

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI PRASANTA KUMAR MOHANTY,
HON'BLE TECHNICAL MEMBER

IA No. 15/JPR/2022
IN CP No. (IB)- 601/ND/2018

UNDER SECTION 9 OF IBC, 2016

IN THE MATTER OF:

M/s Packwell (India) Ltd.

...Operational Creditor

Versus

M/s Emgee Cables And Communication Ltd.

...Corporate Debtor

AND IN THE MATTER OF:

IA NO. 15/JPR/2022

MEMO OF PARTIES

Mr. Satyendra P. Khorania
Liquidator of M/s Emgee Cables
and Communications Limited

...Applicant

VS

Deputy Director,
Jaipur Zonal Office, Directorate of
Enforcement, 2nd Floor, LIC
Building, Bhawani Singh Road,
Jaipur-302005.

...Respondent

For the Applicant : Anubha Singh, Adv.
Satyendra Prasad Khorania, Liquidator

For the Respondent : Anand Sharma, Adv.

Order Pronounced On: 05.12.2022

ORDER

As Per Mr. Deep Chandra Joshi, Member (Judicial)

1. This Interlocutory Application ('IA') bearing the IA No. 15/JPR/2022 is filed by Mr. Satyendra P. Khorania ('Applicant'), the Liquidator of the Corporate Debtor, M/s Emgee Cables and Communication Limited ('ECCL') under Section 35(1)(n) of Insolvency and Bankruptcy Code, 2016 (the 'IBC'/ 'Code') and r/w Rule 11 of NCLT Rules for seeking directions to carry out the auction of properties of the Corporate Debtor which are attached by the order of Deputy Director, Directorate of Enforcement ('Respondent') in the matter mentioned above.
2. This Adjudicating Authority *vide* order dated 27.07.2018 commenced the Corporate Insolvency Resolution Process ('CIRP') of M/s Emgee Cables and Communication Limited under section 9 of the Insolvency and Bankruptcy Code ('IBC'). Thereafter Mr. Pankaj Mahajan ('Resolution Professional') filed an application for the liquidation of M/s Emgee Cables and Communication Limited on 22.04.2019. The order for liquidation was passed on 18.09.2019 whereby Applicant has been appointed as Liquidator of the Corporate Debtor *vide* order dated 25.09.2019.
3. The Applicant has moved the present Application on the following set of facts:

- i. The Applicant submits that the Deputy Directorate Enforcement under section 5(1) of the Prevention of Money Laundering Act, 2002 ('PMLA') has passed provisional attachment order on 12.12.2019 with respect to the properties of the Corporate Debtor.
- ii. Subsequently, the said order was set aside by this Adjudicating Authority *vide* order dated 07.09.2020 under IA NO. 444/JPR/2019 stating in the order:

“ 9. It is observed that if even after initiation of proceedings under this code the creditors are still required to knock other doors, which is time consuming and financially deleterious, it would defeat the object of the Insolvency and Bankruptcy Code, 2016.

10. Having regard to the above material and having heard the arguments, we direct the respondent to withdraw the provisional attachment of the movable and immovable properties belonging to the Corporate Debtor (M/s Emgee Cables and Communication Limited) vide order dated 12.12.2019, so that the liquidator can take them being part of the Liquidation Estate of ECCL.”
- iii. Further the Applicant contends that the Respondent has filed a Writ Petition No. 14476/2020 before the Hon'ble High Court of Rajasthan, Jaipur against the order of this Adjudicating Authority dated 07.09.2020 and it is pending before the Hon'ble High Court.
- iv. The Applicant further mentions that a Contempt Petition has been filed against the Respondent for not complying with an order dated

07.09.2020 passed by this Adjudicating Authority wherein notices have been issued.

- v. The Applicant relied on the Judgements of the National Company Law Appellant Tribunal ('NCLAT') in Company Appeal (AT) (Insolvency) No. 575/2019 titled *The Directorate of Enforcement Vs Manoj Kumar Agarwal & Ors.* and in Company Appeal (AT) (Insolvency) No. 576/2019 titled *The Directorate of Enforcement Vs Vishal Ghisulal Jain and Others* dated 09.04.2021 held that:

“ In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfill objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.”

- vi. The details of the properties elucidated below for which the Applicant is seeking direction from this Adjudicating Authority for auction:

(A) IMMOVABLE PROPERTY

| S.No. | Description of Property | Name of Owner |
|--------------|--|--|
| 1 | <i>Shop No. T-16 to T-20, Third Floor, Alankar Plaza, Vidhyadhar Nagar, Jaipur (Total Area- 2035 Sq. Feet)</i> | <i>EMGEE Cables and Communications Ltd</i> |
| 2 | <i>Plot No. F-75 & 76, Jaitpura Industrial Area, Jaipur (Including Factory Building)</i> | <i>EMGEE Cables and Communications Ltd</i> |

