APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS & PBPT ACT AT NEW DELHI

Date of Decision: 31.10.2018

(1) FPA-PMLA-2173/MUM/2018

Bank of India ... Appellant

Versus

The Deputy Director
Directorate of Enforcement, Mumbai ... Respondent

Advocates/Authorized Representatives who appeared

For the appellant : Shri V. Seshagiri, Advocate & Shri Anchit Tripathi, Advocate

For the respondent : Shri Rajeev Awasthi, Advocate

(2) MP-PMLA-4604/MUM/2018 (E.H.)
in MP-PMLA-4224/MUM/2018 (Stay)
&
FPA-PMLA-2155/MUM/2018

Tirupati Infraprojects Pvt. Ltd. ... Appellant

Versus

The Deputy Director,
Directorate of Enforcement, Mumbai ... Respondent

Advocates/Authorized Representatives who appeared

For the Appellant : Shri Sanjay Bhatt, Advocate

For the Respondent : Shri Jatin S. Sethi, Advocate & Shri Bhagirath Patel, Advocate

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JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

FPA-PMLA-2173 & 2155/MUM/2018

1. By this order, I propose to decide the two appeals filed by the above mentioned appellants. The appeal no. FPA-PMLA-2173/MUM/2018 is filed under Section 26 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the PMLA, 2002) by the Bank of India (being the Lead Bank of Consortium of banks comprising of Canara Bank, UCO Bank, Union Bank of India, Dena Bank, Bank of Baroda and Corporation Bank) collectively referred to as the (**"Appellant Bank")** against the Order dated 20.12.2017 passed by the Adjudicating Authority in O.C. No. 799/2017 (hereinafter referred to as the ("**Complaint**") whereby the Adjudicating Authority purported to confirm the Provisional Attachment Order No. 05/2017 dated 29.06.2017 (**"Attachment Order")** issued by the Deputy Director, Directorate of Enforcement, Mumbai ("**Respondent No.1**") in File No. ECIR/14/MZO/2013 **("ECIR")** with regard to attachment of the property being Plot No. D, Commercial District Centre, Paschim Vihar, New Delhi- 110087, area measuring 13158.71 sq. meters ("**Subject Property**") which was admittedly mortgaged to the Appellant Bank on the reasons that the same was a "proceed of crime."

2. The other appellant has filed the appeal no. FPA-PMLA-2155/MUM/2018 who is borrowers and mortgagor of the said property in favour of the banks challenging the same impugned order.

3. The respondent no. 1 does not deny that the subject Property that have been attached by the Respondent No.1 was duly mortgaged to the Appellant Bank, for the certain credit facilities amounting to INR. 312 Crores (Rupees Three Hundred and Twelve Crores Only), advanced to the borrower i.e. Tirupati Infra Projects Pvt. Ltd. **("TIPL")**, by the Appellant Bank.

4. Copy of the Term Loan Facility Agreement dated 06.03.2009 (hereinafter referred to as the **"Term Loan Agreement-I"** and same was further restructured on 27.02.2013- **"Term Loan Agreement II"**- **Annexure A/1 & A/2** are filed for the purpose of purchase of project land from DDA and for financing the construction/implementation of the project for construction of hotel on the Subject Property to be named "Radisson Blu".

5. The Appellant Bank in the captioned proceedings is solely concerned with the purported attachment of the Subject Property that was mortgaged, and being the prime security available to the Appellant Bank under the Master Restructuring Agreement dated 30.03.2013 by the charge created over the moveable (including receivables from operations of the Subject Property i.e. hotel "Radisson Blu" and immovable assets of TIPL concerning the hotel "Radisson Blu" in addition to the pledge of minimum 51% of shares held by the promoters of TIPL.

6. As per copy of the master restructuring agreement dated 30.03.2013, and Copy of the memorandum of Entry **("MOE")** & Oral Assent Registers along with various documents dated 21.04.2013 shows

that the aforementioned Subject Property was mortgaged by TIPL to the Appellant Bank to secure the due repayment of the facilities advanced by the Appellant Bank are filed as - (**Annexure No. A/3 (Colly)**.

7. It is the case of the bank that as on 07.02.2018, an amount of INR INR. 1,21,87,24,635.55/- (Rupees Hundred Twenty One Crore Eighty Seven Lakh Twenty Four Thousand Six Hundred Thirty Five and Paise Fifty Five Only) is due and payable by TIPL to the Appellant Bank comprising of a principal amount of INR. 59,61,47,873.77/- (Rupees Fifty Nine Crore Sixty One Lakh Forty Seven Thousand Eight Hundred Seventy Three and Paise Seventy Seven Only) together with interest at the rate of 16.50% per annum until 07.02.2018_with further interest till the date of payment and/or realization of the outstanding amounts thereof.

8. It is stated that the outstanding amount due unto the Appellant Bank is public money and that the Appellant Bank has the right to the Subject Property.

9. The Appellant Bank in accordance with the guidelines issued by RBI classified the account of TIPL as Non-Performing Asset ("**NPA**") on 30.09.2014 owing to the TIPL continuous defaults in meeting its financial obligations instituted a proceedings under Section 13(4) of the SARFAESI, 2002 & Section 19 of the RDB Act, 1993 before the Debt Recovery Tribunal, Delhi against TIPL for a recovery along with the interest on behalf of the Appellant Bank and its members of the Consortium.

10. The Appellant Bank had also initiated Corporate Insolvency Resolution Process against TIPL and the same has been admitted by the Adjudicating Authority of Hon'ble NCLT, Delhi vide order dated 03.07.2017.

11. The appeal filed before NCLAT by TIPL was dismissed and consequently the moratorium continued to be in effect.

12. It is not denied by the respondent that subject Property was mortgaged with the Appellant Bank before the date of alleged offence i.e. the mortgage was created in the year 2009 and thereafter extended in April, 2013 whereas the FIR against the accused was registered on 30.09.2013.

