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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : February 25, 2019/
March 27, 2019
Decided on : April 02, 2019

\+ **CRL.A. 143/2018 & Crl.M.A. 2262/2018**

THE DEPUTY DIRECTOR DIRECTORATE
OF ENFORCEMENT DELHI ..... Appellant
Through: Mr. Amit Mahajan, CGSC with Mohammed Faraz & Ms. Mallika Hiremath, Advs.

versus

AXIS BANK & ORS ..... Respondents
Through: Mr. Shri Singh, Advocate with Mr. Pradyumna Sharma, Ms. Maneka Khanna & Ms. Sayali Kadu, Advocates for R-1.

\+ **CRL.A. 210/2018 & Crl.M.A. 3233/2018**

THE DEPUTY DIRECTOR
DIRECTORATE OF ENFORCEMENT ..... Appellant
Through: Mr. Amit Mahajan, CGSC with Mohammed Faraz & Ms. Mallika Hiremath, Advs.

versus

STATE BANK OF INDIA & ORS ..... Respondents
Through: Mr. Ankur Mittal, Advocate for R-1.

+ **CRL.A. 623/2018 & Crl.M.A. 10886-87/2018, 48245/2018**

DEPUTY DIRECTOR DIRECTORATE OF ENFORCEMENT ..... Appellant

Through: Mr. Amit Mahajan, CGSC with Mohammed Faraz & Ms. Mallika Hiremath, Advs.

versus

IDBI BANK LTD ..... Respondent

Through: Mr. Ajay Bahl, Advocate with Mr. Vikas Sharma, Advocate

+ **CRL.A. 764/2018 & Crl.M.A. 28500/2018, 199/2019, 202/2019**

UNION OF INDIA ..... Appellant

Through: Mr. Amit Mahajan, CGSC with Mohammed Faraz & Ms. Mallika Hiremath, Advs.

Versus

PUNJAB NATIONAL BANK ..... Respondent

Through: Mr. Vipul Agarwal, Advocate
Mr. Rajesh Rattan Adv. for PNB.
Mr. Jayant Mehta, Mr. Ashu Kansal & Mr. Milan Singh Negi, Advs. for Resolution Professional.

+ **CRL.A. 1076/2018 & Crl.M.A. 34565/2018, 34567/2018**

DIRECTORATE OF ENFORCEMENT .... Appellant

Through: Mr. Amit Mahajan CGSC with Mohammed Faraz & Ms. Mallika Hiremath, Advs.

versus

PUNJAB NATIONAL BANK & ANR ..... Respondents

Through: Mr. Rajesh Rattan Adv. for PNB.
Mr. Saumyen Das, Adv. for R-2/DBS.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T

1. These five appeals presented under Section 42 of the Prevention of Money-Laundering Act, 2002 ("PMLA", for short) against more or less similar orders of the appellate tribunal (constituted under Section 25), such orders having been rendered on appeals of the respondents ("banks") *vis-à-vis* the orders of provisional attachment issued by the enforcement officers under Section 5, as confirmed by the adjudicating authority under Section 8, give rise, *inter alia*, to certain common questions of law of import concerning nature of property that may be attached under this special law as indeed the conflict arising from claim of *bonafide* acquisition of interest by third parties. Hence, they have been heard together and are being decided by this common judgment.

THE ISSUES

2. The measure of attachment of property involved in "*money laundering*", it essentially representing "*proceeds of crime*" (as defined in law), is provided to ensure that the ultimate objective of "*confiscation*" of such ill-gotten property be not frustrated, the power and jurisdiction to order confiscation being vested in the Special Court. As would be seen at length in later part of this judgment, the provisions for attachment (followed by adjudication) leading to confiscation are sanctions in addition to the criminal sanction rendering the act of "*money laundering*" a penal offence (by virtue of section 4). The order of "confiscation" of property attached under PMLA takes away the right and title of its owner and vests it "*absolutely in the Central Government free from all encumbrances*" (Section 9).

3. The appeals at hand relate to claims of entities other than the persons in whose name the attached properties are held – to be referred hereinafter as "*third party*" – such claims of the third party emanating from charge, lien or encumbrances legitimately created. To put it simply, the conflict meriting resolve here concerns the sovereign authority of the State to take away and confiscate the property which has been acquired by a person through criminal activity as against the lawful claim of a third party to reach out to such property to recover, in accordance with law, what is due by attachment and sale of same very property.

4. Bearing in mind the above, the learned counsel on both sides of the divide in these matters repeatedly submitted that the issues presently brought for adjudication are not adversarial in nature, in that both sides concededly have been given certain authority by law to reach out to the properties in question for their respective purposes, the challenge essentially being to prioritize the claims of one over the other. The appellate tribunal (as constituted under PMLA), by its impugned orders, has taken the view that the relevant statutory provisions of PMLA take a back seat, the enactments under which the third parties (the banks) lay a superior claim over the properties in question having primacy. The appellant assails the said view questioning the correctness of the logic and reasoning by which the appellate tribunal has so concluded arguing that if the decision of the tribunal were to prevail it would not only be prone to misuse but also render PMLA toothless.

THE FACTS

5. Before proceeding further, it would be apposite to take note of the background facts in each case.

Crl.Appeal no. 143/2018 (the case of "Audi Car")

6. The dispute in the first captioned matter (Crl. A. 143/2018) stems from the conflict arising out of the attachment of car make Audi, model no.A-335TDI bearing registration no.DL-2C-AT-4920 ("the Audi car") of seventh respondent Rajeev Singh Kushwaha (the registered owner), by the enforcement officer under PMLA, as confirmed by the adjudicating authority, and the claim of the

respondent bank ("*Axis Bank*") over the said Audi car on account of hypothecation in relation to the finance that had been provided by it for its acquisition by the said registered owner.

7. There is no dispute between the parties herein as to the facts that the registered owner of the Audi Car had availed of loan facility vide account no. AUR012601217345 from the above mentioned bank for purchasing the same in December, 2015, he having executed, *inter alia,* the Loan-cum-Hypothecation Agreement dated 13.09.2014 and irrevocable Power of Attorney dated 04.12.2014 in its favour and by virtue of such documents the vehicle is under hypothecation with the bank, the finance provided for its acquisition having remained unpaid. The bank, it appears, had taken certain steps, through its separate legal entity (Axis Asset Management Company Ltd.), to take over the control/possession of the said asset and recover its dues by its sale, the liability, as on 12.07.2017, being Rs. 12,08,949/-.

8. The Government of India had announced demonetization policy on 08.11.2016, in terms of which the then existing Indian currency notes of the denomination of Rs.1,000/- and Rs.500/- ceased to be legal tender, a window having been provided for exchange of demonetized notes, with the new currency introduced, by deposit in the bank accounts. On 29.11.2016, three persons (including one Mohit Garg) travelling in a car were intercepted in the area of police station Kashmere Gate, their search revealing unaccounted and unauthorized possession of four bags containing demonetized currency notes of the face value of Rs.1,000/- each, totaling worth

Rs.3.70 Crores. In the wake of revelations made, first information report (FIR) no.416/2016 was registered initially for offences punishable under Sections 420, 120B IPC to which, on the basis of evidence gathered in due course, other offences were added, they including those punishable under Sections 409, 467, 468, 471, IPC and Sections 7 and 13(1)(d) of the Prevention of Corruption Act, 1988.

9. It is stated that the investigation carried out has brought to light evidence showing involvement of, amongst others, Vineet Gupta and Shobhit Sinha, Branch Manager and Operations Manager of Axis Bank, Kashmere Gate, Delhi, besides Rajeev Singh Kushwaha in whose name the Audi car was purchased and stands registered. It is further stated that the evidence has been collected to show that Rajeev Singh Kushwaha had floated certain fictitious companies, one of his associates (Mohit Garg) providing services of an entry operator. It is also stated that the evidence collected has shown that a criminal conspiracy was hatched pursuant to which the individuals who were intercepted, alongwith others, including Rajeev Singh Kushwaha, had indulged in acts to convert unaccounted demonetized currency by depositing the same in above mentioned fictitious companies of Rajeev Singh Kushwaha, for consideration, so as to project the same as untainted money. It is alleged that the above mentioned two bank officials had actively participated in the said transactions leading to the demonetized currency being channelized into the fictitious accounts, they having taken illegal gratification, in the form of cash or gold, from Rajeev Singh Kushwaha.

10. The accounts of the above-mentioned four fictitious companies saw demonetized currency being deposited to the tune of Rs.39.26 Crores during the period 10.11.2016 to 21.11.2016. Certain recoveries, including in the form of gold, statedly proceeds of the above-said crimes, were effected from close associates of Rajeev Singh Kushwaha.

11. Primarily on the basis of above-mentioned facts, and the material gathered during investigation into the police case, it involving scheduled offences, information was also conveyed to enforcement authorities, which resulted in ECIR no.11/2016 being registered on 30.11.2016 under PMLA. The investigation into the said case under PMLA has led to a complaint being presented, on 01.02.2017, under Section 45 upon which cognizance has been taken by the Special Court.

12. Simultaneously, on the basis of reasons to believe recorded in writing, provisional attachment order no.01/2017 was passed and properties of Rajeev Singh Kushwaha of the total value of Rs.3.40 Crores were attached on 27.01.2017. These include the Audi car. The adjudicating authority, by its order dated 31.05.2017, confirmed the attachment order. Before confirmation, the adjudicating authority had issued a notice (under Section 8) to the bank to show cause as to why the properties, including the Audi Car, be not attached. The request of its asset management company for suspending the provisional attachment was, however, rejected.

13. The appellate tribunal by its decision dated 25.10.2017 in appeal (FPA-PMLA-1848/DLI/2017) of the bank set aside the order of the adjudicating authority confirming the attachment order directing the vehicle to be returned to the bank holding it entitled to dispose it of to recover the balance amount due to it under the loan contract as per law, pointing out, *inter alia,* that the loan facility pre-dated the allegations of money-laundering, the finance used for its acquisitions not representing "proceeds of crime", the lender (the bank) having first priority/charge over the hypothecated property, the objective of PMLA not detracting or derogating from the protection of legitimate transaction and financial assets as afforded by legislation such as the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act", for short).

14. When this appeal came up before the Court on 06.02.2018, in light of the submissions made, the bank was permitted to sell the Audi car, by open auction, in terms of the relevant guidelines and the proceeds of such sale directed to be deposited with the Registrar General in the form of interest bearing fixed deposit receipt (FDR).

Crl.Appeal no. 210/2018 (the case of "hospital equipment")

15. The second captioned matter (Crl.Appeal no. 210/2018) relates to the conflict arising out of attachment under PMLA of certain immovable properties described as agricultural lands and built-up properties on plot of land in Ghaziabad ("the immovable properties") of private respondents, by the enforcement authority, as confirmed by

the adjudicating authority and the claim of the respondent bank ("State Bank of India") over the said immovable properties under the mortgage contract in relation to the loan facility that had been provided by it.

16. The State Bank of India ("SBI") had been approached by the second respondent (Dr. Kewal Krishan Sood) for sanction of a term loan in favour of the third respondent M/s Raghubir Hospital Pvt. Ltd. (RHPL) of which he claims to be the director and promoter for setting up a 150 bedded hospital in district Ghaziabad (UP) and pursuant to the said request term loan aggregating Rs. 5.63 crores was disbursed during the year 2007 for purchase of certain diagnostic machinery. At the time of sanction, and disbursal of the said loan, title deeds of immovable properties were tendered by the borrowers and guarantors and the said properties were accordingly subjected to mortgage/hypothecation. The loan, was not repaid and the account was classified as "*non-performing asset*" (NPA) w.e.f. 30.04.2009.

17. The SBI, in exercise of its power under Section 13 (4) of SARFAESI Act, took over the hypothecated property/mortgage property (the immovable properties) vide notice dated 07.12.2008. The action was challenged by the second respondent before the Debt Recovery Appellate Tribunal (DRAT), constituted under Recovery of Debts Due to Banks And Financial Institutions Act, 1993 (for short, "RDDBFI Act" – since renamed as the Recovery of Debts and Bankruptcy Act, 1993 or "RDBA"), but without success. The SBI, thereafter, moved Debt Recovery Tribunal (DRT), by OA no.

151/2011, for issuance of recovery certificate by sale of the mortgaged properties and hypothecated securities. The request was granted by the DRT on 15.02.2013, the amount outstanding as on 07.09.2009 being Rs. 6.44 crore.

18. The inquiries statedly brought out that the performa invoices and receipts presented in support of the claim of purchase of diagnostic machinery were fabricated documents, no such machinery having actually being purchased, the communications to this effect to the bank being in the nature of mis-representation.

19. The bank lodged FIR with Central Bureau of Investigation (CBI) which registered it as RC no.BDI/2009/E/0019. The investigation into the said FIR culminated in charge-sheet being presented seeking, *inter alia*, prosecution of the second and third respondents for offences under Sections 420/467/468/471 and 120 B IPC. It is stated that the investigation has also brought out evidence to show that the second respondent had siphoned off the money received from SBI as loan to RHPL through certain bank accounts maintained with Nainital Bank, Ghaziabad.

