



DIAMOND POWER INFRASTRUCTURE LTD.
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(Under Corporate Insolvency Resolution Process vide Hon'ble NCLT Order dated 24th August, 2018)

Date: June 21, 2019

To,
Chief Manager
National Stock Exchange of India
Limited
Exchange Plaza, C-1, Block G,
Bandra Kurla Complex,
Bandra(E), Mumbai-400051
Maharashtra

To,
BSE Limited
25th Floor, P.J. Towers
Dalal Street, Mumbai-400001
Maharashtra

Sub: Judgement dated 18th June, 2019 passed in Appeal filed before PMLA Appellate Authority challenging Provisional Attachment Order dt. 1st October, 2018

Scrip Code: DIAPOWER (NSE), 522163 (BSE)

An appeal ("**Appeal**") was preferred by Mr. Bhuvan Madan, Resolution Professional ("**RP**") for Diamond Power Infrastructure Limited ("**DPIL**") against Directorate of Enforcement, PMLA ("**ED**") before the Appellate Tribunal under the Prevention of Money Laundering Act, 2002 ("**PMLA**") whereby various properties of DPIL were attached by the ED.

The Appeal was listed on 21st May, 2019 and the matter was argued at length. After hearing both the parties, the Appeal was reserved for judgement.

The Hon'ble PMLA Appellate Tribunal, vide Judgement dated 18th June, 2019 was pleased to allow the Appeal thereby setting aside the provisional attachment order passed by ED dated 24th April, 2018 and the attachment order dated 1st October, 2018 passed by the Hon'ble Adjudicating Authority under PMLA.

Further, the Hon'ble PMLA Appellate Tribunal was also pleased to exclude the time period lost till the passing of this Judgment, i.e. from the date of filing of the Appeal (14th December, 2018) till 18th June, 2019 while calculating the limitation of the period of completion of the CIRP.

Yours sincerely,

Bhuvan Madan

Resolution Professional for Diamond Power Infrastructure Limited
Registration Number: IBBI/IPA-001/IP-PO1004 /2017-2018/11655
Registered Address: A-103, Ashok Vihar, Phase-III, New Delhi- 110 052
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**APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS & PBPT ACT
AT NEW DELHI**

Date of Decision: 18th June, 2019

**1) MP-PMLA-5595/AHD/2019 (COD)
MP-PMLA-5596/AHD/2019 (Stay)
FPA-PMLA-2872/AHD/2019**

Bank of India ... Applicant/Appellant

Versus

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

2) FPA-PMLA-2742/AHD/2018

Bhuvan Madan ... Applicant/Appellant
(Resolution Professional for
Diamond Power Infrastructure Ltd.)

Versus

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

Advocates/Authorized Representatives who appeared

For the Appellant no. 1 : Shri V. Seshagiri, Advocate
Mr. Siddharth, Advocate

For the Appellant no. 2 : Shri Neeraj Kumar, Shri Shashank
Agarwal & Shri Satendra Kumar Rai,
Advocates

For the Respondent : Shri A.K. Tripathi, Advocate

CORAM

JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

FPA-PMLA-2872/AHD/2019&FPA-PMLA-2742/AHD/2018

1. The above-mentioned two appeals have been filed by Bank of India as a lead member of the Consortium consisting of various banks, financial institutions and NCD holders (**“Appellant”**) challenging the Impugned Order dated 1st October, 2018 (hereinafter referred to as the **“Impugned Order”**) passed by the Adjudicating Authority in O.C. No.

977/2018(**Complaint**). The Adjudicating Authority has confirmed the Provisional Attachment Order (**PAO**) No.02/2018 dated 24th April, 2018 (**Attachment Order**) issued by the Deputy Director, Directorate of Enforcement, Ahmadabad in File No. ECIR/AMZO/03/2018 (**ECIR**).