13. Therefore, the Subject Property cannot be subject matter of attachment when the same was mortgaged prior to the events of the alleged funds diversion and purported frauds committed by the TIPL. The ED does not deny the fact that the said property was four years earlier from the date of alleged offence, thus was not purchased from the proceed of crime.

14. Even there are no allegations of fraud or involvement on part of the Appellant Bank, the Appellant Bank is and remains the bona fide mortgagee of the Subject Property.

15. The reply has been filed by the ED. The following objections are taken in the reply:

(i) With regard to appellant submission regarding issuance of moratorium, it is humbly submitted that the said Provisional Attachment attaching the subject property as issued on 29.06.2017. However, the subject order passed by the NCLT is dated 03.07.2017 which is post issuance of the provisional attachment order. As such, at the time of issuance of the Provisional Attachment Order, there was no moratorium issued in the matter. The Original Complaint has been filed in the said matter on 27.07.2017 as the same is required to be filed within 30 days from the date of Provisional Attachment Order as per the provisions of the PMLA. Further, the proceeding before the NCLT is of civil nature whereas the proceedings under PMLA are of criminal nature. It is settle law that the criminal proceedings will override the civil proceedings, if any conflict arises during the implementation of the law. The Adjudicating Authority, NCLT, Ahmedabad Bench in CP (I.B) No. 89/7/NCLT/AHM/2017 during the proceedings under Insolvency & Bankruptcy Code 2016 vide order dated 13.09.2017 has issued moratorium and at the same time, concluded as under:

> *14. The moratorium declared by this Adjudicating Authority is not applicable to the criminal proceedings, if any, initiated under the provisions of Prevention of Money Laundering Act, 2002 by the Enforcement Directorate and to the criminal case, if any, initiated by the Central Bureau of Investigation against the Respondent Company."*

In view of the above said categorical order of the NCLT, Ahmedabad Bench, the primacy of PMLA, 2002 in case where moratorium on the assets of the concerned companies is declared by virtue of section 1(1)(a) read with 14 of the Insolvency and Bankruptcy Code, 2016 is established.

Therefore, the proceedings under PMLA will override under the Insolvency & Bankruptcy Code, 2016.

(ii) Section 71 of the PMLA reads as under:-

> *"Act to have overriding effect:- The provisions of this Act shall have effect nowithstanding anything inconsistent therewith contained in any other law for the time being in force."*

As such, it is clear that the provisions of the PMLA override the provisions of any other law being in force. In this case, the other law i.e. Insolvency & Bankruptcy Code, 2016 being civil law, the provisions of the PMLA will have overriding effect.

(iii) Further, the doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a Legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject matter of the legislation. If no such examination, it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislature.

(iv) Section 2 of the Insolvency & Bankruptcy Code, 2016 provides that the provisions of the said Act will apply to companies, partnership firms, etc. As such, there is an express limitation on the application of the code by virtue of Section 2 of the said Code which makes it clear that the code does not stand in the way of PMLA, 2002. It is also clear that the code applies only to areas concerning insolvency, liquidation, voluntary

liquidation or bankruptcy. Thus, there is no contradiction in the areas of operation of the twin. As such, there does not appear to be any dichotomy between the Code and the PMLA when the provisions of the two statutes are construed harmoniously in pursuit of their respective objects.

(v) The PMLA, 2002 has been enacted by the Parliament as per commitment of the country to the United Nations and having global dimensions and cannot be confined to national boundaries of our country. Moreover, its legislative intent has to be gathered from the plain reading of the language used in the provisions of the Act and the Scheduled appended thereunder. Further, it cannot forgotten that this case is relating to "Money Laundering" which is a serious threat to the national economy and national interest. The fact that the schemes have been prepared in a calculative manner with a deliberative design and motive of personal gain, regardless of the consequences to the members of the society, cannot be brushed aside.

(vi) In this connection, the objective of the IBC, 2016 and PMLA, 2002 are as under:-

IBC, 2016

> *"An Act to consolidate and amend the laws relating to reorganization and insolvency, resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all stake holders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for the matters connected therewith or incidental thereto."*

PMLA, 2002

> *" An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto."*

Therefore, as seen from the objectives of IBC, 2016 and PMLA, 2002, the provisions therein are independent.

16. As per settled law, the rights of a bona fide party cannot be prejudiced on account of any alleged offences committed by TIPL as the Appellant Bank is the lawful transferee of the Subject Property.

17. The provisions of the SARFAESI Act, 2002 & RDB, Act, 1993 be read from the date the said amendments were made to the respective acts i.e. 1st September, 2016 and therefore the provisions which have been inserted in the respective acts that i.e. SARFAESI Act, 2002 & RDB, Act, 1993 will have an overriding effect over the PMLA, Act, 2002. Therefore the right of the Appellant Bank to take action against the Subject Property including sale thereof, cannot be taken away by PMLA, 2002. Please refer to ***MP-PMLA-3363/MUM/2017 (Stay) FPA-PMLA-1604/MUM/2017-Standard Chartered Bank Vs. The Deputy Director, Directorate of Enforcement, Mumbai***, wherein the Appellate Tribunal has very categorically held that the provisions of SARFAESI Act, 2002 & RDB, Act, 1993 will prevail over the PMLA, Act, 2002.

18. The Provisional Attachment Order made by the Respondent No.1 is of 29.06.2017 whereas the Subject Property mortgaged to the Appellant

Bank was much prior in time and lastly the mortgage was extended on 30.03.2013.

19. The Appellant Bank is pressing relief only in respect of the mortgaged Subject Property as agreed at the time of arguments. The prayer is only to release said property from the provisional attachment order and to set aside the impugned order. Otherwise if attachment would continue, the same can be disposed of and amount cannot be recovered which is a public money.