20. Against the above backdrop, information was conveyed to the directorate of enforcement which registered a case vide no. ECIR/11/DZ/2011/AD (VM) under PMLA. On the basis of reasons for belief recorded in writing, the enforcement officer found it a case of money-laundering and attached certain assets of the borrowers and guarantors (private party respondents herein) by two separate orders,

the property thus attached (under PMLA) including the assets which are subject to mortgage with SBI.

21. The attachment orders having been confirmed by the adjudicating authority, the same were challenged by SBI before the appellate tribunal by two appeals (FPA-PMLA-729/DLI/2014 and FPA-PMLA-1411/DLI/2016), both of which were allowed, by common order dated 31.08.2017, *inter alia*, holding that neither the bank nor its employees being alleged to be involved in money-laundering, the amount of loan sanctioned being "public money", the bank was entitled to recover it by sale of the mortgage properties "as first charge", the SARFAESI Act having overriding effect over PMLA. As a result of the order of the tribunal, the subject properties have been released from attachment under PMLA.

Crl.Appeal no. 623/2018 (the case of "mortgaged shops")

22. In the third captioned matter (Crl.Appeal No. 623/2018), the claim of the respondent bank (IDBI bank Ltd.) over certain properties attached by enforcement authority has been accepted by appellate tribunal. The properties in question are described as shop nos. 4 and 128 (first floor), both located at 6 DLF Industrial Arrea, Moti Nagar, New Delhi, in the name of one Arun Suri, proprietor of M/s Aryan Electronics.

23. It is stated that Arun Suri had taken cash credit facility from IDBI in January, 2009 executing various security documents thereby creating equitable mortgage in respect of six properties, including the said two shops, depositing the title deeds with the bank. The cash

credit facility initially sanctioned for Rs. 300 lakhs on 23.10.2009 was enhanced to Rs. 500 lakhs and further to Rs. 750 lakhs on 10.07.2010, both times, on request, the charge of equitable mortgage having been extended for enhanced facilities.

24. The borrower (Arun Suri) failed to maintain financial discipline and defaulted in deposit of sale proceeds through the cash credit account, it being declared NPA on 31.12.2012 by IDBI. The bank initiated action under Section 13 (2) of SARFAESI Act on 30.01.2013, a receiver having been appointed by the Chief Metropolitan Magistrate (CMM), by order dated 07.06.2017, to take possession of one of the mortgaged properties. The IDBI also moved DRT for recovery of its dues (by OA no. 582/2014), the amount outstanding at that stage being Rs. 11,19,81,600.44.

25. Meanwhile, certain serious irregularities involving foreign exchange transactions in the current accounts of various firms/companies of the borrowers, and those connected to him, came to the notice of the Bank of Baroda (BoB), its internal audit report showing the value of such illicit transactions being to the tune of Rs. 3600 crores. On the complaint of BoB, the CBI registered FIR (no. RC.BD.F1/2015) on 09.10.2015 against 59 current account holders, it statedly including the borrower in the present case, and certain bank officials, the case involving offences punishable under Sections 420 read with Section 120 B IPC and Section 13 (2) read with section 13 (1) (d) of Prevention of Corruption Act, 1988.

26. Upon information from CBI, finding it to be a case of money-laundering, the enforcement directorate registered a case (ECIR no. DLZO/20/2015) on 09.10.2015. On the basis of reasons to believe reduced to writing, the enforcement authority issued an attachment order on 28.07.2017 in respect of certain properties, including the above-mentioned two shops. The adjudicating authority confirmed the said attachment by its order dated 27.11.2017.

27. On the appeal (FPA-MLA-2147/DLI/2018) of IDBI, the appellate tribunal, by its decision dated 10.05.2018, set aside the said attachment of the two properties under PMLA upholding the contention that the said assets had not been acquired by money-laundering and thus could not be described as "proceeds of crime", it being noted that the two shops had been purchased by sale deeds of 2003, much prior to the alleged commission of acts constituting money-laundering. As in the previous case, the tribunal has reiterated its view that the claim of the IDBI under SARFAESI Act overrides the authority for attachment under PMLA, there being no illegality or unlawfulness in the title of the bank to recover its dues under the mortgage, the bank itself (or its employees) not being involved in money-laundering.

Crl.Appeal no. 764/2018 (the case of "defence supply orders")

28. The fourth captioned matter (Crl.Appeal No. 764/2018) pertains to mortgage of six properties by depositing title deeds with Punjab National Bank (PNB) for credit facilities taken in the name of M/s Dynamic Shells (India) Pvt. Ltd. ("DSIPL") by certain individuals

including Shambhu Prasad Singh, Shyam Sunder Bhatter, Nirmala Bhatter & Ms. Jaspreet Kaur, the said properties including residential house no.C-3/275, Vipul Khand, Gomti Nagar, Lucknow (UP); commercial shop no. SS-14, Gulmohar Complex, Section 15, Noida (UP); Factory Land & Building at A-43, Section-8, Noida, UP; Land & Building (Two storeyed) Industrial Shed and Machineries, situated at plot no. 350, Section 3, Phase-II, Industrial Growth Centre, Bawal, Haryana; Agricultural Land (7.35 acre), Khata no. 28, 55/109, Maujapur, Tehsil, Sikanderpur, Ballia, UP and Agricultural Land, Mauzapur, Gata No. 1009, Pargana Sikandarpur, Purbi, Tehsil, Sikandarpur, Dist. Ballia, UP, the total mortgage value whereof at the relevant point of time is stated to be Rs. 2129.74 lakhs. Shambhu Prasad Singh is described as owner of the first said property and co-owner in the last two above-mentioned properties, DSIPL being indicated to be the owner of fourth said property, Shyam Singh Bhatter having title over the other two properties, in one as a co-owner.

29. It is stated that, on 10.12.2009, DSIPL had approached the PNB to take over the then existing liabilities from Syndicate Bank. The PNB sanctioned credit facilities to the tune of Rs. 2010.50 lakhs on 18.02.2010 on the request of Shambhu Prasad Singh. The credit facility was enhanced from then Rs. 650 lakhs to 1800 lakhs, in the context of certain supply orders to the tune of Rs. 2170.90 lakhs statedly received from armed forces. The enhanced credit facility was availed by DSIPL but with no adjustment, putting PNB to a loss of about Rs. 29.75 crores.

30. The inquiries by PNB revealed that the supply orders from defence authorities which was the basis of drawals were fictitious claims based on forged and fabricated documents, the amounts received against the credit facility having been diverted to the accounts of certain dummy firms and companies set up by Shambhu Prasad Singh in the name of his employees showing them as directors or proprietors.

31. The PNB invoked Section 13 (2) of SARFAESI Act to take the symbolic possession of the mortgaged properties of DSIPL and moved DRT, by original application no. 84/2013, for recovery of debts and also lodged a complaint with CBI which registered FIR no.RCBDI 2014/E/0003 involving offences under Sections 120 B/420/468/471 IPC and Section 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act, 1988.

32. It is stated that investigation has confirmed that fictitious supply orders had been used to seek release of funds from PNB against the above-mentioned credit facility and the funds received in the account of DSIPL were diverted by Shambhu Prasad Singh and his above-mentioned associates to the accounts of fictitious firms and companies. The CBI has since concluded investigation and filed a charge-sheet in the court of Special Judge (Prevention of Corruption Act).

33. The CBI also informed the enforcement directorate which registered a case (ECIR/08/DZ/2015) under PMLA. Finding it, on the basis of reasons to believe reduced to writing, a case involving money-

laundering, the enforcement officer issued attachment order under PMLA on 29.03.2017 attaching the above-mentioned six properties mortgaged with PNB. The said order was confirmed by the Adjudicating Authority on 04.08.2017.

34. The PNB challenged the above-mentioned order of attachment under PMLA by appeal FPA-PMLA-1958/DLI/2017 before the appellate tribunal. The appeal of the PNB was allowed and the attachment orders have been set aside, the reasons set out in the said order being similar to those in the above-mentioned other cases, it being the conclusion of tribunal that the provisions of the SARFAESI Act and RDDBFI Act (or RDBA) prevail over PMLA. The tribunal has also observed that the properties in question had not been acquired out of any proceeds of crime, their acquisition being prior to the commission of offence of money-laundering. It was also noted that there was no nexus between those indulging in money laundering on one hand and the PNB (or its employees) on the other, its claim under the mortgage being a charge which merited priority.

35. The above order of the appellate tribunal was challenged by Union of India in this appeal and, by order dated 25.07.2018, it was directed that the first four above-mentioned properties shall not be alienated by the PNB.

36. In this case, there have been certain developments post the decision of the tribunal rendered on the appeal of PNB on 16.05.2018. The PNB proceeded to invoke the jurisdiction of the National Company Law Tribunal (NCLT), it being the adjudicating authority

under the recently enacted Insolvency and Bankruptcy Code, 2016 ("Insolvency Code", for short), by filing a company petition, it being no. (IB)-718(PB)/2018, seeking initiation of Corporate Insolvency Resolution Process ("CIRP") against DSIPL. The NCLT, by its order dated 27.09.2018, admitted the said petition and appointed Mr. Nilesh Sharma as the Interim Resolution Professional ("IRP") of DSIPL for carrying out the "CIRP". In the wake of developments that took place pursuant to the said appointment the NCLT, by its order dated 06.12.2018, confirmed the appointment of Mr. Nilesh Sharma as the Resolution Professional ("RP") of DSIPL.

37. The abovesaid RP, appointed by NCLT under the Insolvency Code, has approached this court by interlocutory applications (Crl.M.A. 199 and 202 of 2019), *inter alia*, seeking impleadment and for clarification of the restraint order dated 25.07.2018. At the time of hearing on the said applications of RP (intervenor) it was submitted on his behalf that he would feel satisfied if he was given audience in opposition to the appeal, he not pressing for any further directions at that stage. The applications were accordingly allowed, to that extent, by order dated 30.01.2019.

Crl.Appeal no. 1076/2018 (the claim of "consortium of Banks")

38. The last captioned appeal (Crl. Appeal no. 1076/2018) also involves Punjab National Bank (PNB) as the prime respondent, though in its capacity as the lead bank of consortium of almost twenty banks. Similar to the factual matrix of the preceding cases, this case involves credit facilities having been taken, in the name of Surya Vinayak

Industries Ltd. (SVIL), from various banks, by its directors Sanjay Jain and Rajiv Jain, mortgaging several of their immovable properties, they including Factory Land & Building 1.52 acre, plot no. 38, Khaitan No.2, Industrial Growth Centre, Zone-11, Bodhjung Nagar, Agartala; Land & Building at Villa Naya Bans, Sampla, Distt. Rohtak, Haryana msg. 14520 sq. yard; Land & building at Vill-Naya Bans, Sampla, Distt. Rohtak, Haryana, msg. 10 Kanal (6050 sq. yards); Residential House msg. 167.20 sq. Mt., D-259, Ground Floor, Ashok Vihar-1, Delhi-52; Land & Bldg on plot of land bearing Khevat No. 90 at Vill-Naya Bans, Sampla, Rohtak; Land bearing Khewat 145 measuring 11 Kanal 8 Marla (6897 sq. yeard) and Khewat No. 135 measuring 7 Kanal 7 Marla (4446.75 sq yrd) at Vill-Naya Bans, Sampla, Distt-Rohtak (total 11343.75 sq yards); Land measuring 30 Kanal 9 Marla (18422.25 sq. yard) at village Naya Bans, Sampla, Distt. Rohtak, Haryana; Land measuring 53 kanal (32065 sq. yards) at vill-NayaBans, Sampla, Distt, Rohtak (Haryana); Khasra no. 4564 (0.78 Hect), 455 (0.62 Hect), 481 (4.82 Hect), 482 (2.95 Hect) Total 9.17 Hect) situated at Vill-Gudri, Distt, Katni and Khasra no. 499, 501/1 502/2m 503/1, 503/2 (part), 2162/1, 2162 (part), piproudh, NH-7, Distt-Katni (MP). The first three properties are stated to be owned by SVIL, next four held in the name of Rajiv Jain, the one following owned by Sanjay Jain and the last two of SVIL Mines Ltd., a sister concern.

39. In the loan accounts, the aforesaid directors of SVIL had stood guarantee, a corporate guarantee to secure credit facility having also been executed by SVIL, it being claimed that the company in whose

favour money was being borrowed was majorly engaged in the business of trading of agro-commodities and manufacturing and marketing of essence oils, perfumery compounds, flavours, fragrances and aromatic chemicals. The loans were taken and the mortgage contracts created during 2005 and 2007, the properties which were placed under mortgage having been acquired during 1994 to 2005.