2. The allegations against the borrowers are as under:-

Central Bureau of Investigation (CBI), Gandhinagar has registered FIR no. 0292018A0006 dated 26.03.2018 against M/s. Diamond Power Infrastructure Ltd., Vadodara (DPIL), Shri Suresh Narain Bhatnagar, Founder of DPIL, Shri Amit Suresh Bhatnagar, Managing Director, DPIL, Shri Sumit Suresh Bhatnagar, Joint Managing Director of DPIL, Unknown Public Servants of various banks and unknown others for commission of offence under Section 420, 467, 468, 471 r/w 120-B of IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The said FIR inter alia reveals that:

(a) M/s. DPIL has caused a loss of Rs. 2654.40 crore to a consortium of 11 banks (including public as well as private sector banks) and Financial Institutions.

(b) M/s. DPIL had resorted to exorbitant turnover projections for forthcoming years and submitted false stock statements to the lead bank in order to get more drawing power in their cash-credit accounts. They also showed the details of receivables from the date of payment instead of date of invoice, which helped them in showing higher net working capital than actual. Thereby they had obtained higher cash-credit limits from the banks. However, the banks continued to grant higher cash-credit limits in spite of the fact that M/s. DPIL had regularly failed to achieve the targeted turnover.

(c) M/s. DPIL also obtained large number of letters of credit (LCs) from these banks and subsequently failed to honour many of these LCs, which was forced charged on the credit limit. 16 such LCs amounting to Rs. 110.79 Crore which were issued in favour of M/s. Ruby Cables (a sister concern of DPIL), which was in violation of the bank's guidelines.

(d) M/s. DPIL invested about Rs. 16.70 Crore in their group companies out of their CC limit, which is in violation of terms of sanction. Similarly, interest free loans to the tune of Rs. 32.96 Crore were given by DPIL from their CC limit to their group companies, which is in violation of the terms of the sanction.

(e) Once the account of M/s. DPIL became overdue, in 2014, the banks decided to resort to Corrective Action Plan and restructured the accounts on 31.03.2015 under Corporate Debt Restructuring (CDR). Meanwhile, on 16.02.2016, the accounts of DPIL with Bank of Baroda were declared NPA by the RBI. The accounts of DPIL with other banks were declared NPA from December, 2017. However, as the above said restructuring did not work out, the Banks decided to resort to Strategic Debt Restructuring (SDR), whereby the outstanding loan of Rs. 828.42 Crore was converted into equity and distributed among the consortium members. The banks directed DPIL to deposit all the receivables in Trust and Retention Account with Bank of India, out of which 2% was to be deducted against the outstanding. However, M/s. DPIL opened accounts with other banks (outside the consortium) and deposited the receivables in these accounts. By doing so they diverted the funds to the tune of Rs. 70 Crore.

(f) DGGSTI, Vadodara has issued a Show Cause Notice to M/s.

DPIL for fraudulently availing CENVAT credit to the tune of Rs.

100.80 Crore by submitting bogus purchase invoices even though no material had been received. This indicates that fictitious purchases to the tune of Rs. 500 Crore were shown by DPIL to avail the said CENVAT credit and bank credits.

(g) The above modus operandi involving forged documents and diversion of funds has resulted in availability of stock to the tune of Rs. 338.44 Crore only which is hugely inadequate for repayment of loans to the tune of Rs. 2654.40 Crore.

3. The Appellant has nothing to do and has no connection with the allegation of crime committed by the borrowers and other persons concerned involved for the offences of money-laundering. The Appellant is not holding any funds of any of the defendant/respondent. The mortgage properties are admittedly not derived from criminal activities or proceeds of crime. The scope of the PMLA is to punish the accused person and not to punish the innocent person who is not involved in the crime within the meaning of Section 2 (1)(u) read with Section 3 of the Act. The appellant is not charge-sheeted nor any prosecution complaint has been filed against the appellant. The appellant has also no objection if the borrowers' properties, which were acquired from proceeds of crime, be dealt with by the respondent in any manner.

4. There is no nexus whatsoever, between the alleged crime and the appellant, who is mortgagee of the properties and is a victim of the fraud and is an innocent party. The definition of proceeds of crime as per Section (u) of the Act comprises of the property which is derived or obtained as a result of criminal activities. The mortgaged properties in the present matter are not acquired from proceeds of crime.