20. This Appellate Tribunal in Paras 24, 25, 26, 27, 28, 37, 45, 46, and 58 of the Judgment in the case of the ***MP-PMLA-3363/MUM/2017(Stay)FPA-PMLA-1604/MUM/2017-Standard Chartered Bank Vs. The Deputy Director, Directorate of Enforcement, Mumbai*** held that mortgage properties of the banks should be released which is binding on the Adjudicating Authority. Also the Impugned Order passed by the Adjudicating Authority is contrary to the observations made by the Tribunal in case ***FPA-PMLA-2016/KOL/2015 being State Bank of India Vs. Joint Director, DE, Kolkata*** with regard to a binding legal precedent on the Hon'ble Adjudicating Authority as it is bound by law to follow the observations made therein by this Tribunal-(Para-29-41 & 51-65). The said paras are reproduced below:-

> *"29. Both parties have made their submissions, they have also referred large number of documents. The written-submissions have also been filed.*
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> *30. We may point out that the aspect of overriding effect between the two special Act i.e. PMLA, 2002 and SARFAESI Act has been widely discussed by the Supreme Court in the case of Solidaire India Ltd. V/s. Fair Growth Financial Services Ltd. & Ors. Wherein after discussion in para 7-11 it*

was held that later enactment would prevail with a non-obstante clause. Paras 7-11 reads as under:-

> *"7. 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:*
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> *"32.* Effect of the Act on other laws.*—(1) The provisions of this Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 973) and the Urban Land (Ceiling 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."*
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> ***8**. 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:*
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> *"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."*
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> ***9.*** *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 Corpn. Of Maharashtra Ltd.; Sarwan Singh *v.* Kasturi Lal; Allahabad Bank *v.* Canara Bank *and* Ram Narain *v.* Simla Banking & Industrial Co. Ltd.
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> *10. 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.** 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 connection, the Special Court had come to the conclusion that the Special Court Act being a later enactment would prevail. The headnote which brings out succinctly the ration of the said decision is as follows:
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> *"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.

The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, provides in Section 13. that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies Act from the ambit of the said Act, the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

Under Section 3 of the 1992 Act, all properly of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the Custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from hanks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. Under Section 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the appellate authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act of the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under Section 11 (2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

It is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can he harmoniously constructed

then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Acy 1985, is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction whilst considering a .scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced, grant time or installments.

There can, therefore, be no stay of any proceedings for recovery against a sick company so far as the Special Court under the 1992 Act is concerned."

11. *We are in* ***agreement*** *with the aforesaid decision of the case, more so when we find that whenever the legislature wishes to do so it makes appropriate provisions in the Act in that behalf. Mr Shiraz Rustomjee has drawn our attention to Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 wherein after giving an overriding effect to the 1993 Act it is specifically provided that the said Act will be in addition to and not in derogation of a number of other Acts including the 198.5 Act. Similarly under Section 32 of the 1985 Act the applicability of the Foreign Exchange Regulation Act and the Urban Land (Ceiling and Regulation) Act is not excluded. It is clear that in the instant case there was no intention of the legislature to permit the 1985 Act to apply, notwithstanding the fact that proceedings in respect of a company may be going on before the BIFR. The 1992 Act is to have an overriding effect notwithstanding any provision to the contrary in another Act."*

31. The similar view was taken by the Bombay High Court in the case of Bhoruka Steel Ltd. Vs. Fairgrowth Financial Services Ltd. The judgment rendered on ***09.02.2016*** *reported in 1997 (89) company cases 547 (BOM) para 15 of the said judgment read as under:*

> *15. To be noted that in both the judgments, relied upon by counsel, the Supreme Court has held that generally where there are two special statues, 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. In the present case, the said Act is later. The said Act provides that its provisions are to prevail over any other Act. This would include the Sick Companies Act. If the legislature wanted to provide otherwise, they would have specifically so provided."

32. Recently, the Parliament has amended the twin legislations viz. (i) the SARFAESI Act, 2002 and (ii) the DRT Act, 1993(after amendment titled as the Recovery of Debts and Bankruptcy Act, 1993) by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 and its provisions have been given effect from 01.09.2016.

33. The amended provisions give overriding effect over any other law and priority to the secured condition for the time being in force including the provisions of PMLA in so far as recovery of the loan by the secured creditors is concerned.

The amended provisions are reproduced as under:

(i) Section 26E of the SARFAESI Act, 2002 :

*"**26E. Priority to secured creditors** – Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.*
Explanation : For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

(ii) ***<u>Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 :</u>***

> ***31B. Priority to secured creditors*** – *Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and other rates due to the Central Government, State Government or local authority.*
>
> *Explanation : For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."*

34. In ***Section 2*** *of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 after the words "the date of the application", "and includes any liability towards debt securities <u>which remains unpaid</u> in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour <u>security interest is created for the benefit of holders of debt securities</u> or;"* is added which makes the said amendment or the 1993 Act applicable to all the debts which remains unpaid.

35. Thus, it is very clear from above that the secured creditor, get a priority over the rights of Central or State Government or any other Local Authority. The amendment has been introduced to facilitate the rights of the secured creditors which are being hampered by way of attachments of properties, belonging to the financial institutions/secured creditors, done by/in favour of the government institutions.

*36. The Full Bench of the Madras High Court while acknowledging the amount of losses suffered by the Banks and while approving the latest amended Section 31B of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held in the case "**The Assistant Commissioner (CT), Anna Salai-III Assessment Circle Vs. The Indian Overseas bank and Ors.**" that "*

> *"There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of*

assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016. Further it was also held that the law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending."

