of Finance, Government of India under the Government of India (Allocation of Business) Rules, 1961 is misplaced. The use of the expression for accounting purposes – to take care of receipts flowing into the Consolidated Fund – cannot give to the value of proceeds of crime realised by sale of properties confiscated under PMLA the colour of taxation."

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."

34. The Learned Counsel for the Respondent submits that the Prevention of Money Laundering Act, 2002 is a Special Statute enacted by the Parliament for dealing with money laundering and refers to the Judgement of the Hon'ble Supreme Court Y.S. Jagan Mohan Reddy V. Central Bureau of Investigation (2013) 7 SCC 439 wherein at paragraph 15 it is observed as under:-

15) "Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country."

35. Apart from the above, the Learned Counsel for the Respondent refers to the decision of the Hon'ble Supreme Court in P. Chidambaram V. Directorate of Enforcement (2019) 9 SCC 24 and the decision of Hon'ble Supreme Court in Gautam Kundu V Directorate of Enforcement reported in (2015) 16 SCC 1 to put forward a plea that the Prevention of Money Laundering Act is a Special Statute enacted by the Parliament.

36. The Learned Counsel for the Respondent cites the judgement of this Tribunal dated 02.05.2019 in Varrsana Ispaat Ltd V. Dy. Director of Enforcement (Company Appeal (AT)(Ins) No.493/2018) reported in 2019 SCC

OnLine NCLAT 236 wherein at paragraph 8 to 12 and 14 it is observed as under:-

8. Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the 'Prevention of Money Laundering Act, 2002' is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

9. Section 2(1) (u) of the 'Prevention of Money Laundering Act, 2002' defines "proceeds of crime" which reads as follows:

> *"2. Definitions. — (1) In this Act, unless the context otherwise requires,—*
>
> *xxx xxx xxx*
>
> *(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property"*

10. Chapter II relates to 'offence of money-laundering' and Section 3 therein relates to 'offence of money-laundering, which reads as follows:

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

11. 'Punishment for money-laundering' is prescribed under Section 4 as follows: "4. Punishment for money-laundering. — Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words" which may extend to seven years", the words "which may extend to ten years" had been substituted."

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.

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'.

37. The Learned Counsel for the Respondent refers to the order of this Tribunal dated 28.08.2019 in the matter of Andhra Bank & Ors V. Sterling Biotech Ltd & Ors (vide Company Appeal (AT)(Ins) Nos.601, 612 and 527 of 2019) reported in MANU/SL/0408/2019 wherein at paragraph 15, 16 and 18 it is observed as under:-

15. In so far the assets of the 'Corporate Debtor' is concerned, if it is based on the proceeds of crime, it is always open to the 'Enforcement

Directorate' to seize the assets of the 'Corporate Debtor' and act in accordance with the 'Prevention of Money Laundering Act, 2002' (for short, 'the PMLA').

16. However, it will not come in the way of the individual such as 'Promoter' or 'Shareholder' or 'Director', if he pays not from the proceeds of crime but in his individual capacity the amount from his account and not from the account/assets of the 'Corporate Debtor' and satisfies all the stakeholders, including the 'Financial Creditors' and the 'Operational Creditors'. There is nothing on the record to suggest that the individual property of the 'Promoter' / 'Shareholder'/ 'Director' who proposed to pay the amount has been subjected to restraint by the 'Enforcement Directorate'. Therefore, even if the asset of the 'Corporate Debtor' is held to be proceeds of crime, the Adjudicating Authority cannot reject the prayer for withdrawal of application under Section 7, if the 'Promoter' / 'Director' or 'Shareholder' in their individual capacity satisfy the creditors.

17. For the reason aforesaid, while we hold that the order of 'Liquidation' was uncalled for, we set aside the impugned order dated 8th May, 2019 passed by the Adjudicating Authority and allow the Appellant (who filed the application of Section 7 – 'Andhra Bank') to withdraw the application.

18. In the result, the 'Corporate Insolvency Resolution Process' initiated against the 'Corporate Debtor' namely— 'M/s. Sterling Biotech Ltd.' stands set aside subject to the payment of the amount as payable by the

'Promoters'/Shareholders to all the stakeholders/financial creditors and operational creditors in terms of Section 12A as approved with 90% voting share of the 'Committee of Creditors'. However, setting aside the order of initiation of 'Corporate Insolvency Resolution Process' will not amount to interference with any of the order passed by the 'Enforcement Directorate' with regard to the assets of the 'Corporate Debtor' and the proceedings under 'PMLA' will continue against the 'Corporate Debtor' etc. in accordance with Law.

38. The Learned Counsel for the Respondent contends that an 'Aggrieved Person' in the present case has remedies in terms of the ingredients of Sections 8, 26 and 42 of the Prevention of Money Laundering Act, 2002 in regard to the order passed pertaining to the Provisional Attachment of the Properties, under Section 5 of the Prevention of Money Laundering Act. In this connection, the Learned Counsel for the Respondent refers to the order dated 20.02.2015 of the Hon'ble High Court of Delhi in Rai Foundation Thr. Its Trustees Mr. Suresh Sachdev V. The Directorate of Enforcement and Others reported in 2015 SCC OnLine DEL 7626 wherein at paragraph 12 it is observed and held as under:-

9. In view of the availability of alternative remedies available to the petitioner under the this Act, I am not inclined to entertain this writ petition under Article 226 of the Constitution of India at this nascent stage, more so when complete mechanism has been provided under the Act to safeguard the interest of aggrieved person. The petitioner has effective and efficacious statutory remedies to prove the nature of acquisition of assets and to ventilate their grievances. Furthermore, at the stage of

provisional attachment, the person concerned is not divested of the property, but is only prevented from dealing with the same till orders are passed by the adjudicating authority under Section 8(2). Against order of adjudicating authority appeal shall lie to the Appellate Tribunal under Section 26 and further appeal to High Court under Section 42, the statute has provided enough safeguards and redressal mechanism. The writ court cannot go into the merits of the issue at this stage even before attachment order has become final, investigation is completed, trial concluded and issue of attachment is considered by Adjudicating Authority, Appellate Authority and second Appellate Authority.