5. It has come on record that between 2008 and 2015, the Appellant had on various dates had sanctioned both fund based and non-fund based facilities to the Respondent No. 2 for running its business.

6. The credit facilities sanctioned by the Appellant to Respondent No. 2 from time to time are detailed herein below:-

S.No.	Date of Sanction	FBL	NFBL	Total
1.	29-09-2008	23.10	30.30	53.40
2.	16-03-2009	33.78	52.36	86.14
3.	26-06-2009	73.78	52.36	126.14
4.	30-12-2010	91.68	84.18	175.86
5.	01-11-2011	98.40	133.00	231.40
6.	30-04-2012	198.40	133.00	331.40
7.	20-02-2013	230.00	200.00	430.00
8.	23-05-2014	355.00	327.00	682.00
9.	Post – restructuring 30-03-2015	432.29	229.37	661.88*

*Including ECB loan of INR 50.00 Crore at New York Branch

Apart from the credit facilities sanctioned by the Appellant, the members of the Consortium including various financial institutions have also lent to Respondent No. 2 the Working Capital, Rupee Term Loan, External Commercial Borrowing and Non-Convertible Debentures for running its business. The facilities sanctioned by various members of the Consortium are detailed herein below:-

WORKING CAPITAL LOANS OF RS. 1566 CRORE (Second Schedule Part C of MOE dated 21.10.2015)

S.No.	Working Capital Lender (s)	Facility (Fund Based) Rs. (In Crores)	Facility (Non -Fund Based) Rs. (In Crores)	Total Rs. (In Crores)
1.	Allahabad Bank	108.13	123.37	231.50
2.	Axis Bank	54.07	81.92	135.99
3.	Bank of Baroda	144.18	146.66	290.83
4.	Bank of India	180.22	229.37	409.59
5.	Dena Bank	76.98	36.48	113.45
6.	ICICI Bank Ltd.	24.03	107.85	131.87
7.	Indian Overseas Bank	48.30	26.51	74.81
8.	State Bank of Hyderabad	48.06	67.88	115.94
9.	State Bank of Mysore	36.04	25.97	62.02
	TOTAL	720.00	846.00	1,566.00

RUPEE TERM LOANS OF RS. 1078 CRORE (Second Schedule Part A of MOE dated 21.10.2015)

S.No.	Name of Rupee Term Loan Lender	Total Amount Rs. (In Crores)
1.	Allahabad Bank	56.71
2.	Axis Bank	79.81
3.	Bank of Baroda	91.51
4.	Bank of India	215.88
5.	Corporation Bank	120.53
6.	Dena Bank	75.63
7.	ICICI Bank	178.61
8.	State Bank of Hyderabad	19.25
9.	State Bank of Mysore	76.69
10.	IFCI Limited	57.35
11.	Export – Import Bank of India	106.80
	TOTAL	1078.21

EXTERNAL COMMERCIAL BORROWINGS OF RS. 109.30 CRORE (Second Schedule Part B of MOE dated 21st October, 2015)

S.No.	Name if ECB Lenders	Term Loans (USD Millions)
1.	Axis Bank	9.63

2.	Bank of India	8.00
	TOTAL	17.63 (In Indian Rupees, taken as 109.30 Crore)

NON CONVERTIBLE DEBENTURE HOLDERS (Second Schedule Part B of MOE dated 21st October, 2015)

S.No.	NCD Holder	Amount (Rupees in Crore)
1.	Bank of Maharashtra	11.47
2.	Corporation Bank	9.17
3.	CSEB Gratuity and Pension Fund	7.34
4.	Dena Bank Employee Gratuity Fund	4.59
5.	Dena Bank Employee Pension Fund	10.32
6.	L&T Finance	34.40
7.	Syndicate Bank	9.19
8.	Tata Capital Financial Services Limited	19.49
	TOTAL	105.97