37. The Assistant Commissioner (CT) Vs. The Indian Overseas Bank, Madras High Court, WP No. 2675 of 2011 (Full Bench)

> *"2 We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31B in the Principle Act, Which reads as under:-*
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> > *"31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.*
> > *Explanation. – for the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."*
>
> *"3 There is, thus, no doubt that the rights of a secured creditor to realize secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016"*

"4 The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending."

"5 The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property."

*38. In another Madras High Court judgment in the case of "**Dr. V. M. Ganesan vs. The Joint Director, Directorate of Enforcement**" has explained the grievances faced by the financial institutions while holding that*

> *"For instance, if LIC Housing Finance Limited, which has advanced money to the petitioner in the first writ petition and which consequently has a right over the property, is able to satisfy the Adjudicating Authority that the money advanced by them for the purchase of the property cannot be taken to be the proceeds of crime, then, the Adjudicating Authority is obliged to record a finding to that effect and to allow the provisional order of attachment to lapse. Otherwise, a financial institution will be seriously prejudiced. I do not think that the Directorate of Enforcement or the Adjudicating Authority would expect every financial institution to check up whether the contribution made by the borrowers towards their share of the sale consideration was lawfully earned or represent the proceeds of crime. Today, if the Adjudicating Authority confirms the provisional order of attachment and the property vests with the Central Government, LIC Housing Finance Limited will also have to undergo dialysis, due to the illegal kidney trade that the petitioner in the writ petition is alleged to have indulged in. This cannot be purport of the Act."*

*39. In a case contested by one of the branches of the Appellant Bank, the High Court of Madras "**State Bank of India Vs. The Assistant Commissioner, Commercial Tax, Puraswalkam Assistant Circle and Ors.**", while upholding the Amendment Act, 2016 to Section 26E of the SARFAESI Act and reaffirming the view of the Full Bench of the same court in The Assistant Commissioner (CT), Anna Salai-III Assessment Circle (supra) lifted the attachment entry and held that*

> *"In other words, not only should the amendment apply to pending lis, but the declaration that the right of a*

secured creditor to realise the secured debts, would have priority over all debts, which would include, Government dues including revenues, taxes, etc., should hold good qua 2002 Act as well."

40. ***B. RAMA RAJU V. UOI AND ORS.*** *Reported in (2011) 164 company case 149(AP)(DB) who has dealt with the aspect of bonafide acquisition of property in para 103. The same read as under:-*

> *"103. Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence, where a person satisfies the adjudicating authority by relevant material and evidence having a probative value that his acquisition is bona fide, legitimate and for fair market value paid therefor, the adjudicating authority must carefully consider the material and evidence on record (including the Reply furnished by a noticee in response to a notice issue under Section 8(1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in the acquisition of the property); and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional attachment by declining to pass an order of confirmation of the provisional attachment; either in respect of the whole or such part of the property provisionally attached in respect whereof bona fide acquisition by a person is established, at the stage of the section 8(2) process…"*

41. The Supreme Court in (2010)8 Supreme Court Cases 110 (Before G.S. Singhvi and A.K. Ganguly, JJ) in the case of United Bank of India V/s. Satyawati Tondon and Ors. In paras no. 6, 55 & 56 has held as under:-

> *6. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions.*

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

56. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

In the subsequent changes in law and amendment in the another Special Act i.e. SARFAESI Act, 2002 the decisions referred by Mr. Matta in the case of Solidaire (Supra) and Bhoruka Steel (Supra) does not help the case of the respondent no. 1 because the effect of overrding the PMLA looses its validity once the amendment is made which even has been interpreted subsequently by the Full-Bench of the Chennai High Court in the case of Assistant Commissioner CT (Supra) and other decision in the nature of the facts in the present matter.

51. The mortgaged properties are security to the loans and cannot be subject matter of attachment particularly when the same were purchased and mortgaged prior to the events of funds diversion and frauds committed by the respondents. The appellants Banks have to recover huge amounts in the above loan accounts and the appellant bank being the mortgagee/transferee of the interest in the properties is entitled to recover its dues with the sale of the properties. The properties stood transferred by way of mortgage to the appellant bank much before the alleged criminal action.

52. The appellant banks is the rightful claimants of the said properties which are already in the possession of the appellant bank under the SARFAESI Act. The Hon'ble Supreme Court of India in the case of Attorney General of India and Ors. (AIR 1994 SC 2179) while dealing with the matter under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act has

defined the illegally acquired properties and held that such properties are earned and acquired in ways illegal and corrupt, at the cost of the people and the state, hence these properties must justly go back where they belong, the state. In the present case as the money belongs to the Appellant bank it is public money. The appellant bank has the right to property under the Constitution of India. The property of the appellant bank cannot be attached or confiscated if there is no illegality in the title of the appellant and there is no charge of money laundering against the appellant. The mortgage of property is the transfer under the transfer of property act.

53. The objective of Prevention of Money Laundering Act, 2005 has a greater relation to crimes connected with reference to Illicit Traffic in Narcotic Drugs and Psychotropic Substances, drug crimes and other connected activities. None of the provisions are applicable in the facts of the present case. As far as the borrowers are concerned, we are not expressing any opinion with regard to matters pending before the Special Court in relation to schedule offences and the complaint under this Act. These matters are to be considered as per law.

54. There is no money laundering in the present case as far as the banks are concerned. Due to the attachment proceedings by the ED the Appellant banks are not able to recover the public money by way of selling the properties. The proceedings for recovery have been initiated back in the year 2009. The ED in its provisional order as well as in the complaint filed before the Ld. Adjudicating Authority has admitted and acknowledged that the Properties which are mortgaged with the Banks were acquired and possessed by the respective owners much before the Respondents availed the loan from the Appellant Banks and therefore no proceeds of crime are invested in these properties. These properties have been purchased even prior to the coming in force of the PML Act in the year 2002.