10. Learned Senior Counsel has vehemently contended that even if alternative remedies are available, jurisdiction of the High Court under Article 226 of the Constitution of India is not curtailed and the writ petition is maintainable against the provisional attachment order. It is contended that provisional attachment order has been passed without any jurisdiction. There was no material available to indicate that money in the bank and the properties attached was generated from the crime money. Thus, it is necessary for the High Court to intervene in exercise of powers under Article 226 of the Constitution of India, and quash the provisional attachment order and the consequential proceedings. Reliance has been placed on Whirlpool Corporation V Registrar of Trade Marks, Mumbai and Ors.. (1998) 8 SCC 1 and Calcutta Discount Co Ltd V. Income Tax Officer, Companies District I, Calcutta and Another, AIR 1961 Supreme Court 372, which are in the context of different facts and of no help to the petitioner in this case. Per contra, counsel for respondent nos. 1 and 2 has contended that facts have to be ascertained by the Adjudicating Authority on the evidence to be produced by the parties. Complete

mechanism has been envisaged under the Act of adjudication of disputed facts. It is further contended that High Court would refrain from interfering with the Provisional Attachment order as the petitioner has full opportunity to place all the material evidence before the Adjudicating Authority to oppose the confirmation of provisional attachment order.

11. A perusal of Section 5 of the Act makes it clear that the order passed under sub-Section 1 is a provisional measure and valid for maximum period of 180 days. The provisional attachment has to be approved by the Adjudicating Authority after proper adjudication within 180 days. The act envisages three layers of the grievance redressal in addition to safeguards incorporated in Section 5(1) of the Act. The Adjudicating Authority may confirm or set aside the provisional attachment order on the basis of material produced by the parties before it. If Adjudicating Authority confirms the order of provisional attachment, the Act envisages appeal before the Appellate Tribunal. Section 42 of the Act provides further appeal to the High Court. Thus, it is clear that petitioner has an effective alternative remedy upto the High Court by way of adjudicating proceedings, appeal to the Appellate Tribunal and finally, appeal to the High Court. Petitioner can raise all the pleas including that of the jurisdiction before the Adjudicating Authority.

12. It is trite law that Article 226 of the Constitution of India vests wide discretion in the Writ Court to entertain the writ petition on any grievance and to grant appropriate relief. It is an extraordinary jurisdiction vested in the writ Court. The Writ Courts observe self-imposed restraint in exercising the jurisdiction under Article 226 Availability of alternative remedy is not a bar to entertain a writ petition.

However, ordinarily, the writ petition is not entertained under Article 226 if the aggrieved person has an efficacious and effective remedy provided by concerned statute where under an adverse decision is taken against the person, which he seeks to assail in the writ petition. Notwithstanding, availability of alternative remedy in a case of exceptional nature or a case of glaring injustice, Writ Court can entertain a writ petition. However, that would not mean that writ jurisdiction can be exercised in every case, where alternative remedies are available to safeguard the interest of the aggrieved person. It is one thing to say that in exercise of power vested in it under Article 226 of the Constitution, this High Court entertain a writ petition against any order passed by or action taken by the State and/or its agency or any public authority or order passed by quasi-judicial authority and it is altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

39. The Learned Counsel for the Respondent takes a plea that the 'Prevention of Money Laundering Act, 2002', is a 'Special Law' to tackle and curb money laundering and the same is enacted to implement our country's international obligations under 'United Nations Resolutions' ought to receive 'precedence' over the I&B Code, 2016, only to the extent of properties or Assets which are the 'Proceeds of Crime'.

40. The Learned Counsel for the Respondent points out that that on the 'principles of Statutory Interpretation' it is well settled that wherever the Parliament has dealt with a

specific instance through an earlier law, a subsequent general rule will not override the earlier Law, unless Parliament specifically intends as such (vide The Vera Cruz (1884) 10 AC 59 at Page 68 and Maxwell on The Interpretation of Statutes, 12th Edn, P. 196 -7). Added further, the Learned Counsel for the Respondent by adverting to the decision of Hon'ble Supreme Court in the matter of Life Insurance Corporation of India V. D.J. Bahadur 1981 1 SCC 315 and submits that the Hon'ble Supreme Court of India had applied the aforesaid cannon of construction.

41. The Learned Counsel for the Respondent refers to the Judgement dated 2nd July, 2019 of this Tribunal in the matter of Rotomac Global Pvt Ltd V Deputy Director, Directorate of Enforcement, (vide Company Appeal (AT)(Ins) No. 140 of 2019) wherein the Judgement of this Tribunal dated 2.5. 2019 in Varrsana Ispaat Ltd V. Dy. Director of Enforcement (Company Appeal (AT)(Ins) No.493/2018) reported in 2019 SCC OnLine NCLAT 236 was later followed.

42. The Learned Counsel for the Respondent adverts to the order of the Hon'ble Supreme Court dated 22.7.2019 in Varrsana Ispaat Ltd V. Dy. Director of Enforcement vide Civil Appeal No.5546/2019 (Filed against the Judgement of this Tribunal dated 2.5.2019) in Varrsana Ispaat Ltd V Dy. Director of Enforcement (Company Appeal (AT)(Ins) No.493/2018 whereby and where under the Hon'ble Supreme Court had dismissed the Civil Appeal (Filed by the Appellant/Varrsana Ispaat Ltd.