7. It is evident from above in terms of the Master Restructuring Agreement dated 29th May, 2015 as amended by the First Supplemental and Amendatory Agreement dated 10th August, 2015 (“**Loan Agreement**”), facilities of a total and aggregate amount of Rs. 2859,58,00,000/- (Rupees Two Thousand Eight Hundred Fifty Nine Crore Fifty Eight Lakh Only) were availed of by Respondent No.2. It also appears that subsequently upon invocation of the Strategic Debt Restructuring Scheme, part of debt to the tune of Rs. 224,34,00,000/- (Rupees Two Hundred Twenty Four Crore Thirty Four Lakh Only) in the cash credit account was converted by the Appellant into equity. Copy of the Loan Agreement dated 29th May, 2015 along with other documents are marked as ANNEXURE A1 at page no. 1 to 373 of appellants documents. Copy of the Agreement for Strategic Debit Restructuring Dated 29th December, 2016 are marked as ANNEXURE A2 at page no. 374 to 377 of Appellants documents. Copies of the Sanction Letters

issued by the various consortium members are marked as ANNEXURE A3.

8. The Respondent No. 2 in order to secure the due repayment of the facilities granted by the members of the Consortium led by the Appellant had in terms of the sanctions, created equitable mortgage on pari-pasu basis of various immovable properties (“**Subject Properties**”) in favor of the members of Consortium including the Appellant by means of deposit of title deeds with the Appellant. The details of the immovable properties as provided that have been mortgaged to the Appellant and members of consortium Banks on pari-pasu charge basis are detailed herein below:

Serial No as per ED	Details of Property As per Provisional Attachment by ED	Ownership	Mortgage Created	Date of acquisitions of Mortgaged Properties and the Documents available on file
1	Diamond Power Infrastructure Ltd Village Vadadala ,TehSavliDist Vadodara (Land , Building & Plant Machinery)	Diamond Power Infrastructure Ltd	29.07.08 which was extended on: 25.03.09, 8.04.11 26.06.13 12.09.13 29.02.14 and 21.10.15 Detailed in Schedule 3 &4 , Schedule 11 & 12 (Page No. 461 - 475) (Page 482 - 485)	<ul style="list-style-type: none"> • Part I (A)- 11.03.1993 • Part I (B)- 27.6.1995 • Part II – 18.2.1999 • Part III – 01.09.2006 • Part IV- 25.2.2008 • Part V- 24.1.2008 • Part VI- 17.7.2007 • Part VII- 17.7.2007 • Part VIII- 17.7.2007 • Part IX- 24.1.2008 • Part X- 02.08.2011 • Part XI-

				21.6.2007 <ul style="list-style-type: none"> • Part XII- 12.3.2012 • Part XIII- 23.3.2012 • Part XIV – 19.3.2012 • Part XV- 23.3.2012 • Part XVI- 19.3.2012 • Part XVII- 26.9.2012 • Part XVIII- 21.6.2012 • Part XIX- 20.7.2012 • Part XX- 18.9.2012 • Part XXI – 21.9.12 • Part XXII- 20.7.12 • 26.9.2012 • 01.11.2012 • 10.2.2014
2	Wind Turbine Generator JMD 260 , Capacity 2.1 MW Installed at MojeCHarpodi Nani Tal Abdasa ,Dist Kutch (Owned by DPIL)	Diamond Power Infrastructure Ltd	21.10.15 Detailed in Schedule 11 & 12 (Page 482 – 485)	27.2.2012
3	Wind Turbine Generator JMD 260 , Capacity 2.1 MW Installed at MojeCHarpodi Nani Tal Abdasa ,Dist Kutch (Owned by DPIL)	Diamond Power Infrastructure Ltd	21.10.15 Detailed in Schedule 11 & 12 (Page 482 – 485)	27.2.2012
4	Wind Turbine	Diamond Power	21.10.15	27.2.2012