40. All the loans became NPA after 2011. A forensic audit of the borrowers was carried out by the consortium (led by PNB) in the wake of resolution of December, 2013. The audit report brought out serious financial irregularities including mis-representation of value of stock in book debts. It is stated evidence was gathered in due course that the statement of stock as well as debtors and receivables on the basis of which credit facilities were obtained were false and fabricated.

41. Eventually, the matter was reported to CBI which registered FIR (no. RCBDI/2014/E/0001) involving offence under Section 120 B read with Section 420 IPC.

42. It is stated that the CBI brought the above facts to the notice of enforcement directorate which, for reasons reduced to writing, found it to be a case of money-laundering and, thus, registered its own case [ECIR No. DLZO/01/2015/AD (VM)], under PMLA.

43. While the consortium of banks led by PNB has proceeded to take steps for recovery of outstanding dues under SARFAESI Act and RDBA, the enforcement directorate, for reasons to believe reduced to writing, proceeded to attach the above-mentioned properties on

31.03.2016 which order was confirmed by the adjudicating authority on 22.09.2016**.**

44. The respondents i.e. PNB and DBS Bank Ltd. (members of the consortium) approached the appellate tribunal by appeals (FPA-PMLA-1616/DLI/2017 and FPA-PMLA-1618/DLI/2017). The appellate tribunal, by its common judgment dated 28.06.2018, has allowed the said appeals and set aside the attachment order under PMLA, the reasons for such decision being similar (if not identical) to the other cases mentioned above.

THE CONTENTIONS OF THIRD PARTY

45. It is clear from the background facts of these five appeals that the properties which have been targeted in most of the corresponding cases for attachment by the enforcement authority under PMLA are not properties which can be described even remotely to be those which had been derived or obtained as a result of criminal activity leading to commission of money-laundering. All such assets were acquired much prior to the acts of commission or omission relating to money-laundering. The assets in question seem to be held in the name of, or owned by, persons against whom there is material available forming the basis of reasons to believe of complicity in money-laundering. But the properties which were attached are not product of money-laundering, the enforcement authority concededly having moved against such properties because there are reasons to believe that they are properties of value equivalent to the assets that may have been acquired, derived or obtained as a result of money-laundering. To put

it simply, it appears that the enforcement authority having not been able to lay its hands on the property derived or obtained from money laundering has proceeded to reach out to other assets of the suspects that appear *prima facie* to have been acquired earlier from legitimate means because they are properties of the same value as would have been the value of the pecuniary advantage gained by money-laundering.

46. It is in the above context that the conflicts involving third party claims have arisen because the respondents (banks) claim to have acquired lawful interest (by mortgage or hypothecation) in the properties (which have been attached) in due course of their banking activities. It is not disputed that neither the concerned bank nor any of its agents or employees have had any connection whatsoever with any act of commission or omission relating to the money-laundering of which the borrowers are accused in these cases. It is also well conceded by the State (the appellant) that the banks in these matters may be entitled to and may have been pursuing lawful remedies where-under these very properties can be legitimately attached and sold, by public auction, to satisfy their respective claims, such satisfaction, in turn, concededly giving a lawful discharge to the borrowers for the corresponding debt.

47. It is argued that if the contentions of the respondent banks were to be upheld and the view taken by the appellate tribunal endorsed, the law under PMLA would stand defeated, not only because the sovereign authority to take away the property of the money-launderer

"*free from all encumbrances*" would stand frustrated, but also because the wrong-doer (the borrower who has indulged in money-laundering) would derive illegitimate pecuniary advantage by getting a discharge for the debt by using an asset the right to hold which had been forfeited.

48. Conversely, it is argued that the legislative intent and command is that the RDDBFI Act (or "RDBA") and SARFAESI Act (as also the Insolvency Code) must prevail over PMLA, the authority of enforcement agency taking a back-seat. At the same time, it was urged that a harmonious construction of PMLA and the legislations (RDBA and SARFAESI Act) under which the respondent banks ("secured creditors") seek remedy has to be achieved such that the objective of each is sub-served, none defeated.

SANCTIONS AGAINST MONEY-LAUNDERING

49. The malaise of money laundering has been a challenge faced by various members of the global community for many a decade now. At least two international organisations (the European Commission and the Gulf Cooperation Council) and a number of sovereign States had set up an inter-governmental body called the Financial Action Task Force (FATF) on Money-Laundering with the objective of development and promotion of policies to combat the menace. The FATF, by its recommendations made in 1990, suggested measures to be adopted similar to those set forth in the Vienna Convention (on criminalizing the drug money laundering) including legislative ones, to enable their competent authorities to confiscate property laundered,

proceeds from, instrumentalities used in or intended for use in the commission of any money-laundering offence or property of corresponding value. By its document titled "*The Forty Recommendations*" (1996), it reiterated the said suggestion for legislative measures to be adopted for confiscation of such assets or "*property of corresponding value*", cautioning that such measures be "*without prejudicing the rights of bona fide third parties*".

50. The Prevention of Money-Laundering Act, 2002 ("PMLA") though enacted and notified on 17th January, 2003, came into force w.e.f. 01.07.2005 and has been amended more than once, lastly by the Finance Act, 2018 and the Prevention of Corruption (Amendment) Act, 2018. It was brought on the statute book with the avowed objective "*to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incident thereto",* pursuant to the obligation in terms, *inter alia,* of Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 as adopted by the General Assembly of the United Nations on 23.02.1990 and the Political Declaration adopted by the Special Session of the United Nations General Assembly on 8-10 of June, 1998, the global view, which India shares, being that "*money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty".* As is noted in the "*statement of objects and reasons*" for this law to be enacted, in the run up to the above-mentioned political declarations by the United

Nations, the international community had taken certain initiatives that include the following:-

> *"(a) the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to which India is a party, calls for prevention of laundering of proceeds of drug crimes and other connected activities and confiscation of proceeds derived from such offence. (b) the Basle Statement of Principles, enunciated in 1989, outlined basic policies and procedures that banks should follow in order to assist the law enforcement agencies in tackling the problem of money-laundering.*
>
> *(c) the Financial Action Task Force established at the summit of seven major industrial nations, held in Paris from 14th to 16th July, 1989, to examine the problem of money-laundering has made forty recommendations, which provide the foundation material for comprehensive legislation to combat the problem of money-laundering. The recommendations were classified under various heads. Some of the important heads are—*
>
> *(i) declaration of laundering of monies carried through serious crimes a criminal offence;*
>
> *(ii) to work out modalities of disclosure by financial institutions regarding reportable transactions;*
>
> *(iii) confiscation of the proceeds of crime;*
>
> *(iv) declaring money-laundering to be an extraditable offence; and*
>
> *(v) promoting international co-operation in investigation of money-laundering."*

51. The PMLA deals with "money-laundering", treating it as an offence, defining it thus:-

> ***"**3.<u>Offence of money-laundering</u>**.**—Whosoever directly or indirectly attempts to <u>indulge</u> or <u>knowingly assists</u> or knowingly is a party or is actually involved in <u>any</u>*

process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering".

(emphasis supplied)

52. The challenge posed by money-laundering is intended to be met by the legislation through measures which include penal consequences for the offence (Section 4) and by deprivation of the "proceeds of crime" through "confiscation", the latter being a process which commences with order of "attachment". In such context, detailed provisions are also made for reciprocal arrangement (9th chapter) for assistance to be given by India to other sovereign States or expected by from the latter *vis-à-vis* property that is subject matter of money-laundering, this being dependent upon agreements to such effect being entered into by India with other countries. Similarly, the law envisages certain obligations (4th chapter) on the part of banking companies, financial institutions and intermediaries to render assistance to the enforcement agency not only by maintaining records but also reporting, or giving access, to information about certain transactions for dealing with the scourge of money-laundering. The PMLA establishes an enforcement agency, collectively described as "Authorities" (8th Chapter) and criminal justice fora styled as "Special Courts" (7th chapter) conferring, by Section 44, upon the latter (i.e. the special courts), exclusive jurisdiction to try the offence (under Section 4) of "*money-laundering*" and any "*scheduled offence*" connected

thereto, also making it the court of cognizance *vis-à-vis* the offence of money-laundering (under Section 3).

53. For comprehensive understanding of the law on money-laundering (under PMLA), it may also be noted here that the expression "*proceeds of crime*" constitutes the core of the offence of money-laundering, "*the concealment, possession, acquisition or use*" of "*proceeds of crime*" in a manner where the same are projected or are claimed to be "*untainted property"* being what forms the essential part of *actus reus,* the intent to so conceal, possess, acquire or use, or guilty knowledge, being the requisite *mens rea*. It is inherent in this that prior to coming in possession, acquisition, concealment or use of "*tainted property*" (the claim being to the contrary that it is untainted property) there must have been some other offence committed, the property perceived or alleged to be tainted being the product of such criminal activity.

54. It is in the above sense that the expression "*proceeds of crime*" is defined in PMLA, by Section 2 (1) (u). It is not any or every crime, the fruits whereof would be treated as "*proceeds of crime*" for initiation of action under PMLA. The enactment restricts it to the "*result of criminal activity*" relating to a "*scheduled offence".* The expression "*scheduled offence*" is defined by Section 2 (1) (y) as under:-

> *"scheduled offence" means—*
> *(i) the offences specified under Part A of the Schedule; or*

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or
(iii) the offences specified under Part C of the Schedule."

55. While Part 'C' of the schedule concerns certain offences which have *"cross-border implications*", Part 'B' is restricted to the offence under Section 132 of the Customs Act, 1962. In contrast, Part 'A' comprises of twenty-nine paragraphs thereby including offences under many a penal law they including certain offences under the Indian Penal Code, 1860 (IPC) besides some offences under special laws such as Narcotic Drugs and Psychotropic Substances Act, 1985, Explosive Substances Act, 1908, Unlawful activities (Prevention) Act, 1967, Prevention of Corruption Act, 1988, *etc.*

56. There are three parts of the definition of "*proceeds of crime*". The distinct flavor of each would need elaborate discussion later.

PMLA's SANCTION OF CONFISCATION

57. The power and jurisdiction to provisionally attach a property involved in money-laundering is conferred by the law, by virtue of Section 5 (1) of PMLA generally on the director (of enforcement), or on an additional director or joint director or a deputy director, appointed in terms of Sections 48 and 49. These officers are the authorities who have been conferred by law with the powers and jurisdiction to carry out the requisite probe leading to criminal action *vis-à-vis* the offence of money-laundering defined in Section 3 and also to initiate action in the nature of attachment leading to confiscation of "proceeds of crime" (Sections 50 and 51). Detailed

provisions have been made (in 5th Chapter) to equip these functionaries with the requisite powers of survey (Section 16), search and seizure (Section 17), search of persons (Section 18), arrest (Section 19), retention of property (Section 20) and retention of records (Section 21). By virtue of Section 65, the provisions of Code of Criminal Procedure, 1973 (Cr.P.C.) also apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA, insofar as the same are "*not inconsistent*" with the provisions of PMLA (Section 75). Similar is the application of Cr.P.C. to the proceedings before special court by virtue of Section 46.

58. For dealing generally with the matters relating to attachment leading to confiscation of "*proceeds of crime*" (as defined by PMLA), the statute prescribes elaborately the procedure conferring powers on enforcement authorities thereby established, such process beginning with "*provisional attachment*", such provisional attachment being subject to "*confirmation"* by adjudicating authority (constituted under Section 6), the order of the adjudicating authority being amenable to challenge by appeal (under Section 26) to the appellate tribunal (as constituted in terms of Section 25). For such properties other than those covered by reciprocal arrangement for assistance with other sovereign States (9th Chapter), as are tainted, the same representing "proceeds of crime" available in India, the process of attachment is to follow the prescription under Section 5, this being subject to adjudication (and eventual confiscation) in accord with Section 8.

59. For purposes of answering the questions raised in these appeals, it is essential to take note of the said provisions of PMLA (3rd Chapter) in *extenso*. The main provision as the law presently stands reads thus:-

> *"5. Attachment of property involved in money-laundering.—(1)Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—*
>
> *(a) any person is in possession of any proceeds of crime; and*
>
> *(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,*
>
> *he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:*
>
> *Provided that no such order of attachment shall be made unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country:*
>
> *Provided further that, notwithstanding anything contained in first proviso, any property of any*

person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted;

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (3) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable

property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this sub-section, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.
(5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority".

60. As in the case of power of survey, search and seizure, search of persons, retention of property and power to arrest, for enforcing "provisional attachment", it is *sine qua non* for the empowered officer, acting under Section 5 (1), to record in writing his "*reason to believe*" that grounds are made out to direct such provisional attachment.