43. The Learned Counsel for the Respondent puts forward a plea that when a Civil Appeal filed by the concerned party is dismissed by the Hon'ble Supreme Court of India, the 'Doctrine of Merger' applies and the Judgement of this Tribunal stands merged with

the Judgement of the Hon'ble Supreme Court of India, becoming the Law' of the Land' as per Article 141 of the Constitution of India. To lend support to this contention, the Learned Counsel for the Respondent cites the decision of the Hon'ble Supreme Court in VM Salgaocar & Brothers Pvt Ltd V. Commissioner of Income Tax reported (2000) 5 SCC at 373 wherein at paragraph 8 and 9 it is observed as under:-

> 8. "*Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case it has been laid by this Court that when special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought.*
>
> *But what the court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133 This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136 When appeal is dismissed order of the High Court is merged with that of the Supreme Court. We quote the following paragraph from the judgment of this Court in the case of Supreme Court Employee's Welfare Association V. Union of India and Another;, :*
>
> > *"22. It has been already noticed that the special leave petitions filed on behalf of the Union of India against the said judgments of the Delhi High Court were summarily dismissed by this Court. It is now a well settled principle of law that when a special leave petition is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Article 141 of the Constitution, as contended by the learned Attorney-General. In Indian Oil Corporation Ltd. V. State of Bihar, [1986] 4 SCC 146, it has been held by this Court that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave petition*

should be granted, in Union of India V. All India Services Pensioners Association, [1988] 2 SCC 580 this Court has given reasons for dismissing the special leave petition. When such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. It, therefore, follows that when no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution."

9 It was, therefore, contended that once this Court in Civil Appeal No. 424 of 1999 has dismissed the appeal it has upheld the order of the High Court in the case of Assessment Year 1980-81 and it cannot take a different view for the Assessment Year 1979-80. There appears to be subsistence in the submission of the assesse."

44. The Learned Counsel for the Respondent contends that the Judgement of this Tribunal in Manoj Kumar Agarwal case (vide Comp App (AT)(Ins) No.575/2019 with Comp App (AT)(Ins) No.576/2019) reported in 2021 SCC OnLine NCLAT 121 had failed to apply the principle laid down in Embassy Property Developments Pvt Ltd case and in this connection, placed reliance on Section 11 of the I&B Code which deals with persons not entitled to file an application for initiating CIRP and not on the ambit of Section 60(5) of the Code.

45. In short, the Learned Counsel for the Respondent submits that the Judgement of this Tribunal in Manoj Kumar Aggarwal case is per incuriam and 'Contrary to the Law' of 'Stare Decisis' and 'Judicial Discipline'. In this regard, the Learned Counsel for the Respondent refers to the Judgement of the Hon'ble Supreme Court in Sandeep Kumar Bafna V. State of Maharashtra (2014) 16 Supreme Court Cases at Page 623 wherein at paragraph 19 it is observed as under:-

19." It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decided and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam"

46. The Learned Counsel for the Respondent urges before this Tribunal that Section 32-A of the I&B Code does not bar the Attachment of the Proceeds of Crime during the pendency of an ongoing CIRP and as on date, there is no approval of Resolution Plan and as such the bar under Section 32-A(2) of the Code is not attracted in the case on hand.

47. The Learned Counsel for the Respondent refers to the decision of the Hon'ble Supreme Court in Manish Kumar V. Union of India 2021 5 SCC 1 wherein the Hon'ble Supreme Court at paragraph 320 to 320.2 had observed the following:-

320. *"Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence 333 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:*

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

320.2 The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action

can be taken against the property of the corporate debtor in connection with the offence;"

48. It is the plea of the Respondent that the Hon'ble Supreme Court in interpreting Section 32-A of I&B Code, 2016 only envisioned a clean break for a successful Resolution Applicant, as otherwise, every company facing an 'undetermined claim' would approach the Corporate Insolvency Resolution Process, with a view to avoid its liability.

49. The Learned Counsel for the Respondent refers to the Judgement of the Hon'ble Supreme Court of India in P. Mohanraj V. Shah Brothers Ispat Pvt Ltd reported in (2021) SCC Online SC 152 wherein it is observed as under:-

100. "*Lastly, Shri Mehta relied upon Deputy Director, Directorate of Enforcement Delhi v. Axis Bank, 2019 SCC OnLine Del 7854 : (2019) 259 DLT 500, and in particular, on paragraphs 127, 128, and 146 to 148 for the proposition that an offence under the Prevention of Money Laundering Act could not be covered under Section 14(1)(a). The Delhi High Court's reasoning is contained in paragraphs 139 and 141, which are set out here in below:*

"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."

xxx xxx xxx

"141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "proceeds of crime" concerns a property the value whereof is "debt" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill-gotten assets so as to be perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by proscribed criminal activity."

(emphasis in original)

This raison d'être is completely different from what has been advocated by Shri Mehta. The confiscation of the proceeds of crime is by the government acting statutorily and not as a creditor. This judgment, again, does not further his case".

50. The Learned Counsel for the Respondent submits that just because an 'Appeal' is pending against an order, the binding nature of the said Order is not taken away. Further, it is represented on behalf of the Respondent that the Appellant is endeavouring to rely upon the

judgement of the Hon'ble High Court of Delhi in Axis Bank case being under challenge before the Hon'ble Supreme Court of India and on 30.8.2019 a 'Status Quo' order was granted by the Hon'ble Supreme Court and since there is stay of the judgement in Axis Bank's Case, the judgement of the Hon'ble High Court of Delhi (Jurisdictional High Court) holds the field.

51. The Learned Counsel for the Respondent cites the decision of Hon'ble High of Delhi in Rose Valley Hotels and Entertainments Ltd V The Secretary, Department of Revenue, Ministry of Finance & Others reported in 2015 SCC Online DEL 10111 wherein at paragraph 9 it is observed as under:-

> 9. "In Satyawati Tondon (2010) 8 SCC 110 the Supreme Court while dealing with the maintainability of the writ petition in view of the availability of alternate remedy held that it is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision etc. and the particular legislation contains a detailed mechanism for redressal of his grievance and only if the petitioner is able to show that its case falls within any of the exception carved out in Whirlpool Corporation (supra) and some other judgments then the High Court may after considering all the relevant parameters and in public interest pass an appropriate interim order."