	Generator JMD 260 , Cap acity 2.1 MW Installed at MojeCharp odi Nani Tal Abdasa ,Dist Kutch (Owned by DPIL)	Infrastruct ure Ltd	Detailed in Schedule 11 & 12 (Page 482 – 485)	
5	Diamond Projects Ltd MojeHaripu ra Survey No 144 &146 ,TehSavli Dist Vadodara Building , plant & machinery	Diamond Projects Ltd	29.07.08 which was extended on: 8.04.11 29.02.14 and 21.10.15 Detailed in Schedule 5& 6 (Page No. 476 – 477)	10.8.2000
11	Flat 102 , RS No. 4/Part , sheet no 12 , City Survey No. 500, Janki Apartment , 2nd floor, Alkapuri , Vadodara	Amit Bhatnagar	21.10.15 Detailed in Schedule 7& 8 (Page No. 478 – 479)	17.3.2015
14	Flat 103 , RS No. 4/Part , sheet no 12 , City Survey No. 500, Janki Apartment , 2nd floor, Alkapuri , Vadodara	Sumit Bhatnagar	21.10.15 Detailed in Schedule 9 & 10 (Page No. 480 – 481)	17.3.2015

9. The Appellant and other member of the consortium declared the loan account of Respondent No.2 as a non-performing asset as per Circular dated 12.12.2015 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI**”) against its secured assets and properties that one of the

members of the consortium i.e. Corporation Bank has already issued its Notice dated 30th June, 2018 u/s 13(2) of the SARFAESI Act to Respondent No. 2 and the respective guarantors. Copy of the Notice dated 30th June, 2018 u/s 13(2) of the SARFAESI Act is filed and marked as ANNEXURE A5.

10. With regard to the Subject Properties, Appellant Bank as well as other member banks of the consortium has proceeded to exercise the rights available to it in law under the provisions of the RDB Act, 1993 and have instituted proceedings under Section 19 of the RDB Act on various dates before the Debt Recovery Tribunal, Ahmedabad and same are pending for adjudication. Copy of the Order dated 4th July, 2018 passed by the DRT, Ahmadabad is annexed and marked as ANNEXURE A6 page no. 501 to 502 of Appellants documents.

11. It is further stated that the Appellant had on 23rd March, 2018 filed an Application under Section 7 of Insolvency and Bankruptcy Code, 2016 before the Hon'ble NCLT, Ahmedabad for initiating Corporate Insolvency Resolution process against Respondent No. 2 which was duly admitted by the Hon'ble NCLT Ahmedabad on 24th August, 2018. Copy of the order passed by NCLT Ahmedabad is annexed and marked as ANNEXURE A7.

12. However, in the meanwhile, vide the Provisional Attachment Order No. 02/2018 dated 24th April, 2018 issued by Respondent No. 1 in File No. ECIR/AMZO/03/2018, the Subject Property was provisionally attached on the pretext that the Subject Property was a "proceed of crime" within the meaning of Section 2(u) of the PMLA, 2002.

13. It is stated on behalf of appellant that as on 7th June, 2018 approximately an amount of Rs. 2400 Crore (Rupees Two Thousand Four Hundred Crores) along with uncharged interest that is due and payable by Respondent No. 2 to the Appellant Consortium together with further interest till the date of payment and/or realization of thereof. It is also submitted that the outstanding amount due to the Appellant is public money and that the Appellant has the right to deal with the Subject Properties.

14. The Adjudicating Authority vide the Impugned Order dated 1st October, 2018 has confirmed the Provisional Attachment Order No. 02/2018 dated 24th April, 2018 issued by the Respondent No.1 in File No. ECIR/AMZO/03/2018.

15. It is submitted on behalf of the appellants that in view of the recent judgment passed by the Hon'ble Delhi High Court in the matter of Deputy Directorate of Enforcement Delhi and Ors. vs Axis Bank ("Judgment"), the impugned order is liable to be set aside.