61. The bare reading of the above provision makes it clear that following are the pre-requisites for a valid provisional attachment order:-

(i) existence of material ("*in possession of*" the enforcement officer i.e. the specified authorities under PMLA) which is the basis of the "*reason for belief*";

(ii) existence of identifiable "*property*" which qualifies to be treated as "*proceeds of crime*";

(iii) there being likelihood that such proceeds of crime are to be concealed or transferred or dealt with in any such

manner as may result in "*frustrating"* the proceedings relating to its confiscation;

(iv) the "*reasons for belief"* relating to such foundational material (as above) having been *"recorded in writing";*

(v) prior submission of charge-sheet (report under Section 173 Cr.P.C.) or a *"complaint"* in the court of cognizance respecting the "*scheduled offence"* to which the proceeds of crime relate unless there is "*recorded in writing"* the *"reasons to believe"* that if attachment be not ordered *"immediately*" the omission to do so is similarly "*likely to frustrate*";

(vi) the order of provisional attachment, to be issued in writing, to be valid maximum for one hundred eighty days from the date of such order (this excluding the period for which the order may have been stayed by the court); and

(vii) submission of a copy of provisional order of attachment by the empowered officer to the adjudicating authority, in a sealed envelope in the manner prescribed, such submission to include *"material*" in possession of the officer directing such provisional attachment.

62. The provisional order of attachment has the outside validity of maximum one hundred eighty days and the concerned authority must take the matter to the adjudicating authority for confirmation, such submission being in the form of "complaint" under Section 5 (5)

within thirty days from the date of provisional attachment, and the complaint must necessarily set out the facts on the basis of which it is made.

63. The provisional attachment of the property by the enforcement officers is an executive action. The law mandatorily requires its scrutiny by independent entity called adjudicating authority which is vested with *quasi judicial* powers. As noted above, the complaint under Section 5(5) of PMLA by the enforcement officer comes before the adjudicating authority for "*confirmation*" of the attachment order. The procedure to be followed by the adjudicating authority and its powers leading eventually to release or confiscation are prescribed by the following provision :-

> *8. Adjudication.—(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under sub-section (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3 or is in possession of proceeds of crime, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized or frozen under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:*
>
> *Provided that where a notice under this sub-section specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:*

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

(a) continue during investigation for a period not exceeding ninety days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under sub-section (5) or sub-section

(7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court;

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the property attached under section 5 or frozen under sub-section (1A) of section 17, in such manner as may be prescribed:

Provided that if it is not practicable to take possession of a property frozen under sub-section (1A) of section 17, the order of confiscation shall have the same effect as if the property had been taken possession of.

(5) Where on conclusion of a trial of an offence under this Act, the Special Court finds that the offence of money-laundering has been committed, it shall order that such property involved in the money-laundering or which has been used for commission of the offence of money-laundering shall stand confiscated to the Central Government.

(6) Where on conclusion of a trial under this Act, the Special Court finds that the offence of moneylaundering has not taken place or the property is not involved in money-laundering, it shall order release of such property to the person entitled to receive it.

(7) Where the trial under this Act cannot be conducted by reason of the death of the accused or the accused being declared a proclaimed offender or for any other reason or having commenced but could not be concluded, the Special Court shall, on an application moved by the Director or a person claiming to be entitled to possession of a property in respect of which an order has been passed under sub-section (3) of section 8, pass

appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

(8) Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering:

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed."

64. As noted earlier, the enforcement officers of the prescribed rank have also been conferred with the powers of search and seizure (Section 17) and power to carry out search of persons (Section 18). Occasions may arise and the competent authority during the course of investigation may seize any such record or property and if seizure "*not be practicable*" to freeze the record or property. In terms of Section 17 (1) and 17 (1A) similar situation may arise in case of search of persons under Section 18 (1). All such seizures of record, or property, or directions for freezing of such record or property are also matters that require confirmation by the adjudicating authority.

65. Restricting this study of the law to the proceedings leading to confirmation of the attachment by the adjudicating authority with reference to Section 8 of PMLA, it may be noted that the prescribed procedure begins by issuance and service of notice within thirty days by the adjudicating authority on the person respecting whom there is reason to believe as to either (a) his complicity in the crime in the offence of money-laundering or (b) of he being in possession of proceeds of crime [Section 8 (1)].

66. Pertinent to note here that in terms of the provisos to sub-Section (1) of Section 8, the right to be heard in opposition to the prayer for confirmation of attachment by the adjudicating authority is also given to such third parties as may be holding the property in question "*on behalf of any other person*" (whether jointly or otherwise), the adjudicating authority also being obliged by the proviso to sub-Section (2) of Section 8 to give opportunity of being heard and prove that the property is "*not involved in money-laundering*" even to such third parties as to whom notice may not have been issued but may have "*claimed*" the same. Such third parties may include a *benamidar*, transferee, lessee, mortgagee, hypothecatee, manager, agent, trustee, etc.

67. In the context of present appeals, it is also necessary to take note of the provision contained in Section 9 PMLA inasmuch as it prescribes the consequences that flow from the eventual order of confiscation. The provision reads thus:-

"9. Vesting of property in Central Government.—Where an order of confiscation has been made under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances:

Provided that where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest:

Provided further that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages".

68. As is plain and clear from the above-noted legislative scheme, the provisional attachment under the directions of enforcement authorities is subject to confirmation by the adjudicating authority. Mere confirmation of attachment by the adjudicating authority does not lead to the person claiming interest in the property being divested of such interest as he legitimately holds, inasmuch as the expression "attachment" is defined by section 2 (1) (d) to mean prohibition of transfer, conversion, disposition or movement of property by an order issued under third Chapter of PMLA. As is seen, upon perusal of Section 5 (4), mere order of provisional attachment does not prevent a

person "*entitled to claim*" any interest in the property ("*person interested*") or to enjoyment of an immovable property (for example a lessee) from such enjoyment, the possibility of taking over the possession of such property or for it to be treated as "frozen" [Section 17 (1A)] arising only upon confirmation by the adjudicating authority under section 8 (4). In terms of such scheme, the attachment is an interim measure, eventual intendment being that in the event of it being "*found*" that the offence of money-laundering has been committed and that "such property" is involved or has been used for such offence to be committed, the same shall be ordered to be "*confiscated to the Central Government"* [Section 8 (5)].

69. In contrast to the effect of the order of "attachment" which only entails "*prohibition of transfer, conversion, dispossession or movement*" of such property, "*the confiscation*" in terms of Section 8 (5) and (7) entails all the rights and title in such property vesting absolutely in the Central Government "*free from all encumbrances*". The further provision in Section 10 conferring upon the Central Government the power to take over and manage such property as has been confiscated even by disposing it of leaves no doubt that the vesting of the property in the government is absolute. As is clear from the provisos to Section 9, the liability under the encumbrance subsists in favour of such third party as had acted in good faith but if the creation of such encumbrance was with the objective of managing escape of such property from such attachment or confiscation, the law empowers the special court, or the adjudicating authority, to declare

such encumbrance to be "*void*", this also leading to confiscation of the property in favour of the State.

70. The eventual touchstone, even for the special court, dealing with the offence of money-laundering (and connected offences) remains that the property attached, or to be confiscated, must be such as was "*involved in*" or "*used for*" the commission of the offence of money-laundering.

71. The law recognizes that there may be third parties having "*legitimate interest*" in such property. It is for this reason that they are afforded opportunity to approach the adjudicating authority under section 8(1) or (2) and also the appellate tribunal under Section 26, as indeed the special court under section 8 (6), (7) & (8). Generally, the jurisdiction of the special court to deal with the issue comes at the time of conclusion of the trial before it but, in a fit case, it may consider request for release of the property from attachment even "*during the trial*" [second proviso to sub-section (8) of Section 8].

72. The basic tests prescribed by the law while dealing with the claim of a third party for "*release*" of the property are to find as to whether such claimant has "*a legitimate interest"* in the property, whether he had "*acted in good faith*" having taken "*all reasonable precautions*" and himself was "*not involved in the offence of money-laundering*" or "*may have suffered a quantifiable loss as a result of the offence of money-laundering*". It is with this view that the law permits the special court (by section 8) to not only "*release*" from attachment but even "*restore*" the confiscated property (or its part) to

the claimant with a proven legitimate interest (third party) and further allow such party as may have claim over an encumbrance lawfully and *bona fide* created to recover its legitimate dues from the debtor "*by a suit for damages*" though treating as "*void*" the encumbrance or charge that may have been created by the person found guilty of money-laundering "*with a view to defeat*" the law in PMLA (provisos to Section 9).

73. The PMLA provides for presumptions to be raised about a property having the character of "*proceeds of crime*" being involved in money-laundering and also respecting the illicit nature of a transaction involving its acquisition on account of connection with other transaction(s) of suspect nature, the relevant clauses to such effect contained in Sections 23 and 24 to be discussed later.

APPELLATE TRIBUNAL'S APPROACH

74. In the impugned decisions of the appellate tribunal, reference is made to the conclusions on question of law arrived at by the said forum in its earlier decision dated 14.07.2017 in the matter of *State Bank of India vs. Director, Directorate of Enforcement, Kolkata* (in *appeal no.FPA-PMLA-1026/KOL/2015*), the tribunal having chosen to quote verbatim the articulated views. The said observations reflect reliance, *inter alia*, on decisions of the Supreme Court in *Solidaire India Ltd. Vs. Fairgrowth Financial Services Ltd. and Ors., (2001) 3 SCC 71* and *United Bank of India vs. Satyavati Tandon, (2010) 8 SCC 110*; decision of a learned single Judge of this court in *Sanjay*

Bhandari Vs. CBI, 2015 SCC Online Del 10079; (2015) 222 DLT (CN) 5; three decisions of the Madras High Court, they being *V.M. Ganesan vs. Joint Director, Directorate of Enforcement, 2014 SCC Online Mad 10702; C. Chellamuthu vs. Deputy Director, Prevention of Money Laundering Act, Manu/TN/4087/2015*, *decided on 14.10.2015*; and *Assistant Commissioner vs. Indian Overseas Bank, AIR 2017 Mad 67 (FB)*; *2016 SCC Online Mad 10030*; besides one decision each of Bombay High Court and Andhra Pradesh High Court, they being *Bhoruka Steel Ltd. vs. Fairgrowth Financial Services Ltd., 1996 SCC Online Bom 717* and *B. Rama Raju vs. Union of India, 2011 SCCOnline AP 152*. The decision of the appellate tribunal shows that it has treated the other enactments like SARFAESI Act and RDDBFI Act (since rechristened as RDBA) to be prevailing over the PMLA on account of amendments brought into the former two legislations by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (Act no.44 of 2016). By the said amendment of 2016, Section 26-E was inserted in SARFAESI Act with similar provision contained in Section 31-B being added to RDBA, both declaring the claim of "*secured creditors*" to have priority over certain other claims as specified by the law.

75. The case of *Sanjay Bhandari* (supra) related to a petition under Section 482 Cr. PC praying for criminal proceedings to be quashed on account of settlement of the dispute against the backdrop of prosecution involving offences punishable under Sections 120B IPC read with Sections 420, 467, 468, 471 IPC and Section 13(1)(d)(ii) read with Section 13(2) of the Prevention of Corruption Act. The

relevance of this decision in the context of issues before the appellate tribunal cannot be comprehended.

76. In *Satyawati Tandon* (supra), the Supreme Court had made observations against serious adverse impact on the rights of banks and other financial institutions to recover their dues under RDDBFI Act (or RDBA) and SARFAESI Act on account of intervention by the High Court under Article 226 of the Constitution of India, pointing out that the said enactments had brought into existence "*special procedural mechanism for speedy recovery of dues of banks and financial institutions*" ensuring that the defaulting borrowers were "*not able to invoke the jurisdiction of the civil courts*". This decision has no relevance to the issues that arise in the present matters.

77. In *B Rama Raju* (supra), the petitioner before the Andhra Pradesh High Court was accused of having indulged in certain acts of omission or commission constituting the offence of money laundering as defined in Section 3 of PMLA. His property had been provisionally attached by the enforcement officer in the course of investigation. He had challenged the *vires* of PMLA in so far as it would permit such attachment. While dealing with such prayer, the learned single Judge of the said High Court observed thus :

> *"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 adjudication 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 issued 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. A further opportunity of establishing bona fide acquisition of property or that the property in question is not proceeds of crime involved in money-laundering is available and mandated, prior to the adjudicating authority passing an order of confiscation, under Section 8(6)."

78. Clearly, *B Rama Raju* (supra) has not much relevance here since the matters before this court involve claim of third parties.

79. In *C. Chellamuthu* (supra), the case before the Madras High Court was of an accused who was alleged to have committed predicate offences including that of cheating, on the basis of which he had acquired certain monetary benefits which was subject matter of investigation from the perspective of money-laundering. The court

noted the provisions relation to "*presumption in inter-connected transactions*" under Section 23 of PMLA and of "*burden of proof*" under Section 24 of PMLA and, on facts, held the appellant to have rebutted the said presumption and the charge. Again, unlike the cases at hand, the matter involved claim of the person accused of money-laundering to the property that had been attached.