55. The ED has also filed the copies of the sale deeds/ title deeds of the properties which shows the date of acquisition of all the properties. The original title deeds of all the properties are lying with the Appellant Bank. The Appellant Banks are having the mortgage charge over the properties.

56. That the definition of "proceeds of crime" as per Section 2(u) of the PML Act comprises of the property which is derived or obtained as a result of criminal activity. In the present case, all the properties have been purchased by the Respondents and have been mortgaged with the Appellant Bank much prior to the date of alleged offence which shows that no proceeds of crime are involved in the obtention of these properties and hence the same cannot be attached by

the ED because the same would result in hampering the interest of the Appellant Bank.

57. The Ld. Adjudicating Authority has failed to understand that Appellant Banks have heavy stakes in the properties as they have lent its valuable money to the borrowers. The property is mortgaged to the Appellant Bank. If tomorrow any borrower fails to repay the loan, the Bank has a legal right to bring the properties to sale and recover its dues. Valuable right will be lost for the Appellant, by order of attachment and eventual confiscation. As a matter of fact, the borrowers may not be interested in repaying the loan, since they are not going to enjoy the property. Therefore, ultimately, the action of the ED/Respondent No. 1 would make the Appellant, a much greater victim than even the accused/Respondents. Though in the present case, the borrowers have a settled their disputes with the Union Bank of India. Terms of settlement have already been recorded by the Court. Those terms are binding upon the parties. On behalf of borrowers, the statement has been made that they are also ready to resolve their disputes with the State Bank of India on reasonable terms. As and when these properties are sold, the banks would be able to receive the public money. The banks in the present case are just victim and not accused. If the attachment would continue against the mortgage property of the banks in this matter, the economy of the country would suffer. The banks in the present case has proceeded with the matter in good faith and are not involved in the offence of money laundering

58. Thus, in the present case, even though the Ld. Adjudicating Authority had all the reasons to believe that the abovementioned were mortgaged to the Appellant Bank and that the Appellant/SBI had prior charge over the subject matter/five properties; still the Ld. Adjudicating Authority confirmed the provisional attachment order of the Respondent No. 1 and thus causing huge loss to the Appellant/SBI.

59. The Adjudicating Authority did not understand that the alleged illegal money received by the Respondents from the Union Bank of India cannot overshadow the huge amount of credit facilities which were taken by the Respondents from the appellant bank in lieu of the properties kept as security with the Appellant Bank. Thus, making the Appellant Bank the rightful owner of the said properties which are already in the possession of the Appellant Bank under the SARFAESI Act. The origin of the funds is not illegal or unlawful in any manner. The funds were only deposited in the accounts with the Appellant Bank against the drawings already availed or availed subsequently.

60. We also find that the Adjudicating Authority has not examined the law on mortgage and securities. The Appellants Banks are liable to recover huge amounts in the above loan accounts and the appellant bank being the mortgagee/transferee of the interest in the properties is entitled to recover its dues with the sale of the properties. The properties stood transferred by way of mortgage to the Appellant Bank much before the alleged criminal action. The alleged proceeds of crime has not been used for acquiring the mortgage properties. It is even not the allegation of respondent no. 1 that the accused has acquired the mortgage properties with the proceeds of crime.

The meaning of money laundering as mentioned in the objects of the Act will have to be read as part of the statute because as per Supreme Court of India in Vishaka and others Vs. State of Rajasthan reported in AIR1997SC3011 lays down at para 40 that the International Conventions and Norms are to be read into them in the absence of enacted Domestic Law occupying the field when there is no inconsistency between them.

61. The Ld. Adjudicating Authority has failed to considered that the ED has attached all the properties without examining the case of the banks. The evidence on record suggested that all the properties were acquired by the accused much-much before the alleged date of crime. No money disbursed by the Union Bank of India from its Loan Account, has been invested in acquiring his property. Furthermore, the Appellants Banks had mortgaged charge over the property prior to the date of the crime. The Bank has already filed the Suit for recovery and has also had taken the action under SARFAESI Act. The Ld. Adjudicating Authority failed to appreciate that depriving the Appellant Bank from its funds/property, without any allegations or involvement of the Bank in the alleged fraud would be unjustified.

62. The properties attached cannot be attached under Section 5 of the PML Act because the properties are not purchased from the alleged proceeds of crime. As per the provisions of Section 5(1) (c) the primary requirement for the attachment is that the proceeds of crime are likely to be concealed, transferred or dealt with in any manner. In this case it is clear by the order of the Adjudicating Authority that the funds were transferred for the satisfaction of the bigger credit facilities taken by the respondents from the appellant bank which they could not pay due to the losses suffered by the companies.

The said properties are already in the possession of the appellant bank under the SARFAESI Act. The Hon'ble

Supreme Court of India in the case of Attorney-General of India and others reported in AIR 1994 SC 2179 while dealing with the matter under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act has defined the illegally acquired properties and has held that the illegally acquired properties are earned and acquired in ways illegal and corrupt, at the cost of the people and the state, the state is deprived of legitimate revenue to that extent hence these properties must justly go back where they belong, the state. In the present case as the money belongs to the Appellant Bank it is liable to be recovered by the Appellants Banks.

63. The property of the Appellant Bank cannot be attached or confiscated when there is no illegality or unlawfulness in the title of the Appellant and there is no charge of money laundering against the Appellant. The mortgage of property is the transfer under the transfer of property act as there is no dispute as regards the origin of funds or the title of the properties. As far as the bank is concerned, the bank had to recover its outstanding dues by taking over the possession of the mortgaged properties in case the Respondents are not able to pay back the credit facilities availed by the Respondents and by way of the SARFAESI provisions these properties are being taken in possession by the appellant bank so that recovery can be made from the accounts which have become NPA.