52. The Learned Counsel for the Respondent refers to the decision of the Hon'ble Supreme Court in Smt Ujjam Bai V State of Uttar Pradesh AIR 1962 SC 1621wherein at paragraph 246 it is observed as under:-

> *"But while an erroneous action of the State in exercise of its administrative functions can be challenged directly under Art. 32 if it affects a person's fundamental right on the ground that it is not authorised by law the action of the tribunal pursuant to an erroneous order will not be open to challenge for the reason that its action arises out of the exercise of a judicial power and is thus authorised by law, State action though it be. When, Under the provisions of a law, the State exercises judicial power, as for instance, by entertaining an appeal or revision or assessing or levying a tax it acts as a quasi-judicial tribunal and its decision even though erroneous will not be a nullity and cannot be ignored. It can be corrected only under Art. 226 or Art 227 by the High Court or under Art. 136 by this Court inasmuch as the State would then be acting as a quasi- judicial tribunal."*

53. The Learned Counsel for the Respondent refers to the decision of the Hon'ble Supreme Court in Authorised Officer, State Bank of Travancore & Another reported in (2018) 3 Supreme Court Cases Page 85 wherein it is observed and held that the discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in given facts of a case and in accordance with Law and further that normally a Writ Petition under Article 226 ought not to be entertained if alternative statutory remedies are available except in cases falling within the well defined exceptions as observed by the Hon'ble Supreme Court in the case of Chhabil Dass Agarwal, reported in (2014) 1 SCC 603.

54. The Learned Counsel for the Respondent contends that the judgement of this Tribunal in JSW Steel V. Mahender Kumar Khandelwal and others (Comp App (AT)(Ins) No.957/2019 dated 14.10.2019 cannot be pressed into service by the Appellant since that was a case where the PAO was passed on 10.10.2019, which was after the final approval of the Resolution Plan by the National Company Law Tribunal on 5.9.2019. Under these circumstances it was held that where a Successful Applicant stepped into the shoes of a Corporate Debtor after the approval of the Resolution Plan by the Tribunal he deserved a clean slate and cannot be saddled with the liabilities of the Corporate Debtor. As such the

said judgement is inapplicable because of the fact that in the instant case there is no final 'Approved Resolution Plant' and the attachments stood confirmed by the 'Adjudicating Authority' PMLA after providing 'Hearing' to the 'Appellant/Resolution Professional'.

I & B Code, 2016:

55. The I & B Code, has the element of 'Time Bound Process' and also lays emphasis in regard to the revival of the Company by the Resolution Applicant. In fact, one of the Objectives of the Code is to bring Insolvency Law in India under single unified umbrella with the aim of speeding up of the Insolvency process. The primary object of the I&B Code 2016, is one of Resolution. The other aim is for 'Maximization of the Value of Assets' of the 'Corporate Debtor'. Also, the objective is for promoting Entrepreneurship availability of credit and balancing the interests. The Insolvency & Bankruptcy Code, 2016 ensures the management of operation of the 'Corporate Debtor' as a going concern during the 'Corporate Insolvency Resolution Process'.

56. In terms of Section 30 of the Code, a 'Resolution Applicant' may project a 'Resolution Plan' to a Resolution Professional who is to scrutinize the said Plan as to whether it confirms to the fulfilment of by ingredients of Section 30(2). In the event of the 'Plan' confirms to such requirements, the same is to be presented to the 'Committee of Creditors' for its approval as per Section 30(3). The 'Committee of Creditors' may approve the said 'Plan' by a vote of not less than 75% as per Section 30(4).

57. To be noted, the 'Committee of Creditors' is not to approve a 'Resolution Plan' where the 'Resolution Applicant' is not eligible under Section 29-A of the Code, and it necessitates the 'Resolution Professional' to invite a fresh 'Resolution Plan', in case no other 'Resolution Plan' is very much available. In the event of 'Resolution Plan' is approved by the 'Committee of Creditors', the said Plan is to be placed before the 'Adjudicating Authority' as per Section 31 of the Code. The 'Adjudicating Authority' is to apply his judicial mind in respect of the 'Resolution Plan' so submitted, who upon subjective satisfaction being arrived at that the 'Plan' meets the requirements contemplated under Section 30 of the Code, can approve the 'Resolution Plan'. In case the 'Resolution Plan' does not satisfy the ingredients of the Section 30 of the Code, the 'Adjudicating Authority' is to reject the said 'Plan'.

58. Section 32-A of I&BC -Liability for prior offences, etc

Section 32-A (1) of I&BC is a non-obstante provision granting a blanket immunity to the new Directors who replaces the earlier Directors of the 'Corporate Debtor' in respect of the offences committed by the old Directors or the Promotors prior the Company going into the Corporate Insolvency Resolution Process or liquidation from the date of approval of 'Resolution Plan' by an 'Adjudicating Authority.

59. Section 32-A (2) of the Code restrains all actions that can be taken against the 'Corporate Debtor' undergoing 'CIRP'. In fact, this clause deprives all the claims of 'Attachment of Property' by the Government. However, the 'Property' ought to have been considered and approved under 'Resolution Plan' submitted to the 'Adjudicating Authority'. It must be borne in mind that

the provisions of this Section do not provide immunity against the property of all actions by the Guarantors.

60. Section 32-A (3) of the I & B Code is a non-absentee one which begins that notwithstanding contained in clause (2) & (3) of Section 32, the 'Corporate Debtor' and any person shall extend assistance and cooperation to the 'Authority' which was' investigating an 'Offence' committed before 'CIRP'. Section 32-A of the Code aims to detect all 'Liabilities' associated with the 'Corporate Debtor' and its property. Indeed, this Section is not applicable where in a given case, the 'Corporate Debtor' comes within the category of 'MSME' and when the 'Resolution Plan' is furnished by the promotors of the Company. As per Section 240-A of the I & B Code, the exceptions are provided to support 'MSME'.