CONFISCATION : FORFEITURE

80. Unlike PMLA, certain other criminal laws use the expression "*forfeiture*" of property as one of the statutorily permitted sanctions. The expression "*confiscation*" has been held to have similar meaning and effect as the word "*forfeiture*". For clarity in this regard, the following observations of the Supreme Court in *Gunwant Lal Godawat vs. Union of India and Anr., (2018) 12 SCC 309* should suffice :-

> *"39. The expression "confiscation" is not defined in the Rules. It had roots in the Latin word Confiscare - to consign to fiscus i.e. transfer to treasury, as a punishment or in enforcement of law. Though, the expression is generally understood as having implications associated with a crime…. The words "forfeiture" and "confiscation" have come to be used interchangeably. The General Clauses Act, 1897 does not employ the word "confiscation". On the other hand, it employs the word "forfeiture" in Section 6(d). Having regard to the long history of the usage of those two expressions, we are of the opinion that "forfeiture" is an expression which takes within its sweep "confiscation" also for the*

purpose of law *[Salig Ram vs. Secy of State of India in Council, 1872 SCC Online PC 43]*."

(emphasis supplied)

FORFEITURE (CONFISCATION) : NATURE OF SANCTION

81. Some argument was raised to urge that the process of attachment (for confiscation) under PMLA is in the nature of punishment for an offence and so cannot precede determination of guilt or adjudication of value of proceeds of crime by the court. It is essential to dispel this impression.

82. The Indian Penal Code, 1860 (IPC), by Section 53 (*Fifthly*), provides for "forfeiture *of property*" as one of the permissible "*punishments*". Though in IPC, as initially enforced, a number of offences attracted such punishment, prescription of this nature in some of them (e.g. Sections 121 & 122 IPC) having since been omitted, a few (e.g. Section 126 & 127 IPC) still retain forfeiture of property as one of the possible punishments, this giving it a flavour of criminal sanction. Interestingly, the act of unlawful purchase of, or bidding for, property by a public servant, under certain circumstances, is not only punishable offence under Section 169 IPC but also entails such property, if purchased, to be "confiscated".

83. The Code of Criminal Procedure, 1973 (Cr. PC) replaced the then existing procedural law governing criminal investigations and trials, it being the Code of Criminal Procedure, 1898 (old Cr. PC). Both the said laws have carried provisions for attachment of property

of an accused, the objective whereof, however, has been to compel appearance. In case the criminal court has reasons to believe that a person against whom warrant (of arrest) issued by it has "*absconded*" or is concealing himself, subject to certain other conditions being fulfilled, it may while issuing, or following the issuance of, proclamation (under Section 82 Cr. PC) requiring his appearance, proceed to order "*attachment*" of property (movable or immovable) of such person by issuance of a warrant under Section 83 Cr. PC (corresponding to Section 88 of the old Cr. PC). Pertinent to note the objective of such attachment (under Section 83 Cr. PC) being to compel appearance, the attachment is lifted and the property released in the event of appearance within the period specified in law.

84. Conversely, in the event of continued default beyond the specified period, the property is placed by the criminal court "*at the disposal of the State Government*", though the right for its disposal (except in case the property is subject to speedy and natural decay) is deferred for a period of six months. Meanwhile, a third party claiming interest may approach the criminal court by objections that his "*interest*" in the property is "*not liable to attachment*", such objection requiring inquiry and adjudication (Section 84 Cr.PC).

85. The absconder, in any case, must come up "*within two years from the date of the attachment*" to claim restoration of the property or net proceeds of its sale, or residue thereof, by showing and proving to the satisfaction of the criminal court that he had not absconded to evade the process. After two years, the criminal court virtually

becomes *functus officio* in the matter. In these provisions under the general law, however, the core issue that the court is to inquire into is the connection, if any, between the absconder and the property. The property of a third person cannot be attached under Section 83 to compel the appearance of an accused.

86. The Criminal Law Amendment Ordinance, 1944 ("the 1944 Ordinance") is one of the earliest legal measures put in position to take away the ill-gotten wealth, in case of public servants engaging in corrupt practices. The said law continues to operate till date, the jurisdiction to enforce it having been conferred on the Special Judge appointed under the Prevention of Corruption Act, 1988, *inter alia*, by Section 5(6), as reinforced by a new provision (Section 18A in Chapter IVA) on the subject of "*attachment and forfeiture of property*", added by the Prevention of Corruption (Amendment) Act, 2018. The Ordinance focuses on "*money or other property*" believed to have been "*procured by means of* " an offence under the said law, the persons "*claiming an interest*" in the subject property or any portion thereof having been given (by Section 4) the right to object and be heard against such sanction. As in the case of certain other enactments (e.g. SAFEMA), the property to be attached or forfeited must have "*nexus*" with the corrupt practice constituting the offence.

87. In *State of West Bengal vs. S.K. Ghosh* (supra), as referred to in *Gunwant Lal* (supra), in the context of Section 13(3) of the 1944 Ordinance, it had been observed thus :-

"15. The argument for the respondent is apparently based on the use of the word "forfeited" in Section 13(3) and also on the use of the word "forfeiture" in Section 53 of the Indian Penal Code. There is no doubt that forfeiture in Section 53 of the Indian Penal code is a penalty but when Section 13(3) speaks of forfeiting ... the amount of money or value of the other property procured by the accused by means of the offence, it in effect provides for recovery by the Government of the property belonging to it, which the accused might have procured by embezzlement etc. <u>The mere use of the word "forfeited" would not necessarily make it a penalty. The word "forfeiture" has been used in other laws without importing the idea of penalty or punishment within the meaning of Article 20(1).</u> Reference in this connection may be made to Section 111(g) of the Transfer of Property Act (4 of 1882) which talks of determination of a lease by forfeiture. We are therefore of opinion that forfeiture provided in Section 13(3) in case of offences which involve the embezzlement etc. of money or property as compared to a suit which it is not disputed the Government could bring for realizing the money or property and is not punishment or penalty within the meaning of Article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realise the fine that may have been imposed by a criminal court in connection with the offence."

(emphasis supplied)

88. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 ("SAFEMA", for short) came on the statute book with the avowed objective of meeting the challenge of "*serious threats to the economy and the security of the nation*" posed by activities in the nature of smuggling, foreign exchange manipulations and violation of certain laws (Income Tax, Wealth Tax, etc.) by malpractices resulting in augmenting of ill-gotten gains and accumulation of ill-gotten wealth, it having become necessary to assume powers "*to deprive such persons of their illegally acquired properties*". The enactment thus focused on forfeiture of "*illegally acquired property*". It defines, by Section 2(2), the "*person*" to whom the law is to apply to include not only every person who has been held guilty and convicted for offences (involving specified amounts of money) under specified laws (i.e. Customs Act, 1962, Foreign Exchange Regulation Act, 1947, Foreign Exchange Regulation Act, 1973, Sea Customs Act, 1878) and those against whom order of detention is made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), also taking in its sweep others including "*every person who is a relative* (as specified by second explanation, of such convict)", "*every associate (*as specified by third explanation, of such convict or detenue)" and, what turned out to be the cause of conflict, "*any holder (hereinafter in this clause referred to as the present holder) of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present*

holder, is or was a transferee in good faith for adequate consideration". The definition of the expression "*illegally acquired property*" under SAFEMA required a clear "*nexus*" between the prohibited activities and acquisition of such asset as indeed the means (including the consideration paid) employed in that regard and, in the event of the third party being the holder, carved out an exception if he had acquired it "*in good faith*" and "*for adequate consideration*", the onus to prove such elements obviously being on him.

89. The case of *Biswanath Bhattacharya* (supra) arose out of SAFEMA. The Supreme Court dealing with similar issue referred to the regime of forfeiture of property prevalent in this country at least from 1944 and accepted the argument that the forfeiture contemplated under the said law was not a "*penalty*" within the meaning of Article 20 of the Constitution of India but "*only a deprivation of property of a legislatively identified class of persons - in the event of their inability to explain (to the satisfaction of the State) that they had legitimate sources of funds for the acquisition of such property*", holding *inter alia*, that "*the property which is determined to be illegally acquired property*" only could primarily be forfeited, similar being the law in context of certain other similar enactments some of which shall be noted a little later.

90. In *Gunwant Lal Godawat (supra)*, the Supreme Court held that *"the liability for confiscation of property could be purely civil in nature as a consequence of the violation of some prescription of law commonly described as "forfeiture".*

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

92. The statutory authorities vested with the jurisdiction to provisionally direct or confirm attachment are, however, expected to assess, even if tentatively, the value of proceeds of crime so that it is ensured that only proceeds or assets of the offender of money-laundering of equivalent value are subjected to restraint, the evaluation undoubtedly open to variation or modification in light of evidence gathered till the probe is concluded.

93. The provision for "*provisional attachment*" and its confirmation, pending trial before court (wherein the issue of confiscation would come up at the time of determination of guilt in criminal case), is similar to the one for "*attachment before judgment*" in civil law. The law conceives of possibility of disposal of ill-gotten assets to "*frustrate*" the objective. The argument to the contrary is thus repelled. Ultimately, the confiscation is left to the special court. But then, the order to such effect only follows the determination of the

guilt in the criminal trial on the charge for offence of money-laundering. This view is in *sync* with the rulings in the cases of *S.K. Ghosh* (supra) and *Biswanath Bhattacharya* (supra) in context of Ordinance of 1944 and SAFEMA quoted above.

FORFEITURE (CONFISCATION) : CERTAIN OTHER LAWS

94. As was brought out at the hearing, similar provisions for attachment and forfeiture of property are also made in certain other enactments including Unlawful Activities (Prevention) Act, 1967 ("UAPA", for short), Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act", for short), the Prohibition of Benami Property Transactions Act, 2002 ("the Benami Property Act", for short) and the Fugitive Economic Offenders Act, 2018 ("the Fugitive Economic Offenders Act", for short). It would be of advantage to have a brief look at the same to ascertain the safeguards against unjust effect of such power vis-à-vis third party claimants.

95. The UAPA was amended by Act no.29 of 2004 simultaneous to the repeal of the Prevention of Terrorism Act, 2002 ("POTA", for short). The amendment brought on the statute book (by insertion of fifth Chapter), provisions for "*forfeiture*" of "*proceeds of terrorism*", a later amendment (by Act no.3 of 2013) adding to such measures the "*forfeiture*" of "*any property*" intended to be "*used for terrorism*". The expression, "*property*" is defined to include property or asset of every possible description. The expression "*proceeds of terrorism*" means all kinds of properties "*derived or obtained*" from commission of any *"terrorist act"* or through funds "*traceable to a terrorist act*" or

"*used*" or "*intended to be used*" for a terrorist act. Section 30 of UAPA obliges the designated authority to inquire into claims of "*third party*". The claimant or objector must establish in such inquiry that the property claimed by him is "*not liable to be forfeited*" under such law, the onus being placed on the claimant or objector. The test clearly is of "*nexus*" between the offender of the terrorist act and the property in question.

96. The NDPS Act was amended (by Act no.2 of 1989) to bring in special measures (Section 68A to 68Z) for "*forfeiture*" of "*illegally acquired property*" with special reference to offences relating to narcotic drugs and psychotropic substances. Again, the idea is to take away from the hands of the offender of such crimes the ill-gotten assets or property, the focus being on "*illegally acquired property*", its definition, by Section 68-B (g), requiring a connection between the acquisition of the property and the contravention of the NDPS Act and, interestingly, also including "*the equivalent value of such property*". Generally speaking, to qualify as "*illegally acquired property*" for purposes of NDPS Act, the property must be one "*derived or obtained*" by income, earnings or assets attributable to NDPS offence or "*traceable (wholly or partly)*" to property of former nature or acquired by means of income or earnings or assets the source of which cannot be proved by the person convicted of (or arrested for) an offence under the law relating to narcotic drug and psychotropic substance (whether in India or outside) or one who is related to or associate of such person (subject to certain other requirements to be fulfilled).

97. The interpretation and application of the provisions relating to attachment and forfeiture of illegally acquired property under NDPS Act was subject matter of decision of the Supreme Court in *Aslam Mohd. Merchant vs. Competent Authority, (2008) 14 SCC 186*. While construing the said provisions, to hold that principles of natural justice must be complied with to order forfeiture, it being implicit that the statutory elements of "*reason to believe*" and "*recording of reasons*" must be premised on materials available and though upholding the clause (Section 68-J) placing the burden of proving that the property sought to be forfeited was "*not illegally acquired property*" on the person so claiming, it was held that "*formation of belief*" as to "*a link or nexus*" traceable between the "*holder of the property proceeded against*" and "*an illegal activity*" was essential.