64. The respondent has no lien over the said properties as the Appellants banks are now the Legal transferee of said properties. Even in the criminal jurisprudence the stolen property when it is in the hands of unauthorized person that person cannot claim title to the property. The said recipient cannot retain the property over which he has no legal title and the property should be returned to the lawful owners because the both banks are victims and even after trial, they are to receive-back the said properties being victim party in normal types of cases u/s 8(8) of the Act. However in the present cases, the banks are innocent parties. They are not involved in any criminal proceedings. If they are asked to await till the trial is over, the systems in these types of cases, the economy would collapse. In the case, of Union Bank of India, no sanction against the employee was granted who is also not involved in any criminal proceedings.

65. From the entire gamut of the matter we are of the view that there is no nexus whatsoever between the alleged crime and the two bank who are mortgagee of all the properties which were purchased before sanctioning the loan. Thus no case of money-laundering is made out against banks who have sanctioned the amount which is

untainted and pure money. They have priority to the secured creditors to recover the loan amount/debts by sale of assets over which security interest is created, which remains unpaid. The Ld. Adjudicating Authority has not appreciated the facts and law involved in these matters and the primary objective of section 8 of PMLA is that the Adjudicating Authority to take a prima facie view on available material and facts produced. All the contentions raised by Mr. Matta has no substance. The provisional attachment in the present matter is bad and against the law.

In the circumstances available in the present case, the allegation of money laundering prima facie found to be unsustainable for the purpose of attachment under the PMLA, 2002.

21. There is no denial on behalf of respondent that the Appellant Bank being a mortgagee of the Subject Property mentioned in the para-1 hereinabove is not required to approach the trial court for getting released the Subject Property that was mortgaged to the Appellant Bank. The Proceedings under section 5 & section 8 of the PMLA, Act, 2002 are civil in nature and therefore the Adjudicating Authority has the power to release the Subject Property ***(Counsel has referred para-31 of Foziya Samir Godil vs. Union of India 2014 SCC Online Guj 3417).***

22. It is not denied by the ED that the bank is a victim party, The loan amount was given to the borrowers with bonafide intention and it must be recovered, however it is submitted that the same is recoverable after the trial against the borrowers. Thus, prayer pressed by the bank in its appeal is strongly opposed.

23. The relevant date and events supplied by the appellant in appeal no. FPA-PMLA-2155/MUM/2018 are mentioned below in order to understand the series of actions pending:-

15.09.2008	The Appellant sought loan from Bank of India (BOI) under multiple banking arrangements as consortium for setting up of a 5 star hotel cum retail space at Paschim Vihar, Delhi primarily to cater to tourists for Common Wealth Games
October, 2008	National Stock Exchange of India Limited (NSEL) commenced operations
19.01.2009	Loan sanctioned to BOI
07.12.2009	Appellant created an equitable mortgage on the hotel property in favour of consortium of public sector banks led by BOI
07.12.2009	Appellant created an equitable mortgage on the hotel property in favour of consortium of public sector banks led by BOI
30.09.2013	FIR is registered on a Complaint of an investor in NSEL
14.10.2013	ECIR is registered by ED without naming the Appellant as accused
30.09.2014	In view of defaults in payment, the account of the Appellant classified as NPA by BOI

12.08.2015	BOI issued Notice under Section 13(2) of SARFAESI Act
10.12.2015	BOI took possession of hotel property under Section 13(4) of the SARFAESI Act for itself and as lender of the consortium of banks
29.06.2017	Provisional Attachment Order (PAO) in respect of 50% of Hotel Property is issued by ED based on the contention that 50% shareholder of Mohan India Pvt. Ltd. i.e. Mr. Jag Mohan Garg through his family, friends, and relatives holds 50% shares in Appellant as well.
03.07.2017	Admission of Application filed by BOI under Section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) against the Appellant, appointment of Mr. Anil Kohli as the Interim Resolution Professional (IRP) for the Appellant and passing of moratorium order under Section 14, IBC
14.08.2017	Complaint under Section 5(5) of PML Act filed by ED before the Adjudicating Authority for confirmation of PAO. Notice issued inter alia to the Appellant for 16.09.2017
16.09.2017	The Appellant through IRP filed an Application challenging the

	maintainability of the Complaint and permissibility thereof in the teeth of Section 14 of IBC. Moreover, on account of primacy provided to IBC by virtue of Section 238 of IBC
01.11.2017	Pursuant to issuance of notice of the said Application to ED, reply was filed and detailed arguments were heard and orders reserved. However, no orders were passed thereon. Even in the impugned Order despite taking note of it, the Adjudicating Authority did not any order thereon.
20.12.2017	Impugned Order is passed confirming the attachment
12.01.2018	Present Appeal filed before this Hon'ble Appellate Tribunal
02.02.2018	Notice for taking possession under Section 8(4) of PML Act issued by ED
22.02.2018	This Appellate Tribunal passed stay of impugned Order qua the subject hotel in connected Appeal No. FPA-PMLA-2173/MUM/2018 filed by BOI

24. In the present case, the SARFAESI Act, RDDB Act and PMLA are special Acts. The SARFAESI Act and RDDB Act are enacted earlier to PMLA. The RDDB Act and PMLA have non-obstante clause.

Recently, the parliament has amended the twin legislations viz. (i) the SARFAESI Act, 2002 and (ii) the DRT Act, 1993 (after amendment titled as the Recovery of Debts and Bankruptcy Act, 1993) by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 and its provisions have been given effect from 01.09.2016. The Parliament in its wisdom has not excluded the application of the amended provisions to the proceedings under PMLA. In other words, had the Parliament intended to exclude the application of non-obstante clause of SARFAESI Act and RDDB Act to PMLA then it would have done so expressly as has been specifically prescribed in the amended provisions. It may also be noted here that the judgment of **Hon'ble Supreme Court in the matter of KSL & Industries Ltd (supra)** has been delivered in the year 2014 whereas the amendment in aforesaid two Acts have been brought in the year 2016.