61. Ousting of Civil Court's Jurisdiction

Section 63 of the I&B Code, 2016 bars the jurisdiction of Civil Courts, thus creating a mechanism in relation to the purpose of 'Insolvency & Liquidation of Corporate Debtor'. For the adjudication of issues relating to the exclusive jurisdiction of the Civil Court under I&BC, 2016, Section 63 of the Code is necessarily to be read in conjunction with Section 430 of the Companies Act, 2013. In matters relating to 'Corporate Insolvency Resolution', the petition/application under Section 7 or 9 as the case may be has to be made only before the 'Adjudicating Authority'. The 'National Company Law Tribunal' and the 'National Company Law Appellate Tribunal' have sole jurisdiction in respect of matters arising under the I&B Code, 2016.

62. As per Section 430 of the Companies Act, 2013 the National Company Law Tribunal alone has jurisdiction in relation to the matters coming under the ambit of the Companies Act, 2013 or any other law, which means the I&B Code, as opined by this Tribunal. Indeed, the exclusion under Section 63 of I&B Code, 2016 limiting the powers of a Civil Court to grant injunction, is taken care of by means of the ingredients of Section 430 of the Companies Act.

Prevention of Money Laundering Act, 2002

63. It is pertinently pointed out that the 'Prevention of Money Laundering Act, 2002 provides for 'Attachment', 'Seizure/Confiscation' of assets derived from or involved in 'Money Laundering'. As a matter of fact, under the scheme of things, the 'Adjudicating Authority' is the 'Competent/Appropriate Authority' under the 'Prevention of Money Laundering Act, 2002' to resolve/controversies/issues pertaining to the 'Attachment Order'.

64. For the offence of 'Money Laundering' mandatorily there has to be 'Proceeds of Crime' arising out of criminal activity. The offence of 'Money Laundering' is not an independent crime and it depends upon another crime which is the 'predicate offence' or the 'Schedule Offence', the proceeds of which are projected as untainted.

65. The goal of 'Money Laundering' operation is to hide either the source or the destination of money. The aspect of 'Money Laundering' involves hiding, moving and investing the proceeds of Criminal Conduct. The 'proceeds of crime' is a property derived by any person as a result of criminal activity

pertaining to a schedule offence mentioned in Part –A or Part-B or Part-C of the schedule to the 'Prevention of Money Laundering Act 2002'.

66. It is pointed out that the 'Shell Companies' do exist only on paper and they do not partake in the ordinary commercial sphere of activity. Undoubtedly, 'Money Laundering' is a global menace.

67. The 'Adjudicating Authority' under the provision of 'Money Laundering' Act 2002, at the stage of Adjudication is to entertain 'Reason to Believe' concept that a person has committed an 'Offence' under Section 3 or is in possession of the 'Proceeds of Crime'.

68. At this juncture, this 'Tribunal' points out that in the decision ***Mahanivesh Oils Foods Pvt. Ltd. V. Directorate of Enforcement*** (2016) SCC online Delhi 475, it is held that the concerned Officer must have a 'Reason to Believe' on the basis of material in his possession sought to be attached is likely to be concealed, transferred or dealt with in a manner which may result in frustrating any proceedings for confiscation.

RENDERING OF FINDING

69. An 'Adjudicating Authority' as per Section 8(1) of the PMLA is to 'record a finding' whether all or any of the properties referred in the 'Notice' issued under sub-Section 1o Section 8 of the Act are involved in 'Money Laundering'. If an 'Adjudicating Authority' determines under sub-Section 2 of Section 8 that the property of 'Money Laundering' he shall by an Order in wring confirm the attachment of the property under sub-section 1 of Section 5 or the

'Retention of Property' or record seizure or frozen under Section 17 or Section 18.

ATTACHMENT OF PROPERTY

70. A 'Deputy Director of Enforcement Directorate' can attach the property which is purchased from out of the 'Proceeds of the Crime'. The 'Attachment of Property' is to be made after the approval of the 'District Magistrate'. Later, a 'Report' is to be submitted to the 'Adjudicating Authority' constituted under Section 6 of the PMLA Act, 2002. The 'Adjudicating Authority' affected person/party is to pass a 'Final Order of Attachment'. The property which is attached can be retained for '180 days' and the period of 'Attachment' may be extended subject to the discretion of the 'Adjudicating Authority'.

BAR OF CIVIL COURT

71. Section 41 of the Prevention of Money Laundering Act, 2002 bars the jurisdiction of Civil Court in matters in which the Director, 'Adjudicating Authority' or the Appellate Tribunal has the power to decide and no injunction shall be granted by any Court in respect of any action pursuant to the power conferred to or under the Act.

APPEAL TO HIGH COURT

72. Section 42 of the Prevention of Money Laundering Act, 2002 specifies anyone 'Aggrieved' by any decision or order of an 'Appellate Tribunal' to file an 'Appeal' to the 'Hon'ble High Court' and an 'Appeal' to the 'Hon'ble High Court' is 'Second Appeal', an 'Appeal' to the 'Appellate Tribunal' (being the 'First Appeal') under Section 26 of the 'Prevention of Money Laundering Act'

against an 'order' passed by the 'Adjudicating Authority' under sub Section 2 & 3 of Section 8 of the Act 2002.

OVERRIDING EFFECT

73. Section 71 of the PMLA, 2002speaks of the provisions of this 'Act' shall have effect notwithstanding anything inconsistent therewith contained in any other law, for the time being in force. A 'Special Law' is defined under Section 41 of the Indian Penal Code, 1860 as a 'Special Law' being a 'Law' applicable to a particular subject.