98. The objective of *Benami* Property Act has been "*to prohibit benami transactions and the right to recover property held benami*". It devotes fourth Chapter to the subject of "*attachment, adjudication and confiscation*". As noted earlier, the expression "*confiscation*" is to be construed similarly as "*forfeiture*". By the provision contained in Section 27, a property found to be held "*benami*" may be confiscated by the adjudicating authority, subject to remedy of appeal before the appellate tribunal. The detailed procedure for such action requires due notice to the interested parties that include "*any person who has made a claim in respect of the property*" (Section 26). The action is initiated on the basis of "*reason to believe*" that the holder of the property is a "*benamidar*" which expression is defined by Section 2 (10) to mean "*a person or a fictitious person, as the case may be, in whose name the*

benami property is transferred or held and includes a person who lends his name". The "*benami property*" means, as per Section 2(8), a property which is "*the subject matter of a benami transaction*" and also includes the proceeds from such property. The expression "*benami transaction*" is defined by Section 2(9) to connote a transaction or an arrangement where the property is transferred to or held by one person while the consideration for the same is provided or paid by another, it being held for the "*immediate or future benefit*" of the latter, this being subject to some exceptions with which one is not immediately concerned here.

99. Ordinarily, the disputes relating to attachment or confiscation under the law relating to *benami* property come up before the courts involving the parties in whose name the property is acquired on one hand and those claiming to have paid the consideration for such acquisition on the other. But, particularly in the context of attachment and confiscation, the disputes might also involve a transferee, for consideration, of property suspected to be held *benami* in the name of transferor. Such transferee is given (by Section 27) the right to object to confiscation, it being incumbent on him to prove that the property had been held or acquired by him from the transferor (*benamidar*) "*without his having knowledge of the benami transaction*". The test, thus, is of the transaction being *bonafide* and for "*adequate consideration*". The taint of *benami* in such disputes would generally precede the acquisition by the *bonafide* holder.

100. In contrast to the above mentioned earlier legislations, the Fugitive Economic Offenders Act is of recent origin, it having come into force with effect from 21.04.2018. The objective of this legislation is "*to provide for measures to deter economic offenders from evading the process of law in India*", which is similar to one of existing general law of proclamation and attachment under Sections 82-83 Cr. PC, the idea being to compel appearance. As in PMLA, this law, however, also focuses on certain specified economic ("*scheduled*") offences (as included in the schedule), the value involved wherein exceeds the minimum threshold (Rs.100 Crore), the focus of attachment leading to confiscation, upon declaration of a person as "*fugitive economic offender*" being on the "*proceeds of crime*". The definition of the expression "*proceeds of crime*" under this law is similar to that of identical clause in PMLA. A person is declared fugitive economic offender if the special court finds that a warrant for his arrest in relation to a scheduled offence having been issued by any court in India he "*has left India so as to avoid criminal prosecution*" or being abroad "*refuses to return*" to India "*to face criminal prosecution*". The property which can be attached and confiscated under this law would be the one acquired by the "*proceeds of crime*" or the value thereof, it including *benami* property held in India or abroad, even if such property were to be not "*owned by the fugitive economic offender*".

101. Section 5 (4) protects the continuation of enjoyment of the immovable property by a "*person interested*" if he had a claim or title to "*any interest in the property*". Similarly, in terms of Section 12(7),

a property may be held "*exempt from confiscation*" if a third party ("*any other person, other than the fugitive economic offender*") has "*an interest*" which was "*acquired bonafide and without knowledge of the fact that the property was proceeds of crime*".

102. Generally speaking, the civil sanction of forfeiture (for confiscation) of property is thus directed by all the above-mentioned enactments against property with which there is a *link* or *nexus* of the criminal offence. A *bonafide* holder of such property is protected but the onus to displace the inference arising from the evidence available by proving that his acquisition was legitimate and for adequate consideration is on him.

PROCEEDS OF CRIME : TARGETTED ASSET(S)

103. The special legislation against money-laundering (PMLA) seeks to enforce the sanction of confiscation (initiated by attachment) against ill-gotten assets expecting to ensnare them in a net wider than under most of the existing laws germane to the issue of economic well-being, security and integrity of India as a sovereign State. The expansive definition of the targeted property, described as "*proceeds of crime*", as given in Section 2(1)(u) is as under :

> *"proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;*
>
> (emphasis supplied)

104. The above definition may be deconstructed into three parts :-

(i). property derived or obtained (directly or indirectly) as a result of criminal activity relating to scheduled offence; or

(ii). the value of any such property as above; or

(iii). if the property of the nature first above mentioned has been "*taken or held*" abroad, any other property "*equivalent in value*" whether held in India or abroad.

105. It is vivid that the legislature has made provision for "*provisional attachment*" bearing in mind the possibility of circumstances of urgency that might necessitate such power to be resorted to. A person engaged in criminal activity intending to convert the proceeds of crime into assets that can be projected as legitimate (or untainted) would generally be in a hurry to render the same unavailable. The entire contours of the crime may not be known when it comes to light and the enforcement authority embarks upon a probe. The crime of such nature is generally executed in stealth and secrecy, multiple transactions (seemingly legitimate) creating a web lifting the veil whereof is not an easy task. The truth of the matter is expected to be uncovered by a detailed probe which may take long time to undertake and conclude. The total wrongful gain from the criminal activity cannot be computed till the investigation is completed. The authority for "*provisional*" attachment of suspect assets is to ensure that the same remain within the reach of the law.

106. Among the three kinds of attachable properties mentioned above, the first may be referred to, for sake of convenience, as

"*tainted property*" in as much as there would assumably be evidence to *prima facie* show that the source of (or consideration for) its acquisition is the product of specified crime, the essence of "*money-laundering*" being its projection as "*untainted property*" (Section 3). This would include such property as may have been obtained or acquired by using the tainted property as the consideration (directly or indirectly). To illustrate, bribe or illegal gratification received by a public servant in form of money (cash) being undue advantage and dishonestly gained, is tainted property acquired *"directly"* by a scheduled offence and consequently "*proceeds of crime*". Any other property acquired using such bribe as consideration is also "*proceeds of crime*", it having been obtained *"indirectly"* from a prohibited criminal activity within the meaning of first limb of the definition.

107. In contrast, the second and third kinds of properties mentioned above would ordinarily be "*untainted property*" that may have been acquired by the suspect legitimately without any connection with criminal activity or its result. The same, however, are intended to fall in the net because their owner is involved in the proscribed criminality and the tainted assets held by him are not traceable, or cannot be reached, or those found are not sufficient to fully account for the pecuniary advantage thereby gained. This is why for such untainted properties (held in India or abroad) to be taken away, the rider put by law insists on equivalence in value. From this perspective, it is essential that, before the order of attachment is confirmed, there must be some assessment (even if tentative one) as to the value of wrongful gain made by the specified criminal activity unless it be not possible to

do so by such stage, given the peculiar features or complexities of the case. The confiscation to be eventually ordered, however, must be restricted to the value of illicit gains from the crime. For the sake of convenience, the properties covered by the second and third categories may be referred to as "*the alternative attachable property*" or "*deemed tainted property*".

108. Generally, there would be no difficulty in proceeding with the attachment or confiscation of a tainted property respecting which there is material available to show that the same was derived or obtained as a result of criminal activity of specified nature, so long as such property is found held by the person who had indulged in such criminal activity, it amounting to money-laundering, as indeed those who may have aided or abetted such acts. Dispute, however, is likely to arise in relation to attachment or confiscation upon questions being raised at the instance of the person suspected of money-laundering (or his abettor) as to sufficiency of the material or reasons to believe for such action, as indeed of the fairness or propriety of the procedure followed. Dispute may also arise in such context if the property has been transferred to another person, after it had been acquired by the transaction relatable to money-laundering and before its attachment under PMLA. The third party may have a claim to agitate that it had been acquired by it *bonafide* and for lawful and adequate consideration.

109. The inclusive definition of "*proceeds of crime*" respecting property of the second above-mentioned nature - i.e. "*the value of any*

such property" - gives rise (as it has done so in these five appeals) to potential multi-layered conflicts between the person suspected of money-laundering (the accused), a third party (with whom such accused may have entered into some transaction vis-a-vis the property in question) and the enforcement authority (the State). Since the second of the above species of "*proceeds of crime*" uses the expression "*such property*", the qualifying word being "*such*", it is vivid that the "*property*" referred to here is equivalent to the one indicated by the first kind. The only difference is that it is not the same property as of the first kind, it having been picked up from among other properties of the accused, the intent of the legislature being that it must be of the same "*value*" as the former. The third kind does use the qualifying words "*equivalent in value*". Though these words are not used in the second category, it is clear that the said kind also has to be understood in the same sense.

110. Thus, it must be observed that, in the opinion of this court, if the enforcement authority under PMLA has not been able to trace the "*tainted property*" which was acquired or obtained by criminal activity relating to the scheduled offence for money-laundering, it can legitimately proceed to attach some other property of the accused, by tapping the second (or third) above-mentioned kind provided that it is of value near or equivalent to the proceeds of crime. But, for this to be a fair exercise, the empowered enforcement officer must assess (even if tentatively), and re-evaluate, as the investigation into the case progresses, the quantum of "*proceeds of crime*" derived or obtained from the criminal activity so that proceeds or other assets of

equivalent value of the offender of money-laundering (or his abettor) are subjected to attachment to such extent, the eventual order of confiscation being always restricted to take over by the Government of illicit gains of crime, the burden of proving facts to the contrary being on the person who so contends.

111. If such other property as above (*the alternative attachable property* or *deemed tainted property*) is owned by, or held in the name of, the accused, objections to attachment (or confiscation) would generally concern the material on which reasons to believe about money-laundering and acquisition of proceeds of crime are founded or the value of the property which has been attached. Again, the possibility of conflict involving interest of a third party comes in for which the *bonafide*s of the acts through which such third party may have acquired interest in the targeted property, as indeed of the lawfulness and adequacy of consideration for such acquisition, would need scrutiny.

THE ARGUMENT OF PREVALENCE OF CERTAIN LAWS (RDBA, SARFAESI ACT & INSOLVENCY CODE) OVER PMLA

112. Chronologically speaking, RDBA (in its original form and moniker RDDBFI Act) was enacted in 1993, followed by SARFAESI Act coming on the statute book in 2002, the PMLA being enacted in 2002, commencing in 2005, the Insolvency Code being the latest legislation enforced in 2016. These laws, enacted for different objects and reasons, have come with provisions declaring each of them to have the "*overriding effect*".

113. The RDBA was enacted "*for the establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions*" and for matters connected therewith or incidental thereto, the objective of "*insolvency resolution and bankruptcy of individuals and partnership firms*" having been added, by an amendment in 2016, against the backdrop of "*considerable difficulties*" experienced by the banks and financial institutions in recovering loans and enforcement of securities charged with them.

114. The RDBA established tribunals – Debt Recovery Tribunal (DRT) and Debt Recovery Appellate Tribunal (DRAT) – as a special mechanism through which the banks and financial institutions specified by the legislation could seek recovery of "*debts*" as may be "*due*" to them, it being the requirement of law that the amount of debt so claimed to be due should be above the minimum threshold thereby prescribed for cases which are governed by the said law, the jurisdiction of the civil courts being ousted, the law in that sense to have the overriding effect.

115. Section 34 of RDBA (as originally enacted in 1993), after amendment brought about with retrospective effect from 17.01.2000, reads as under :-

> *"34. Act to have over-riding effect - (1). Save as provided under sub-Section (2), 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.*

> *(2). The provisions of this Act or the rules made there-under shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948, the State Financial Corporations Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984, the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industrial Development Bank of India Act, 1989."*

116. The above clause clearly would not give primacy to RDBA over PMLA since the object of the original first said enactment was to provide for expeditious adjudication of the claims of the banks and financial institutions and quite distinct from the objective of the latter.

117. The SARFAESI Act, on the other hand, has aimed at regulating "*securitisation* and *reconstruction of financial assets*" as indeed "*enforcement of security interest*" besides certain other objectives, the "*existing legal framework relating to commercial transactions*" having "*not kept pace with the changed commercial practices and finance sector reforms*" such institutions in India not having the "*power to take possession of securities and sell them*" unlike their counterparts in the international arena, this resulting in "*slow pace of recovery of defaulting loans and mounting levels of non-performing assets*".

118. While construing the scheme and provisions of SARFAESI Act, a division bench of this court (of which I was a member) in *Urmila Kumari vs. Om Prakash Jangra and Ors., 2015 SCC OnLine Del 8283* had noted as under :

> *"24. The expression "security interest" as defined in Section 2(1)(zf) SARFAESI Act means "right, title and interest of any kind whatsoever upon property,*

created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31". Similarly, in terms of Section 2(1)(zc) SARFAESI Act, the expression "secured asset" means "the property on which security interest is created." For purposes of this special law, "banks" and "financial institutions", defined in Section 2(1)(c) and (m) respectively, qualify, as per Section 2(1)(zd), to be treated as "secured creditor".

26. Section 13 of the SARFAESI Act is conceived as the code prescribed for "enforcement of security interest" by the secured creditors, inter alia, for whose purposes the law was enacted. It opens with non-obstante clause and declares upfront that the provision herein is made, over and above, what is available under the general law through Section 69 and 69A of Transfer of Property Act.