25. The conflict of non-obstante clause arising in respect of two or more enactments then the same have to be resolved by taking into consideration of policy underlying the enactment and the language used in them. The Prevention of Money Laundering Act has been enacted for forfeiture of crime involved in the money laundering which was considered necessary to deprive persons engaged in serious illegal activities and have thereby been increasing their resources for operating in clandestine manner. the Act was created to forfeit illegal properties and to prevent the money laundering activities which are threat to financial system of the country and its integrity and sovereignty. Further the question of prevalence of a subsequent

legislation will only come into picture when there is a conflict between the two statutes. The Securitization Act has been enacted for the purpose of establishing a expeditious system for recovery of debts due to Banks and for matters connected therewith or incidental thereto. It only lays down a procedure for recovery of debts due to Banks. The Prevention of Money Laundering act vests the statutory authorities with a power to forfeit proceeds of crime involved in money laundering to the State. There is thus no apparent conflict between the two statues. The two statues operate in their exclusive fields. The question is only who will have his first claim on any property where the claim of the State concur with the claim of any other person. In the light of above a harmonious construction has to be arrived that keeping in view the facts of the case vis. a vis the statues involved. In the present case the aforesaid principle suggest that the amendments carried out in SARFAESI Act and RDDB Act in 2016 will prevail over PML Act, 2002 because the properties involved in the present appeal were untainted when the same were acquired. Even when the properties were mortgaged with the appellant Bank the same were not tainted. The allegation of commission money laundering is after the mortgage of the said properties with the appellant Bank. After the mortgage of the aforesaid properties a legal right has been accrued in favour of the appellant Bank over the said properties which cannot be taken away in the given facts and circumstance of the case. As far as borrowers are concerned (who are the accused parties) even we stress that as per law, they must face the trial in the complaint filed against them.

26. The Respondent has also heavily relied on the judgment or order passed by this Tribunal in the matter of **Chief Manager, Syndicate Bank Vs. Dy. Director**, **PMLA in Appeal no. FPA-PMLA-A-34/CAL/2009**. We have gone through the said order from which it appears that the facts of that appeal are quite different from the facts of the present appeal. In the said appeal proceeds of crime were used to acquired properties and those acquired properties were mortgaged with the Bank. Para 2 of the said order of this Tribunal which reflects the brief facts of the case is reproduced below to clear the cloud:-

> *"2. Brief facts: M/s Hindustan International, Kolkata proprietor Sh. Gopinath Das operated and maintained current a/c 01000051007 and 03921011000797 with State Bank of India, Overseas Branch, Kolkata (in short SBI) and Oriental Bank of Commerce, Stand Road Branch, Kolkata (in short OBC) respectively with the intention to defraud the bank and submitted fake and forged documents for export of goods such as Invoice, Packing List, Quality and Quantify Certificate, SDF Declaration, Undertaking, Origin of Good Certificate, Shipping Bill, Bill of lading etc. to the bank and god these bills discounted against L/C(s) and obtained an amount of Rs. 12,28,22,463/- and Rs. 1,30,43,433/- from State Bank of India and Rs. 6,76,65,000/- from Oriental Bank of Commerce. The funds which were credited to the above current accounts, were withdrawn from bank for personal gain of ShriGopinath Das and companies owned and managed by him. Out of these funds, Sh. GopinathDas has acquired several immovable properties as detailed in the impugned order and mortgaged them with Syndicate Bank, Salt Lake Branch, Kolkata, the present appellant for availing credit facilities to the extent of Rs. 10 crores and got Rs. 4.5 crores fraudulently released from the appellant against fake and forged documents. As the amount of loan given by the appellant was not repaid the account became Non Performing Asset (NPA) and the appellant proceeded u/s 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short Securitisation Act) for recovery of its dues and claimed to have taken possession of the properties on 30.11.2006.*

27. Neither of the judgments relied on by the Respondent no. 1 and the contents of reply is of any help to their case in the given facts and circumstances of the case. The facts in the referred cases are not similar. In the present case, it is admitted by the respondent that the bank is not involved in any crime. The mortgaged property is not purchased from proceed of crime. The respondent agrees that the bank is entitled to recover the amount and end of the day, it is a public money. The respondent is taking the frivolous defence as the bank is also involved in money laundering. Thus the respondent is mis-reading many provisions of PMLA, 2002. The situation in the present case is entirely different. Those provisions referred by the respondent are only applicable in those cases if the subject matter of property is acquired from proceed of crime.

28. It is an admitted fact that the properties herein are mortgaged with the appellant Bank. It is also a fact that the mortgaged properties are not acquired out of any proceeds of crime. It has come on record that the properties mortgaged were acquired prior to the alleged commission of crime. The relevant sale deed of the mortgaged properties are of 2003 so the date of acquisition is much prior to the date of alleged commission of crime in the present case.

29. In the present case the Adjudicating Authority has come to a conclusion of the impugned order that the defendants are in possession of proceeds of crime and are involved in money laundering. The aforesaid conclusion has not be elucidated by the Ld. Adjudicating Authority in his order. It appears that the only thing

was in his mind that section 71 of PMLA has an overriding effect. The provisions of PMLA shall have effect and prevail over provisions of any other Act or its provisions. To this we are not in agreement with the Ld. Adjudicating Authority because of the amendment of 2016 made in SARFAESI Act RDDB Act. The Bank is the rightful claimants of the said property which are already in its possession under SARFAESI Act.

30. The Hon'ble Supreme Court of India in the case of Attorney General of India and Ors. (AIR 1994 SC 2179) while dealing with the matter under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act has defined the illegally acquired properties and held that such properties are earned and acquired in ways illegal and corrupt, at the cost of the people and the state, hence these properties must justly go back where they belong, the state. In the present case as they money belongs to the Bank it is public money. The Bank has the right to property under the Constitution of India.