16. The Hon'ble High Court in its Judgment has held that "*the charge or encumbrance of third party in property attached under PMLA cannot be treated or declared void unless material is available to show that it was created to defeat the PMLA, such declaration rendering such properties available for attachment and confiscation under PMLA, free from encumbrance.*" The Hon'ble High Court further held that "*a party in order to be considered as a bonafide third party claimant for its claim in a property being subjected to attachment under PMLA to be entertained must*

show, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, the party itself not being privy to, or complacent in, the offence of money laundering, and that it had made all compliances with the existing law including, if so required, by having said security interest registered”

17. In view of the fact the Bank of India being the secured creditor has initiated proceedings/ taken actions against DPIL in accordance with the law much before the initiation of proceeding under the PMLA Act, it is submitted that the attachment in respect of the aforementioned properties be vacated.

18. Since the action taken by the Bank of India was in accordance with law and was prior to the proceedings initiated under PMLA Act, the proceedings initiated by the Bank of India under the Code is ought to be given precedence over the proceedings initiated under PMLA Act in respect of the aforementioned properties. The said position has been clarified by the Hon'ble High Court of Delhi in the matter of **Deputy Directorate of Enforcement Delhi and Ors. vs Axis Bank in CRL.A. 143/ 2018 & Cr.M.A. 2262 of 2018** dated April 02, 2019 wherein in Paragraph 171, the court held that:

“ (xv): If the bona fide third party claimant (as aforesaid) is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under

PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.”

19. In the present appeal, the Subject Properties mentioned at serial number 1 and 5 of the Complaint belong to Respondent No. 2 after carrying out due compliances were mortgaged with the Appellant in the year July 2008 and thereafter were extended from time to time on various dates till October 2015 for securing the facilities advanced by the Appellant.

20. The properties mortgaged to the Appellant were acquired by Respondent No. 2 between March 1993 and January 2008. The details of the acquisitions are mentioned in third schedule (Annexure A4 at page no. 461 to 464).

21. The interest in the Subject Properties stood transferred to the Appellant when the Respondent No. 2 had created a valid mortgage in favor of the Appellant which was much prior to the alleged offence committed by Respondent No. 2 under the PMLA.

22. The rights of Appellant Bank being the secured creditor would survive in spite of the order of the attachment under PMLA remains operative. Therefore, the Appellant being the lawful mortgagee/transferee of the interest in the Subject Properties are entitled to recover its dues with the sale of the Subject Properties as the Hon'ble High Court in the Judgment has also held that mere issuance of an attachment order does

not ispo facto render illegal prior charge of encumbrance of secured creditor, the claim of the latter of release (or restoration) from PMLA attachment being dependent on its bonafides. the court further held *“if it is shown by the cogent evidence by bonafide third party claimant (as aforesaid), staking interest in an alternate attachable property (or deemed tainted property), claiming that it had acquired the same at a time around or after the commission of prescribed criminal activity, in order to establish a legitimate claim for its release from attachment it must additionally prove that it had taken “due diligence” (eg taking reasonable precautions and after due enquiry) to ensure that it was not a tainted asset and the transactions indulged in where legitimate at the time of acquisitions of such interest”*

23. The Hon'ble High Court further held that *“if it is shown by the cogent evidence by the bonafide third party claimant (as aforesaid), staking interest in an alternative attachable property (or deemed tainted property) claiming that it had acquired the same at a time anterior to the commission of proscribed criminal activity, the property to the extent of such interest of third party will not be subjected to confiscation so long as the charge or encumbrance of such third party subsists, the attachment under PMLA being valid or operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as in is excess of the claim of the said third party.*

24. The acquisition of such interest cannot be presumed to have been created with mala fide intent to defeat and/ or frustrate the proceeding under the PMLA Act and hence the said properties can be held to be “tainted property”. Since in the present case, the bona fide third party

claimant, secured creditor, had initiated action in accordance with law for enforcement of interest prior to the order of attachment under PMLA, the PMLA attachment takes a back seat allowing the secured creditor to enforce its claim and only the remainder to be made available for purposes of PMLA. The properties in the present case are thus not liable to be attached even as “alternative attachable property”, as held in **Para 165** of the judgment of Hon`ble Delhi High Court in the case of **Deputy Directorate of Enforcement Delhi and Ors. vs Axis Bank in CRL.A. 143/ 2018 &Crl.M.A. 2262 of 2018** dated April 02, 2019.