28. Section 13 of SARFAESI Act vests in the secured creditor, the power to enforce the security interest "without the intervention of the Court or Tribunal". It may be noted, at the outset, that the rights thus conferred on the secured creditor are exercisable, by virtue of Section 13(12) through officers duly authorized in such behalf. For such purposes, the legislation sets out an elaborate procedure that begins with a notice under Section 13(2) issued by the secured creditor (giving requisite details of the amount due and the secured assets in which respect the enforcement is intended) and addressed to the borrower-in-default requiring him "to discharge in full his liabilities" within 60 days. On the expiry of the said period of 60 days calculated "from the date of notice" if the default continues, the secured creditor acquires the title to proceed further.

> *29. Upon being served with a notice under Section 13(2), the borrower is given the liberty, by Section 13(3A), to object or make any representation and in the event of such objection or representation, the secured creditor is obliged to consider it and communicate his response (specifying the reasons) within a week. Of course, by virtue of proviso to Section 13(3A), the non-acceptance of the objection or representation at this stage does not confer on the borrower any legal remedy in the nature of appeal or application.*
>
> *30. In the event of failure on the part of borrower to discharge his liability in full, in terms of the notice under Section 13(2), the secured creditor is permitted, by Section 13(4), to take recourse to any of the measures indicated in the said clause "to recover his secured debt". The measures include taking of the "possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset". Noticeably, Section 13(4) broadly indicates the said measures, pursuit whereof requires compliance with the procedure that is laid out in detail thereafter."*

119. *The* SARFAESI *Act* and *RDBA (earlier RDDBFI Act)* have an overlap in the matter of judicial remedy. *In Urmila Kumari* (supra), it was further noted as under :-

> *"39. The procedure prescribed by the law, and rules, for enforcement of security interest, as noted above, at the hands of the secured creditor (or its authorized officer) is subject to the remedy of appeal before the Debts Recovery Tribunal (DRT), constituted under RDDBFI Act, in terms of Section 17 SARFAESI Act. As noted earlier, mere non-acceptance of the objection or representation in response to the initial notice under*

> *Section 13(2) does not confer the right of challenge through appeal. The remedy of appeal becomes available as soon as effective action, including taking over of possession of the secured asset (and further process in the nature of sale, etc.) commences. The test to which the process undertaken by the secured creditor is subjected by DRT is indicated in Section 17(2) as under:-*
>
> > *"17(2). The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."*

120. It is thus clear that prime objective of SARFAESI Act is to *facilitate* enforcement of "*security interest*". *Section 37 of SARFAESI Act* makes it further clear that the provisions of this law, or rules made thereunder, have been enacted *"in addition to, and not in derogation of"* other laws including the RDBA.

121. The SARFAESI Act contains Section 35 which reads thus :-

> *"35. The provisions of this Act to override other laws - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

122. As in the case of RDBA, the above clause of SARFAESI Act would not render PMLA subservient to it because of the different objects and reasons of both enactments. Thus, the PMLA, enacted in

2002 (but enforced in 2005), continued to prevail, particularly in the matter of attachment and confiscation, by virtue of Section 71 which reads thus :-

> *"71. 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."*

123. But, some confusion has come about, as is the subject matter of the discourse in the impugned decisions of the appellate tribunal, on account of certain amendments, *inter alia*, to RDBA and SARFAESI Act, by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (Act no.44 of 2016), which came into force from 01.09.2016. As per the statement of objects and reasons of the said amending law (Act no. 44 of 2016), the core legislative concern has been the need for "*expeditious disposal of recovery applications, such matters being pending for money years due to various adjournments and prolonged hearings*", the purpose of amendments to RDBA (then RDDBFI Act) being indicated thus :

> *"3. The amendments proposed in the Recovery of Debts due to Banks and Financial Institutions Act, 1993 inter alia, include (i) expeditious adjudication of recovery applications; (ii) electronic filing of recovery applications, documents and written statements; (iii) priority to secured creditors in repayment of debts; (iv) debenture trustees as financial institutions; (v) empowering the Central Government to provide for uniform procedural rules for conduct of proceedings in*

the Debts Recovery Tribunals and Appellate Tribunals."

124. Similarly the prime objective sought to be served by the amendments to SARFAESI Act was set out in the statement of objects and reasons as under :-

> *"2. The amendments in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are proposed to suit changing credit landscape and augment ease of doing business which, inter alia, include (i) registration of creation, modification and satisfaction of security interest by all secured creditors and provision for integration of registration systems under different laws relating to property rights with the Central Registry so as to create Central database of security interest on property rights; (ii) conferment of powers upon the Reserve Bank of India to regulate asset reconstruction companies in a changing business environment; (iii) exemption from stamp duty on assignment of loans by banks and financial institutions in favour of asset reconstruction companies; (iv) enabling non-institutional investors to invest in security receipts; (v) debenture trustees as secured creditors; (vi) specific timeline for taking possession of secured assets; and (vii) priority to secured creditors in repayment of debts."*

125. By the above-mentioned amendment of 2016, the following provision has been inserted in RDBA :-

> *"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 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."

126. Similarly, by the above-mentioned amendment of 2016, while inserting a new chapter (no.IVA) relating to "*registration by secured creditors and other creditors*" in SARFAESI Act, conferring (by Section 26-D) right of enforcement of securities, a new provision - Section 26 E – was added (in the same chapter), reading thus :-

"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 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."

127. The Insolvency Code (referred to in explanations in above quoted clauses), enacted and enforced in 2016, with the objective of consolidating and amending the laws "*relating to reorganization and*

insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote enterpreneurship, availability of credit and balance the interest of all the stake holders including alteration in the order of priority of payment of government dues" has also come with a declaration of its primacy through the following provision :

> *"238. Provisions of this Code to override other laws - The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*"

128. It is the view of the appellate tribunal that the insertion of Section 31-B to RDBA and Section 26-E to SARFAESI Act by the amendment of 2016 renders the said laws to have an overriding effect over PMLA. Though the issue raised by the Resolution Professional (RP) in the fourth captioned appeal with reference to the Insolvency Code was not urged before the appellate tribunal, similar argument is pressed to seek primacy for the Insolvency Code over PMLA on account of Section 238 of the former.

129. At the hearing, however, it was noted that some of the amendments made to the SARFEAESI Act by second chapter of Act No.44 of 2016 are yet to come into force and this includes the chapter (no.IV-A) on the subject of *"registration by secured creditors and other creditors".* Section 26-E (priority to secured creditors) with reference, *inter alia,* to which the aforementioned view has been taken

by the Appellate Tribunal falls in said Chapter (no. IV-A) by virtue of Section 18 of the Act No.44 of 2016. Strictly speaking, therefore, a view to the effect taken by the tribunal by reference to Section 26-E (which is yet to come into effect) was impermissible. Be that as it may, since the said Chapter (no.IV-A) has been inserted in SARFEAESI Act by the legislature, and is likely to come into force in future, its effect on the issues being addressed in these matters may be considered also on the assumption that it is part of the law.

130. For comprehensive understanding of the subject, before proceeding further, it may be noted here that the existing provisions in SARFEAESI Act, particularly the Chapter (no. IV) captioned *"Central Registry"* envisage, *inter alia, "registration of ... creation of security interest*" (as indeed of its modification), through a central registry established under Section 20 by the Central Government, its database required to be integrated with other registration systems by virtue of Section 20-A, the mandate in terms of notification issued under proviso to Section 23(1) for all such transactions to be compulsorily registered within the period specified. It may be added here that the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (Central Registry) Rule, 2011 published in the Gazette of India on 31.03.2011 govern the procedure and the timelines for such registration.

131. The Chapter (no. IV-A) on the subject of *"registration by secured creditors and other creditors"* - containing sections 26-B to 26-E – is primarily meant to extend the above-said requirement of

compulsory registration, *inter alia*, of *"security interest over any property of the borrower"* to "*all creditors other than the secured creditors".* As and when the said Chapter (no. IV-A) is notified and brought into force, the registration of the "*security interest"* would become a condition precedent for the creditor to exercise *"any right"* of "*enforcement of securities"* under the SARFEAESI Act by virtue, *inter alia*, of Section 26-B(3) and Section 26-D.

132. But, the position of law may be examined assuming also the situation to prevail when above noted amendment to SARFEAESI Act, come into force. In this context, the objects and reasons of the laws have to be the guiding factors. The law on the subject may be noted here.

133. The issue in *Bhoruka Steel Ltd.* (supra) before the Bombay High Court concerned conflicting claims under the then existing Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA" for short) and Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 ("the Special Courts Act of 1992", for short). The court held that if the language of the law is obscure and ambiguous, the object and purpose of a legislation assumes greater relevance and quoted the following views of the Supreme Court in *Sarwan Singh vs. Kasturi Lal, (1977) 1 SCC 750* :-

> *"When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation*

has no conventional protocol cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration."

134. In *Solidaire India Ltd.*(supra), the Supreme Court was dealing with similar issues concerning the conflict between SICA and the Special Courts Act of 1992 and quoted with approval the above decision in *Bhoruka*, observing thus :

"...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..."

135. In *KSL and* Industries *Ltd. v. Arihant Threads Ltd. and Ors., (2015) 1 SCC 166*, the effect of non-obstante clause in Section 32 of SICA on RDDBFI Act was examined by the Supreme Court, the latter enactment also containing non-obstante clause under Section 34(1). While concluding that the objective of the two enactments is entirely different, and observing that "*the purpose of one is to provide ameliorative measures for reconstruction of sick companies, and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions*", the rule laid down in a previous decision reported as *LIC vs. D.J. Bahadur, (1981) 1 SCC 315*, to the following effect was noted :-

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes — so too in life…"

136. The court also referred to the principle of contextual construction laid down in earlier ruling of *RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424*, holding thus :-

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may

well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

137. It was further clarified that :

"49. The term "not in derogation" clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings against the company and its properties should be stayed pending the process of reconstruction. While the term "proceedings" under Section 22 of SICA did not originally include the RDDB Act, which was not there in existence. Section 22 covers proceedings under the RDDB Act.

50. The purpose of the two Acts is entirely different and where actions under the two laws may seem to be in conflict, Parliament has wisely preserved the

proceedings under SICA, by specifically providing for sub-section (2), which lays down that the later Act, RDDB shall be in addition to and not in derogation of SICA."

138. In *Assistant Commissioner vs. Indian Overseas Bank* (supra), referred to by the tribunal, the issue before the full bench of the Madras High Court arose out of objection of the sales tax authority to recovery proceedings taken out by the bank against the property of the defaulting borrower under RDBA without taking care of the arrears of revenue. The court noted the insertion of Section 31-B in RDBA by the amending Act of 2016, holding the financial institution (a secured creditor) to have the "*priority of charge*" over the mortgaged property and with reference to said provision (Section 31B) held thus :

"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."

139. From the above discussion, it is clear that the objects and reasons of enactment of the four legislations are distinct, each operating in different field. There is no overlap. While RDBA has been enacted to provide for speedier remedy for banks and financial institutions to recover their dues, SARFAESI Act (with added chapter

on registration of secured creditor) aims at facilitating the secured creditors to expeditiously and effectively enforce their security interest. In each case, the amount to be recovered is "*due*" to the claimant i.e. the banks or the financial institutions or the secured creditor, as the case may be, the claim being against the debtor (or his guarantor). The Insolvency Code, in contrast, seeks to primarily protect the interest of creditors by entrusting them with the responsibility to seek resolution through a professional (RP), failure on his part leading eventually to the liquidation process.

140. The purpose, purport and import of Section 31-B inserted in RDBA, and Section 26-E inserted in SARFAESI Act, has to be understood in above light. The marginal heads of both the provisions are identically worded - "*Priority to secured creditors*". Though Section 26-E of SARFAESI Act requires, as a condition precedent, "*the registration of security interest*", which is not requisite for Section 31-B of RDBA to operate, both provisions give precedence to realization of "*debts due to*" the "*secured creditor*", the clause in RDBA also clarifying it by additional words "*payable to them by sale of assets over which security interest is created*". Each of these provisions renders secondary "*all other debts*" and "*revenues, taxes, cesses*" and "*rates*" enforced by "*the Central Government, State Government or local authority*". Section 31- B of RDBA uses the expression "*due to*" while Section 26-E of SARFAESI Act uses the words "*payable to*" in relation to such debts, revenues, taxes, etc., the meaning being similar.

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

142. In view of the above, the reliance by the respondents in support of argument of government dues taking a back seat, on *Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. & Ors., (2000) 5 SCC 694; Union of India & Ors. vs. SICOM Limited & Anr., (2009) 2 SCC 121; Bank of Bihar vs. State of Bihar & Ors., (1972) 3 SCC 196;* and *Pr. Commissioner of Income Tax vs. Monnet Ispat and Energy Limited, SLP No.6483/2018, decided on 10.08.2018,* is misplaced.