31. The property of the Bank cannot be attached or confiscated if there is no illegality in the title of the appellant and there is no charge of money laundering against the appellant. The mortgaged of property is the transfer under the Transfer of Property Act. Even the respondent is not denying the fact that the Bank is a victim party who is also innocent and is entitled to recover the loan amount. It is also not disputed by the respondent that the properties in dispute are mortgaged with Bank and it has to go to Bank ultimately.

32. The only submission of the respondent that u/s 8(8) of PMLA, the possession be given to Bank after the trail and final outcome of criminal matters against the barrowers. We do not agree with the argument in this regard in view of amendment in the two statutes. Even otherwise the trail would take number of years. The public money cannot be stalled otherwise Banking system would be collapsed. The said provision has also amended under PMLA the attachment can be lifted in the case of victim party who suffers a loss because of non-returned of debts by the borrowers.

33. That the definition of "proceeds of crime" as per Section 2(u) of the PML Act comprises of the property which is derived or obtained as a result of criminal activity. In the present case, both the properties have been purchased by the borrowers and mortgaged with the bank much prior to the date of alleged offence which would shows that no proceeds of crime are involved in the acquiring of the property and hence the same cannot be attached.

34. The Adjudicating Authority has failed to consider that the ED has attached the properties without examining the case of the bank. The evidence on record suggests that the properties were acquired by the borrowers much before the alleged date of crime.

35. No money disbursed by the Bank from its loan account, has been invested in acquiring these properties. Furthermore, the Appellant Bank had created charge over the property prior to the date of the crime. The Bank has already filed the suit for recovery and has

also taken the action under SARFAESI Act. The Adjudicating Authority failed to appreciate that depriving the Appellant Bank from its funds/property, without any allegations or involvement of the Bank in the alleged fraud would be legally unjustified.

36. The properties attached cannot be attached under Section 5 of the PML Act because the properties are not purchased from the alleged proceeds of crime. As per the provisions of Section 5(1) (c) the primary requirement for the attachment is that the proceeds of crime are likely to be concealed, transferred or dealt with in any manner. In this case there was absence of such requirement. The said properties are already in the possession of the Appellant Bank under the SARFAESI Act.

37. From the discussion made above, I am of the view that there is no nexus whatsoever between the alleged crime and the Bank who is mortgagee of the properties in question which were purchased before sanctioning the loan. Thus no case of money-laundering is made out against Bank who has sanctioned the amount which is untainted and pure money.

38. The bank has the priority right to recover the loan amount/debts by sale of assets over which security interest is created, which remains unpaid. The Adjudicating Authority has not appreciated the facts and law involved in the matter and the primary objective of section 8 of PMLA is that the Adjudicating Authority to take a prima facie view on available material and facts produced. The

contentions raised by Mr. Rajiv Awasthi, Advocate has no substance. The provisional attachment in the present matter is bad and against the law.

39. In the circumstances available in the present case, the allegation of money laundering, so far as present appellant Bank & properties involved in this appeal are not acquired from the proceeds of crime.

40. The arguments addressed by the respondent no. 1 is no force and is not tenable because of the reasons that this Tribunal is only concerned in the present appeal as to whether the Provisional Attachment Order and confirmation order. With regard to the order passed by the NCLT this Tribunal does not want to express any opinion on merit.

41. Subject property was purchased by the Appellant on 26.11.2009 and lying mortgaged with the banks since 07.12.2009 so by no stretch of imagination can be termed as “proceeds of crime”.

42. Hotel property was in possession of BOI under the provisions of Section 13(4) of the SARFAESI Act since 10.12.2015 and thus well prior to passing of provisional attachment order under PML Act.

43. The proceedings under PML Act before the Adjudicating Authority are civil in nature and not criminal. The provisions of Section 11 and Section 42 of the PML Act specifically confirms the said position and

therefore the reliance placed by ED on the judgment passed by NCLT, Ahmedabad to contend non-applicability of moratorium on the proceedings before Adjudicating Authority is wholly misplaced. Rather the said judgment reinforces the correct position.

44. In view of aforesaid facts and circumstances and for reasons referred above, we set aside the Impugned Order dated 20.12.2017 and the Provisional Attachment Order dated 29.06.2017. The mortgaged properties attached under the PAO 05/2017, so far as, properties concern in this appeal are releas*ed from attachment forthwith.*"

45. Even the arguments of the respondent no. 1 that the PMLA will override the proceeding under the Insolvency and Bankruptcy Act of 2006 are wholly without any merit because of the reasons as explained earlier even otherwise the SARFAESI Act after the amendment is over-ride proceedings of PMLA because of the reasons that the properties in question is mortgaged property with the bank.

46. If the provisional attachment order, impugned order as well as the pleadings of ED are read, one is failed to understand, why is ED is opposing the move to recover the debts. The trial against the borrowers would take number of years.

47. The public money cannot be stalled in view of objection raised by the ED. I am of the view that both authorities before passing such orders must appreciate the welcome move of the Government of India. They must

understand that the borrowers would always happy if mortgaged property remain attached and should not be disposed of as the same is lying in safe heaven after the attachment order is made. All NPA/borrowers celebrate the said occasion when their properties are attached as under those circumstances neither they shall to pay the debts and their property would also safe for number of years in view of attachment order.

48. Thus, the impugned order passed is totally contrary to law and is not sustainable. The same is set-aside pertaining to subject matter of mortgaged property. The provisional attachment is also quashed. The attached property is released forthwith. The time spent from the date of provisional attachment order till today shall be deducted if the chosen to continue the proceedings against the borrowers under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).

49. No costs.

(Justice Manmohan Singh)
Chairman

New Delhi,
31st October, 2018
'D'