25. As already mentioned in the present case, it has come on record that the that the security interest in respect of the of the aforesaid properties were created much before the date or period of the alleged criminal activity in respect of which the attachment order was passed.

26. The Hon`ble Delhi High Court on the Axis Bank Judgement (supra) had observed that

“...the charge or encumbrance of third party in property attached under PMLA cannot be treated or declared void unless material is available to show that it was created to defeat the PMLA, such declaration rendering such properties available for attachment and confiscation under PMLA, free from encumbrance...”

The Hon`ble Delhi High Court further observed that

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

27. As such the properties/ assets acquired by DPIL before the initiation of the proceeding under PMLA Act and properties/ asset in respect of which security interest has been created in favour of the bona fide secured creditor ought not be subjected to attachment in view of the aforesaid observations of the Hon'ble Delhi High Court and the State Action would be restricted to such part of the value of the property as it exceeds the claim of the bona fide third party.

28. As such, in the present case once it has been showed by the Bank of India that proper due diligence was conducted before the properties/ assets were mortgaged to them, the properties thus cannot be attached, neither as a 'tainted property' nor as 'alternative attachable property' since it is nobody's case that the secured creditor had not done the due diligence and/or the transactions were not legitimate.

29. The Respondent had passed the attachment order whilst suppressing the fact that insolvency proceeding has been initiated in respect of DPIL by the bona fide lenders in favour of whom security interest have been created before passing the provisional attachment order.

30. It appears from the material available on record that in the present appeal, the Appellant at the request of Respondent No. 2 had sanctioned Term Loan Facilities to Respondent No. 2 for construction of 3 windmills at MojeCharpodi Nani Tal Abdasa , Dist Kutch. The Appellant upon being conducting a due diligence had sanctioned to Respondent no. 2 the term loan facilities. The Respondent No. 2 in order to secure the facilities sanctioned by the Appellant had mortgaged the

properties mentioned in serial number 2, 3, 4, 11 and 14 of the Complaint.

31. The properties mentioned at serial number 2,3 and 4 were acquired by Respondent No. 2 on 27th February, 2012. The details of the acquisitions are mentioned at **Annexure A4Page 482 and 483 of documents filed by the Appellant**. Similarly, the properties mentioned at 11 and 14 of the Complaint were acquired by the promoters of Respondent No. 2 on 17th March, 2015, the details of acquisitions are mentioned at **Annexure A4 page 478 and 480**.

32. It is the case of appellant that the appellant before seeking to create a mortgage of the aforementioned properties had conducted due diligence of the purchase of the properties and upon being satisfied that the properties are in no way tainted and or benami got created mortgage in favour of the Appellant. No contrary evidence is available on record to show that the mortgaged properties were purchased from proceed of crime.

33. The term loan advanced to the Respondent No. 2 for construction of windmill in District Kutch were duly constructed and were mortgaged to the Appellant along with the land on which the 1said windmills were constructed since there is no negligence or involvement of any bank in any manner in the alleged offence.

34. Thus, the attachment of the encumbered property by Respondent No. 1 treating to be tainted is not valid argument if the bonafide third

party claimant (as aforesaid) is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party. In the situations covered by the preceding, the bonafide third party claimant shall be accountable to the enforcement authorities for the "excess" value of the property subjected to PMLA attachment. Counsel for the appellant is agreeable to deposit the excess value with the respondent no. 1.

35. The Appellant had declared the account of Respondent No. 2 as NPA and initiated an action under the SARFAESI Act as well as IBC Code 2016 against the Respondent No. 2 and its guarantors. Upon admitting the petition filed by one of the consortium members before NCLT Ahmadabad, the Resolution Professional has been appointed for initiation of corporate insolvency process. The Appellant in order to recover its outstanding dues has to sell the assets of the Respondent No. 2 and its promoters that were mortgaged to the Appellant at the time of sanctioning of various credit facilities to the Respondent from time to time for running its business. The facilities sanctioned by the Appellant

after conducting due diligence and in strict compliance of the letter of sanction issued by each member bank.