(B) MOVABLE PROPERTY**(i) Plant and Machinery of ECCL****(ii) Cars in the name of ECCL**

| <i>S.No.</i> | <i>No. of Vehicle and Model of the Vehicle</i> |
|--------------|--|
| <i>1</i> | <i>RJ14AC0890 Hyundai Creta 1.6 VTVT SX+</i> |
| <i>2</i> | <i>RJ14CZ7908 Maruti Swift LDI</i> |
| <i>3</i> | <i>RJ14XC0890 Audi A-3, 1.8 TFSI</i> |

- vii. The Applicant submits that the auction of said properties are not carried out till date moreover during the course of the hearing in the Contempt Petition oral submission was made by the Sub-registrar that the noting on the properties of the Corporate Debtor has been removed.
4. The Applicant has filed Affidavit *vide* Diary No. 173/2022 dated 20.01.2022, which states the following:
- i. The Applicant submitted that the claim form has been received from the Financial Creditor, Dena Bank on 22.10.2019 with respect to the properties attached by the PMLA as the properties were mortgaged by the Financial Creditor and while submitting the claim, the Financial Creditor has relinquished security interest in favour of the Liquidator. Resultantly, the Liquidator was empowered to sell the said properties as the properties are part of the Liquidation Estate as per the provisions of the IBC.

- ii. The Applicant vide this affidavit submits the list of the properties which are included in the Liquidation Estate as defined under section 36 of the IBC. The details of the properties are given below:

(A) Immovable Properties

| <i>S. No.</i> | <i>Description Property</i> | <i>Name of Owner</i> | <i>Mortgaged to Bank in FY</i> |
|-------------------|---|--|--------------------------------|
| <i>2 to 6</i> | <i>Shop No. T-16 to T-20, Third Floor, Alankar Plaza, Vidhyadhar Nagar, Jaipur (Total Area-2035 Sq. Feet)</i> | <i>EMGEE Cables and Communication Ltd.</i> | <i>2006</i> |
| <i>7</i> | <i>Plot No. F-75 & 76 Jaitpura Industrial Area, Jaipur (Including factory Building)</i> | <i>EMGEE Cables and Communication Ltd.</i> | <i>1998</i> |
| <i>9 & 10</i> | <i>Plot No. 86A & 86B Gaurav Nagar, Civil Lines Road, Jaipur (Total Area-884.02 Sq. Yards)</i> | <i>EMGEE Cables and Communication Ltd.</i> | <i>2006</i> |

(B) Movable Property

- (i) Balance available in the Bank Accounts:*

| <i>Sr. No.</i> | <i>Account No.</i> | <i>Name of Account</i> | <i>Bank Name</i> | <i>Branch</i> | <i>Balance in the account as on 06.11.2019(in Rs. with interest)</i> |
|----------------|--------------------|------------------------|---------------------|------------------|--|
| 19 | 61190502053 | EMGEE Cables | State Bank of India | Vidhyadhar Nagar | 5768.12 |

(ii) Plant and Machinery along with supporting equipment and Other Movable assets such as Furniture & Fittings, Office Appliances, Laboratory Equipment etc. of ECCL

(iii) Cars in the name of ECCL

| <i>S. No.</i> | <i>No. of Vehicle and Model of Vehicle</i> |
|---------------|--|
| 1. | <i>RJ14AC0890 Hyundai Creta 1.6 VTVT SX+</i> |
| 2. | <i>RJ14CZ7908 Maruti Swift LDI</i> |
| 3. | <i>RJ14XC0890 Audi A-3, 1.8 TESI</i> |
| | <i>Total Value of all the three Vehicles</i> |

5. The Respondent filed its reply, *vide* Diary No. 2752/2022 dated 14.09.2022, stating the following:

- i. It is submitted by the Respondent that just because the assets of the Corporate Debtor are subject to a liquidation proceeding under IBC that does not mean that the Corporate Debtor can escape from its liability under the PMLA. The Respondent relied on the Judgement of the

Hon'ble High Court of Delhi in the case of *Deputy Director, Directorate of Enforcement Delhi vs. Axis Bank & Ors.* 2019 SCC Online Del. 7854

“146.....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 arguments of prevalence of the said laws over PMLA.”

ii. Further, the Respondent contends that the PMLA is a Special Act and has overriding effects in terms of section 71 of the PMLA. The main objectives of IBC and PMLA are different from each other.

6. The Applicant has filed its written submission *vide* Diary No. 3059/2022 dated 17.10.2022 reiterating the same as mentioned in the Application.

Additionally, the Applicant has relied on the following Judgements:

i. *The Directorate of Enforcement Vs Manoj Kumar Agarwal & Ors., NCLAT, New Delhi Company Appeal (AT) (Insolvency) No. 575/2019 dated 09.04.2021*