EVALUATION

74. Before the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench, Ahmedabad Court-2, the Interim Resolution Professional of the 'Corporate Debtor'/KSL Industries Ltd (as an 'Applicant') filed IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 (under Sections 14,18,25 & 60(5) of the I& B Code) praying to (1) quash and set aside the order of 'Attachment of the Property' of the 'Corporate Debtor' dated 08.05.2019 passed by the Respondent/ Enforcement Directorate and the Order dated 24.10.2019 passed by the 'Adjudicating Authority' PMLA (2) to vest the property of 'Corporate Debtor' (described in Exhibit – E) in the control and custody of Interim Resolution Professional in terms of Section 18(1)(f) of the I & B Code.

75. It is represented on behalf of the Appellant that on 06.09.2019, by virtue of Order dated -06.09.2017 under Section 7 of I & B Code, on the Application filed by the Applicants, the CIRP was initiated against the 'Corporate Debtor' and that an IRP Mr. Anil Kumar was appointed upon

Admission of the Application. After the 2nd 'Committee of Creditors' meeting that took place on 12.12.2019, the 'Financial Creditor' had authorised the 'Interim Resolution Professional'/'Resolution Professional' to prefer an 'Application' before the 'Adjudicating Authority' to secure the release of the property which was arbitrary attached by the Respondent/Enforcement Directorate and later affirmed by the 'Adjudicating Authority' PMLA.

76. The averment made by the 'Applicant'/IRP of 'Corporate Debtor' in IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 is that the Asset/property which was attached provisionally through an Order dated 08.05.2019 was confirmed by the 'Adjudicating Authority' of PMLA on 24.10.2019 in an erroneous manner without considering the submission made on behalf of the Applicant that the Asset/Property which was attached, was acquired prior to the commission of purported offences under the same was mortgaged to the Bank against the loan raised for the development of the said property.

77. According to the Appellant, the property which was attached by the Respondent/Enforcement Directorate was acquired by a registered 'Conveyance Deed' on 07.02.2005 and that the 'Equitable Mortgage of the said Property' was created by means of 'Deposit of Title Deeds' on 05.09.2008, pursuant to its Sanction Letter dated 14.06.2008 considering release of the Credit Facilities to the 'Corporate Debtor'.

78. It comes to be known that upon 'Default' committed by the 'Corporate Debtor' in repayment of the loan amount, the Bank of India issued a Notice under Section 13(4) SARFECIE Act. On 23.07.2015 and took symbolic possession of the said property of the 'Corporate Debtor' on 16.05.2018. The

'Corporate Debtor' being dissatisfied with the action of the 'Bank of India' in releasing the 'Auction Notice' inviting bids towards sale of the property, filed necessary application before the 'Debt Recovery Tribunal', Nagpur which admitted the Application of the 'Corporate Debtor' and granted injunction on the sale of the property.

79. It is the stand of the Appellant that before the Final Hearing of the Original Complaint no. 1150/2019 filed (under Section 5(5) of PMLA) before the Adjudicating Authority, PMLA, an Order for initiating CIRP was issued against the 'Corporate Debtor' by the 'Adjudicating Authority', Ahmedabad and the IRP through his Advocate argued the matter by pointing out that the property of the 'Corporate Debtor' could not be attached against whom CIRP was initiated particularly, in the light Section 14(1) of I & B code which provides moratorium on the 'Corporate Debtor'.

80. The plea of the Appellant is that the property could not be attached as per Section 8(1) of the 'Prevention of Money Laundering Act' 2002, especially where there exists 'charge' on the property, the fact of the matter is that the 'mortgaged' was already created in favour of the Bank.

81. The prime stand of the Appellant is that the confirmation order passed by the 'Adjudicating Authority' in respect of the 'Provisional Attachment' clearly violates Section 14 of the I & B Code and further that no evidence was brought on record to show 'property' is a part of 'Proceeds of Crime'. Moreover, there is no provision under the 'Prevention of Money Laundering Act, 2002 which permits the 'Attachment of any Property' which does not contain 'Proceeds of Crime'.

82. The other contention of the Appellant is that the 'Provisional Attachment' cannot be confirmed during the 'Continuance of Moratorium' and the same is to be quashed. Further, if the 'Provisional Attachment' on the property in question of the 'Corporate Debtor' is not lifted, it will affect the 'CIRP' and shall act as stumbling block for 'Fructification' of the 'Resolution Plan' as well as 'Resolution' as contemplated under the I & B Code.

83. It is the version of the Appellant that the property attached through the 'Provisional Attachment' order dated 08.05.2019 is the major income generating asset of the 'Corporate Debtor' and without which, there is no possibility of arriving at a satisfactory 'Resolution Plan' during the tenure of 'CIRP' of the 'Corporate Debtor'.

84. It is the case of the 'Appellant' is that the 'objective' of the I & B Code 2016 can well be achieved, if the 'property' in question is handed over to the Appellant/Applicant who acts on behalf of the 'Committee of Creditors' dealing with 'Resolution' of the 'Corporate Debtor' of course, in the interest of all stakeholders.

85. The Respondent/Enforcement Directorate before the 'Adjudicating Authority' had filed a 'reply' in IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/ 2018 averring, inter alia, that the 'Provisional Attachment order' was issued on 08.05.2019 and that the 'Adjudication' proceeding was initiated since then as such any Order later to that date shall have no effect because of the fact that the proceeding for confirmation under Section 8A of the 'Prevention of Money Laundering Act, 2002' was continuing.

86. Apart from that, based on the materials in its possession of the Respondent, the 'Attachment of the Property' of the 'borrower' was justified as per the definition of the 'Proceeds of Crime', as per Section 2(1)(u) of PMLA. Further that the properties are covered under definition of Section 5(1) of PMLA, as they represent the value of 'Proceeds of Crime' which is inclusive of definition of 'Proceeds of Crime'.