36. Therefore, it is not possible to hold that the mortgaged properties claimed by the Appellant in no way can be considered to be “Proceed of Crime” under Section 2(u) of PMLA. The impugned order does not disclose any reasoning. There is no application of mind whatsoever and it is assumed that the properties in question are the proceeds of the crime. There is no reasoning to show as to how the attached properties mortgaged prior to the date of alleged offence are the subject matter of proceeds of crime. The Adjudicating Authority has not analysed the facts at all. The order suffers from a fundamental error. There is no understanding by the Adjudicating Authority of the contents of the statute, much less its application to the facts of the case.

37. Section-3 of the Act provides that only a person who is knowingly a party to any activity or is involved in such activity connected with proceeds of crime and projects or claims it as untainted property can be guilty of the offence. S.5(1) shows that before any property can be provisionally attached there must be material prima facie to show any person is in possession of any proceeds of crime which are likely to be concealed, transferred or dealt with in a manner which may frustrate the confiscation proceedings thereof. The primary requirement for invoking S.5(1) is that there must be material to show that some proceeds of crime are in possession of any person. The requirement is that material must indicate that any property of whatever description in possession of any known person is “proceeds of crime” as defined in S. 2 (u). Finally adjudication proceedings are under S.8. Perusal of S.8 (1) shows that if

any person has committed an offence under S. 3 or is in possession of proceeds of crime **he may be served notice to indicate the sources of his income etc. out of which or by means of which he has acquired the attached property.** This obviously means that **if in response to the notice, the person in possession discloses legitimate means for having acquired the property in question, the property cannot be deemed to be involved in money laundering. Therefore, the attachment thereof cannot be confirmed.**

38. The legal implication of a mortgage must be understood by both authorities. When a property is mortgaged, the only right which is left in the mortgagor is that of the equity of redemption. Otherwise the entire corpus of the property passes to the mortgagee i.e. the appellant Bank in this case. The mortgagee has a right to take over the possession of the property and to realise it whereas the mortgagor who is left only with the equity of redemption has only the right to make full payment of the dues of the mortgagee and then redeem the property. Otherwise the mortgagor is not left with any vested right. In other words the mortgaged assets are essentially assets of the appellant Bank and not of the mortgagor.

39. **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...”

40. *The Appellant undertakes to deposit any amount realized, which is in excess of its outstanding dues, with the ED if such situation would arise.*

41. Adjudicating Authority failed to apply its mind at the time of issue of the Show Cause Notice (“**SCN**”). No reason to believe can be discerned from the SCN, or the provisional attachment order accompanying the SCN under Section 8 of the PMLA, as to how there was reason to believe that the Appellant was in possession of ‘proceeds of crime’. Adjudicating Authority, in its discussions, did not even consider the reply of the Appellants.

42. The Adjudicating Authority is bound by the law laid down by the higher courts. No authority has any justification to ignore the law laid down by the Supreme Court and various High Courts and this Tribunal, who on the basis of decisions of Hon’ble Supreme Court and various High Courts, has delivered orders. Unless each and every judgment is distinguished or are on different facts, the different conclusion cannot be arrived. The facts and legal issues are almost same and the Adjudicating Authority has incorrectly passed the impugned order by not following the orders passed by this Tribunal.The appellant is a Public Sector Bank. The money must come to the public forthwith not

after the trial of criminal case against the borrowers which may take many years. The banks are in crisis, no attempt should be made to block the loan amount in order to avoid worsen positions in the commercial market. The trial may continue against the borrowers. One is failed to understand why the bank loan amount be blocked in view of settled law.

43. 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.

44. 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.

45. The period of continuation of proceedings before the Adjudicating Authority, PMLA, and before this Tribunal till the passing of the 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.

46. The appeals are allowed. The impugned order dated 1st October, 2018 is set-aside. Consequently, PAO order dated 24.04.2018 is also quashed in relation to the appellants.

47. No cost.

(Justice Manmohan Singh)
Chairman

New Delhi,
18th June , 2019
'skb'