- ii. *The Directorate of Enforcement Vs Vishal Ghishulal Jain & Ors. , NCLAT, New Delhi Company Appeal (AT) (Insolvency) No. 576/2019 dated 09.04.2021*
 - iii. *Nitin Jain Liquidator PSL Limited Vs Enforcement Directorate, Hon'ble High Court of Delhi dated 15.12.2021*
 - iv. *ABG Shipyard Vs Central Board of Indirect Taxes and Customs Civil, Hon'ble Supreme Court in Appeal No. 7667 of 2021 dated 26.08.2022*
7. The Respondent filed its written submission *vide* Diary No. 2750/2022 dated 14.09.2022 reiterating the same as mentioned in its reply.
8. We have closely gone through the facts of the case, documents placed on record before us, submissions made and arguments advanced. We find that a Civil Writ No. 14476/2020 has been filed by the Respondent in the High Court of Rajasthan against the order dated 07.09.2020 which is passed by this Adjudicating Authority whereby the Respondent was directed to withdraw the attachment of the properties of the Corporate Debtor.
9. The order of the Liquidation has been passed by this Adjudicating Authority on 18.09.2019 in IA 117/JRP/2019. Subsequently, the properties have been attached by the Directorate of Enforcement. List of dates and events which are taken place after the passing of the Liquidation Order by this Adjudicating Authority:

| Sr. No. | Date | Event |
|---------|------------|--|
| 1. | 12.12.2019 | The Directorate of Enforcement has passed the provisional attachment order under section 5 of PMLA. |
| 2. | 08.01.2020 | In pursuance of section 5(5) of the PMLA, the Directorate of Enforcement filed original complaint no. 1245 of 2019 before the PMLA seeking confirmation of the attachment of proceeds of crime <i>vide</i> PAO No. 13/2019 dated 12.12.2019. |
| 3. | 07.09.2020 | This Adjudicating Authority withdraws the provisional attachment of the properties of the Corporate Debtor in IA No. 444/JPR/2019. |
| 4. | 24.11.2020 | The Directorate of Enforcement has filed Civil Writ Petition No. 14476/2020 against the order dated 07.09.2020 passed by this Adjudicating Authority. |
| | | Till date no final order has come in Civil Writ Petition No. 14476/2020 filed before the High Court of Rajasthan, Jaipur. No interim order of stay has been [assed by the Hon'ble High Court. |

10. The NCLAT in the matter of *The Directorate of Enforcement Vs Manoj Kumar Agarwal & Ors. (Supra)* held as follows:

“42. In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is

belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.”

11. Further in the matter of *Nitin Jain, Liquidator, PSL Limited Vs Enforcement Directorate W.P.(C) 3261/2021 dated 15.12.2021*, the Hon’ble Delhi High Court held that:

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

12. Later on in the recent Judgment of the Hon’ble High Court of Delhi in *Rajiv Chakraborty Resolution Professional of EIEL Vs Directorate of Enforcement W.P. (C) 9531/2020 dated 11.11.2022*, it was held that:

“105..... Notwithstanding the above, the Legislature chose to structure that provision in a manner that the authorities under the PMLA would cease to have the power to attach or confiscate

only when a Resolution Plan had been approved or where a measure towards liquidation had been adopted. The statutory injunct against the invocation or utilisation of the powers available under the PMLA was thus ordained to come into effect only once the trigger events envisaged under Section 32A came into effect. The Legislature thus in its wisdom chose to place an embargo upon the continuance of criminal proceedings including action of attachment under the PMLA only once a Resolution Plan were approved or a measure in aid of liquidation had been adopted.”

13. Therefore, in view of the above-mentioned Judgements, the PMLA would cease to have the power to attach the property at this juncture when the order of the Liquidation has already been passed. Further, the attachment of the properties of the Corporate Debtor under the PMLA has to be lifted in lieu of section 32A of the IBC which is reproduced below:

Section 32A. Liability for prior offences, etc.

“(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person.”

14. Thus, the IBC creates a specific bar with respect to proceedings that may be initiated under the PMLA by virtue of the provisions contained in Section 32A. Moreover, Section 32A cannot possibly be read as being applicable prior to a Resolution Plan being approved or a liquidation measure being enforced. Further, it can therefore be construed that the objective and intention of the Code is providing a free hand to the creditors if the properties of the Corporate Debtor are attached then it will jeopardize the Liquidation Process.
15. It is always important to ensure that the object laid down in the preamble of the Code is achieved which enunciates maximization of the value of the Corporate Debtor for proper resolution. In view of the same, this Application filed by the Liquidator numbered as *IA No. 15/JPR/2022* is hereby allowed with the following directions:
 - I. The Liquidator shall carry out auction of the properties of the Corporate Debtor in an open auction preferably Swiss Challenge Method after due approval from the stakeholders. The auction notice shall be published in widely circulated Two Newspapers, One English and One Vernacular/ Local Language inviting bidders to submit their offers with a view to maximize the value of the properties mortgaged/hypothecated.
 - II. The Enforcement Directorate is at liberty to prefer their claim if any, to the Liquidator within three(3) weeks from the date of

pronouncement of this order. The Liquidator shall only consider the claim of the Enforcement Directorate and examine the same in accordance with the provisions of the Code.

- III. The Liquidator is further directed to complete the entire auction process within the time as prescribed under the provisions of the Code. The sale proceeds shall be kept in the Liquidation Account and distribution of the said assets shall be carried out as per Section 53 of the Code. The details of the distribution of assets with Form H shall be filed within 15 days before this Adjudicating Authority.

**DEEP CHANDRA JOSHI,
JUDICIAL MEMBER**

**PRASANTA KUMAR MOHANTY,
TECHNICAL MEMBER**