87. According to the Respondent, the conduct of the authorised representative of the 'Operational Creditor' indicators that he is hand in glove with the 'Promotors of the Corporate Borrowers' and its 'Associated Companies' and had preferred the Application before the 'Adjudicating Authority' (National Company Law Tribunal) with mala fide intent to thwart the proceedings under PMLA.

88. It is the stand of the Respondent that under the Money Laundering Act, 2002, an 'Appeal' can be filed and without exercising an alternate remedy, the Appellant/Applicant cannot approach the 'Adjudicating Authority' (National Company Law Tribunal) to determine the matter relating to an 'Offence of Money Laundering'.

89. Besides the above, on behalf of the Respondent, it is brought to the fore that the Respondent/Directorate of Enforcement is cast with a duty to investigate the duty of 'Money Laundering'. Further, under the 'Prevention of Money Launder Act, 2002', in regard to the legitimate claim of the concerned person, one can take recourse to the Provision of Restoring the Property, of course during the 'Trial' of the case before the Special Court. Therefore, any

exercise prior to that will be a superfluous one and in negation to the intent of the 'Law Makers'.

90. By way of 'Reply', the Learned Counsel for the Appellant submits that the Legislative Intent behind Section 32-A of the I & B Code is to extinguish the Criminal Liability of the 'Corporate Debtor' upon approval of the 'Resolution Plan' with a view to ensure that a new management can start on a 'clean slate' after a clear break from the past. Continuing further, the order dated 24.10.2019, affirming the 'Provisional Attachment Order' dated 08.05.2019, was passed after the start of 'CIRP' in the Company is a non est in law keeping in mind of Section 14(1), 63 and 238 of the I & B Code.

91. It is to be relevantly pointed out that Section 32-A 'Liability for Prior Offences etc.' was inserted by Act 1 of 2020 S. 10 (with effect from 28.12.2019) and in reality, this Section only bars attachment after approval of 'Resolution Plan' by an 'Adjudicating Authority' of course subject to the requirement of certain conditions being satisfied. In the instant case in hand, admittedly, there is no approval of 'Resolution Plan' till date and as such, it is held by this 'Tribunal', that the Appellant cannot press into service the ingredients of Section 32-A(2) of the I & B Code.

92. To put it, in clear and in an unequivocal term, this Tribunal points out that Section 32 A of the I & B Code, 2016 in the present form and content in a cocksure manner will negate the action i.e. taken to discharge the criminally acquired asset/property in the considered opinion of this 'Tribunal'. Further more, such Illgotten/ Illegitimate Assets will be legitimised after the 'Corporate Insolvency Resolution Process' was completed.

93. A mere running of the eye of the 'Prevention of the Money Laundering Act 2002' latently and patently indicates that it pertains to 'Proceeds of Crime' and provides for the penal action in respect of the 'Proceeds of Crime'. It is to be remembered that only when an endeavour is made to show the source of that money as something legitimate, it would amount to projecting the 'Proceeds' as untainted property.

94. One cannot brush aside a primordial fact that 'Money Laundering' is an 'Unlawful Bustle Activity' through which the Illegal/Illegitimate Proceeds take an outward appearance of 'Legitimacy'. In this connection, this Tribunal worth recalls and recollects the decision of Hon'ble Supreme Court in Binoy Viswam vs. Union of India reported in 2017 7 SC 59 where in it is observed that 'unearthing black money' or checking money laundering is to be achieved to whatever extent possible.

95. Although, Section 14 of I & B Code deals with 'moratorium', it is not a hindrance for the 'Authority' and the Officers under the 'Prevention of Money Laundering Act, 2002' to deny a person of the tainted 'Proceeds of Crime'. Suffice it for this 'Tribunal' to point out that a person who is involved in 'Money Laundering' is not to be allowed to enjoy the fruits of 'Proceeds of Crime' with a view to ward off is Civil indebtedness, in respect of his Creditors.

96. As seen from the 'Prevention of Money Laundering Act, 2002', the purpose of the Act is to prevent 'Money Laundering' and it deals with confiscation of property derived from or concerned with 'Money Laundering' etc. In fact, 'The Prevention of Money Laundering Act, 2002' is to fulfill our Country's obligation in adhering to the United Nations Resolutions and in

regard to Assets/Properties being the 'Proceeds of Crime', it takes a 'primacy and precedence' over the 'Insolvency and Bankruptcy Code, 2016' which promotes "Resolution' as its objective over Liquidation in the considered opinion of this 'Tribunal'.

97. In the instant case, there is no 'Resolution Plan' as approved by the 'Tribunal' and further no Liquidation Proceedings had ended in the sale of Liquidation Assets of the 'Corporate Debtor'.

98. Besides this, the objective, purpose of two enactments (1) 'I & B Code' and (2) 'PMLA' even though at the first blush appear to be at logger heads, there is no repugnancy and inconsistency between them, in lieu of the fact the text, shape and its colour are conspicuously distinct and different, operating in their respective spheres. More importantly, when confiscation of the 'Proceeds of Crime' takes place, the said Act is performed by the Government not in its status/capacity/role as Creditor.

ADJUDICATING AUTHORITY'S JURISDICTION UNDER IBC

99. Section 60(5) of I & B. 2016 showers jurisdiction to an 'Adjudicating Authority' to determine issues/questions relating to priorities, question of Law or fact emanating out of or in relation to the 'Insolvency Resolution'.

APPEAL & APPELATE AUTHORITY

100. Section 61 of the I & B Code although provide for filing of an 'Appeal' to the National Company Law Appellate Tribunal by 'any person' aggrieved by an Order of an 'Adjudicating Authority' (NCLT) of course within 30 days etc, in the instant Case, the Appellant/Applicant in IA 81 of 2020 in CP(IB) No.

397/NCLT/AHM/2018 had in fact, approached the Appellate Tribunal under the 'Prevention of Money Laundering Act, 2002' by filing an Appeal No. 3387 of 2019, on 27.12.2019 against the order of the 'Adjudicating Authority' 'PMLA'.

101. At this stage this 'Tribunal' aptly points out the decision of the Hon'ble Supreme Court in Northern Plastics Ltd. v Hindustan Petroleum (1997) 91 ELT 502 SC where in at paragraph 11 it is observe that….. "if he has not been subjected to a legal wrong has suffered no legal grievance, then, he has no legal or justiciable claim to hang on, he is not a person aggrieved and has no locus standi to challenge the order".

102. Moreover, in the decision of the Hon'ble Supreme Court in Kanwar Singh Saini v High Court of Delhi 2012 4 SCC page 307 it is held that "when a statute gives a right and provides a forum for adjudication of claims remedy has to be sought under the provisions of the Act".

103. In so far as anyone aggrieved against any decision or order of the 'Adjudicating Authority' of the PMLA, then it is open to him to prefer an Appeal before the Appellate Tribunal, PMLA by resorting to the relevant provision(s) of the 'Prevention of the Money Laundering Act, 2002'. Moreover, as against any decision or order of the Appellate Tribunal, PMLA, the concerned person/entity may file an 'Appeal' to the Hon'ble High Court under Section 42 of the PMLA.

104. There is no two opinion of the fact that the 'First Appeal' to the Appellate Tribunal is as per Section 26 of the PMLA against the Order passed by the 'Adjudicating Authority' under sub Sections 2 & 3 of Section 8 of the Act.

105. The Hon'ble Supreme Court had confirmed the Judgment of this Tribunal in Varrsana Ispat Ltd. v Deputy Director of Enforcement (Vide Comp. App. (AT) (Ins) No. 493 of 2018) through an order dated 22.07.2019 in Civil Appeal 5546 of 2019 and the same has become final, conclusive and the same being of a binding value upon this Tribunal. Indeed, as per Article 141 of the Constitution of India the Judgment of the Hon'ble Supreme Court is binding on this Appellate Tribunal.

106. In regard to the Judgment of the Hon'ble High Court of Delhi in the matter of Deputy Director, Directorate of Enforcement Delhi v Axis Bank and Ors. Reported in 2019 SCC Online Del 7854, it is to be pointed out that the Hon'ble Supreme Court had granted only a Status quo Order on 30.08.2019, but there is no stay of the Judgment of the Hon'ble High Court of Delhi. As on date, the Judgment of the Hon'ble High Court of Delhi in the matter of Deputy Director Directorate of Enforcement Delhi v Axis Bank and Ors. in law is binding upon this 'Tribunal'.

107. It is significantly pointed out by this 'Tribunal' that the Judgment of this Tribunal in JSW Steel's Case(Vide Comp. App.(AT) (Ins) No. 957 of 2019)is in applicable to the facts of the present case before this 'Tribunal' because of the latent and patent fact. There is no final approval of Resolution Plan in Company Appeal (AT) (Ins) No. 817 of 2021 and that apart the attachment order was confirmed by the Adjudicating Authority under the prevention of 'Money Laundering Act' of course after providing an opportunity of 'Hearing' to the Appellant/ Resolution Professional.

108. Even the decision in Bank of India's Case in 2019 SCC Online ATPMLA 23 relied on the side of Appellant, in the earnest opinion of this Tribunal is inapplicable because of the fact the Bank had obtained a secured charge in respect of the properties under attachment, which was acquired before the offence under the prevention of Money Laundering Act, 2002. However, it cannot be forgotten that in the present case on hand, before this Tribunal, the property came to be attached belonging to that of 'Corporate Debtor' as 'Proceeds Of Crime'.

109. In so far as the decision in Manoj Kumar Aggarwal case is concerned (reported in 2021 SCC OnLine NCLAT 121), this 'Tribunal' is of the considered opinion that the said decision runs contra to the 'Principle of Stare Decisis'.

110. As far as the present case is concerned, the 'Appellant/Resolution Professional' even though has filed Company Appeal (AT)(Ins) No. 817 of 2021 being dissatisfied with the order dated 31.12.2020 in IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 [filed by the Applicant/IRP for KSL Industries Ltd./Corporate Debtor under Sections 14,18,25 & 60(5) of Code] seeking to set aside the 'Attachment of the Property of the 'Corporate Debtor' by the Respondent/Enforcement Directorate vide order dated 24.10.2019 passed by the 'Adjudicating Authority' PMLA etc., this 'Tribunal' makes it candidly clear that filing of Application under Section 60(5) of the I & B Code is not an 'all pervasive' one, thereby conferring 'Jurisdiction' to an 'Adjudicating Authority' (NCLT) to determine 'any question/issue of priorities', question of Law or Facts pertaining to the 'Corporate Debtor' when in reality in 'Law', the 'Adjudicating Authority' (NCLT) is not empowered to deal with the matters falling under the

purview of another authority under PMLA. Viewed in that perspective, IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 filed by the Applicant/IRP for KSL & Industries Ltd is held by this 'Tribunal' as not maintainable in law. Resultantly, the Appeal fails.

DISPOSITION

111. In fine, Company Appeal (AT)(Insolvency) No. 817 of 2021 is dismissed. No Costs. Connected I.A.s' No. 2778 of 2021 and 2194 of 2021(Stay Application) are dismissed.

112. Before parting with the case, this 'Tribunal' makes it crystalline clear that the proper recourse to be resorted to by the 'Corporate Debtor' is to approach the 'Competent Forum' by pursuing its remedy in Appeal No. 33387/2019 (filed on 27.12.2019) under the 'Prevention of Money Laundering Act, 2002' to its logical end or any other 'Jurisdictional Forum' (other than the purview of I & B Code, 2016,) of course in the manner known to Law and in accordance with Law, if it so desires/advised.

(Justice M. Venugopal)
Member (Judicial)

(V.P. Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

03rd January, 2022

Bm/Akc