143. The proceeds of crime, there is no doubt, are not even remotely covered by the expressions "*revenues, taxes, cesses*" or other "*rates*". The word "*revenue*" is the controlling word, the expressions following (taxes, cesses, rates) taking the colour from the same. The word revenue, in the context of Government is to be understood to be

conveying taxation [*Gopi Pershad vs. State of Punjab, AIR 1957 Punjab 45 (DB)*]. This is how the expression is defined by *Black's Law Dictionary, Eighth Edition* as also by *Cambridge English Dictionary (accessible online)*. The reliance by the respondents on the use of the expression "*non-tax revenue*" with reference to PMLA under major accounting head "*0047 Other Fiscal Services*" in the list of Heads of Accounts of Union and States issued by Controller General of Accounts, Department of Expenditure in the Ministry of Finance, Government of India under the Government of India (Allocation of Business) Rules, 1961 is misplaced. The use of the expression for accounting purposes – to take care of receipts flowing into the Consolidated Fund – cannot give to the value of proceeds of crime realised by sale of properties confiscated under PMLA the colour of taxation.

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

> *"Given Section 238 of the Insolvency and Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.*
>
> *We may also refer in this connection to Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown*

debts, do not take precedence even over secured creditors, who are private persons."

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

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

147. To sum up on the issue, the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the

text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA.

THE RIGHTS OF THIRD PARTY ACTING BONA FIDE

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

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

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

150. The legislation on money-laundering, as is the case of similarly placed other legislations providing for forfeiture or confiscation of illegally acquired assets, contains sufficient safeguards to protect the interest of such third parties as may have acted *bonafide*. Such safeguards and rights to secure their lawful interest in the property subjected to attachment (with intent to take it to confiscation) have already been noticed at length with reference to the statutory provisions. To recapitulate, and by way of illustration, reference may be made to the opportunity afforded by law (Section 8) to a person claiming "*a legitimate interest*" to approach the adjudicating authority and the appellate tribunal, as indeed the court, to prove that he had "*acted in good faith*", taking "*all reasonable precautions*", himself not being involved in money-laundering, to seek its "*release*" or

"*restoration*". In this context, however, as also earlier noted, the presumptions that can be drawn in terms of Sections 23 and 24 of PMLA are to be borne in mind, the burden of proving facts contrary to the case of money-laundering being on the person claiming to have acted *bonafide*.

151. The appellate tribunal, in the decision (dated 14.07.2017) earlier rendered (In Kolkata case), and followed in the matters from which these appeals have arisen, has also observed thus :

> *"59. These are four ingredients which are determinative factors on the basis of which it can be said that whether any person or any property is involved in money laundering or not. If there is no direct / indirect involvement of any person or property with the proceeds of the crime nor there is any aspect of knowledge in any person with respect to involvement or assistance nor the said person is party to the said transaction, then it cannot be said that the said person is connected with any activity or process with the proceeds of the crime. The same principle should be applied while judging the involvement of any property or any person in money laundering. This is due to the reason that if the property has no direct involvement in the proceeds of the crime and has passed on hands to the number of purchasers which includes the bona fide purchaser without notice, the said purchaser who is not having any knowledge about the involvement of the said property with the proceeds of the crime nor being the participants in the said transaction ever, cannot be penalized for no fault*

> *of his. Therefore, it cannot be the scheme of the Act whereby bona fide person without having any direct / indirect involvement in the proceeds of the crime or its dealings can be made to suffer by mere attachment of the property at the initial stage and later on its confirmation on the basis of mere suspicion when the element of mens rea or knowledge is missing..."*

152. The appellate tribunal has referred to the decision in *V. M. Ganesan* (supra). The issues relating to the attachment order under PMLA involved in that case concerned the claims not only of the person accused of money-laundering and also of predicate offences, they including those punishable under Sections 294(b), 406, 420, 465, 468, 471, 197, 419, 506 (ii) of IPC and Section 19 of Transplantation of Human Organs Act, 1994, it involving illegal kidney trade, but also of a financial institution (LIC Housing Finance Ltd.) which had advanced money to the said accused. The learned single judge of Madras High Court held thus :-

> *"47. 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.

48. Fortunately, the Adjudicating Authority is obliged under the proviso to Sub-Section (2) of Section 8 to issue a notice to every person, who claims the property to be his own and to provide an opportunity of being heard even to such a person. Therefore, the Adjudicating Authority is obliged to issue a notice to LIC Housing Finance Limited. They have already issued show cause notices to the writ petitioners, though the petitioner in the second writ petition is not obliged of obtaining the property as a result of any criminal activity, to come within the definition of the expression "proceeds of crime". The Adjudicating Authority has power, why, even an obligation and a statutory duty under Section 8(2) to look into the evidence produced by the petitioner in the second writ petition and LIC Housing Finance Limited and to come to an independent conclusion as to whether the provisional order of attachment is to be confirmed or not. Therefore, I am of the view that

the petitioners should submit themselves to the enquiry under Section 8(1)."

153. The ruling in *V.M. Ganesan* (supra), referred to above, is not of much help since the claim of third party (secured creditor) was yet to be inquired into or adjudicated upon. This court generally accepts the spirit behind the earlier quoted thoughts articulated by the tribunal, but finds it difficult to accept that a property may be allowed escape from civil sanction under PMLA only on the plea of the third party claiming to be at "*no fault*" or to have acted "*without notice*" of the criminal activity engaged in by the person from whom interest is acquired. As would be elaborated hereinafter, the burden to prove facts to rebut the statutory presumptions necessitates more than mere ignorance to be shown.

154. Generally speaking, the third party whose interest in a property may be adversely affected on account of it being attached under PMLA would be one who may have acquired such interest, right or title by a transaction involving, directly or indirectly, the person who is accused of, or charged with, the offence of money-laundering. Such acquisition of interest, right or title may be by transactions in the nature of sale / purchase, gift, lease, mortgage, pledge, hypothecation, etc. In the present cases, the respondent banks cried foul by objecting to the attachment orders respecting properties which were subject matter of mortgage or hypothecation with them.

155. It is well settled that by hypothecation, no interest or property is transferred to the hypothecatee, the latter acquiring nothing more than

an equitable and notional charge to have his claim realized by sale of goods hypothecated [*Paramatha Nath Talukdar v. Maharaja Probirendra M. Tagore, AIR 1966 Calcutta 405*]. The possession remains with the hypothecator, the hypothecatee having the right to take possession of the hypothecated property, in the event of default, and to sell it for realization of the debt secured by hypothecation [*Syndicate Bank vs. Official Liquidator, AIR 1985 Delhi 256*].

156. Section 58 of the Transfer of Property Act, 1882 ("TPA") defines the expression "*mortgage*" as "*the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability*", the transferor in such contract being a "*mortgagor*", transferee the "*mortgagee*" and the principal money with interest thereby secured known as "*the mortgage money*", the instrument by which such transfer is effected called a "*mortgage deed*".

157. Section 60 of TPA provides for the right of the mortgagor to require the mortgagee to deliver the mortgage deed and all documents relating to mortgage property and where the mortgagee is in possession of such property to deliver possession thereof to him at any time after the money has become due subject to he (the mortgagor) paying or tendering, at a proper time and place, the mortgage money, such right being known as the equity of "*redemption*". The mortgagor being the owner who had parted with some rights of ownership has a

right to get back the mortgaged property and the mortgage deed, in exercise of his right of ownership. The right of redemption is a statutory right under TPA which cannot be extinguished, this being subject to the right of the creditor to seek the remedy of fore-closure or sale under Section 67 or to exercise the power under Section 69 to sell the mortgaged property or appoint a receiver under Section 69A [*Shivdev Singh and Anr. Vs. Sucha Singh and Anr. (2000) 4 SCC 326*]. To put it simply, a mortgage is transfer of an interest in an immovable property for the purpose of securing repayment of a loan, the mortgagee's interest lasting "*only as long as the mortgage has not been paid off*" [*All Indian Film Corporation Ltd. vs. Raja Gyan Nath, 2(1969) 3 SCC 79*].

158. A hypothecatee or a mortgagee, thus, has a limited interest in the property, the right restricted to have the debt realized by putting the hypothecated goods or mortgaged property to sale. There is no ownership, or right to possess, vesting in either. At the same time, it must be added that the charge or encumbrance of a third party in a property attached under PMLA can be treated as "*void*" if there is material to show that it had been created "*to defeat*" the law, such declaration rendering the property liable to attachment and confiscation in favour of the Government vesting it "*free from all encumbrances*".

159. As noted earlier, there are three parts of the definition of the expression "*proceeds of crime*", the first clearly referring to a property respecting which there is material to show the same to have been

"*derived or obtained*", directly or indirectly, by a person "*as a result of criminal activity (*of specified nature*)*". In case such property is held by the person who is "*charged with the offence of money-laundering*", there is a statutory presumption under Section 24(a) PMLA, using the expression "*shall presume*", about it being proceeds of crime involved in such money-laundering. It is a rebuttable presumption, the onus to prove facts to the contrary being on the person accused of such offence. If the acquisition of such property by such accused has involved more than one "*inter-connected transactions*", one of such transactions being proved to be involving money-laundering, a statutory presumption is raised under Section 23 PMLA that the other transactions form part of the former, the burden to prove facts to the contrary being again on the person claiming otherwise.

160. But, in cases where the enforcement authority seeks to attach other properties, suspecting them to be "*proceeds of crime*", not on the basis of fact that they are actually "*derived or obtained*" from criminal activity but because they are of equivalent "*value*" as to the proceeds of crime which cannot be traced, it is essential that there be some *nexus* or *link* between such property on one hand and the person accused of or charged with the offence of money-laundering on the other. In cases of this nature, the person accused of money-laundering must have had an interest in such property at least till the time of engagement in the proscribed criminal activity from which he is stated to have derived or obtained pecuniary benefit which is to be taken away by attachment or confiscation. It is with this view that PMLA provides for a possible presumption to be drawn, under Section 24(b)

using the expression "*may presume*", about a property being "*involved in money-laundering*" in the case of person other than the one who is charged with the offence of money-laundering. There is no doubt that such presumption, if drawn, may also be rebutted by evidence showing facts to the contrary.

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

162. But, in case an otherwise untainted asset (i.e. *deemed tainted property*) is targeted by the enforcement authority for attachment under the second or third part of the definition of "*proceeds of crime*", for the reason that such asset is equivalent in value to the tainted asset that was derived or obtained by criminal activity but which cannot be traced, the third party having a legitimate interest may approach the adjudicating authority to seek its release by showing that the interest

in such property was acquired *bona fide* and for lawful (and adequate) consideration, there being no intent, while acquiring such interest or charge, to defeat or frustrate the law, neither the said property nor the person claiming such interest having any connection with or being privy to the offence of money-laundering.

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

164. Though the sequitur to the above conclusion is that the *bonafide third party claimant* has a legitimate right to proceed ahead with enforcement of its claim in accordance with law, notwithstanding the

order of attachment under PMLA, the latter action is not rendered irrelevant or unenforceable. To put it clearly, in such situations as above (third party interest being prior to criminal activity) the order of attachment under PMLA would remain valid and operative, even though the charge or encumbrance of such third party subsists but the State action would be restricted to such part of the value of the property as exceeds the claim of the third party.

165. Situation may also arise, as seems to be the factual matrix of some of the cases at hand, wherein a *secured creditor*, it being a *bonafide third party claimant* vis-a-vis the *alternative attachable property* (or *deemed tainted property*) has initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the initiation of the latter action unwittingly having the effect of frustrating the former. Since both actions are in accord with law, in order to co-exist and be in harmony with each other, following the preceding prescription, it would be appropriate that the PMLA attachment, though remaining valid and operative, takes a back-seat allowing the secured creditor *bonafide third party claimant* to enforce its claim by disposal of the subject property, the remainder of its value, if any, thereafter to be made available for purposes of PMLA.

166. As already noted, the newly inserted provision contained in Sections 26-B to 26-E falling in Chapter (no. IV-A) on *"registration by secured creditors and other creditors"* of SARFEAESI Act are yet to be notified and brought into force. In the event of said statutory

clauses coming into force, a creditor will not be entitled to exercise the right of enforcement, *inter alia,* of security interest over the property of borrower unless such "*security interest"* has been duly registered under the said law. Upon such amended law being enforced, a *bona fide third party claimant* seeking relief against an order of attachment under PMLA will also be obliged to show due compliance with such statutory requirements.

167. As has been highlighted earlier, the provisional order of attachment is subject to confirmation by the adjudicating authority. The order of the adjudicating authority, in turn, is amenable to appeal to the appellate tribunal. The said forum (i.e. the appellate tribunal) may pass such orders as it thinks fit "*confirming, modifying or setting aside the order appealed against*" [Section 26(4)]. Undoubtedly, an aggrieved party is entitled in law to invoke the said jurisdiction of the appellate tribunal to bring a challenge to the orders of attachment (as confirmed) but, the law in PMLA, at the same time, also confers jurisdiction on the special court to entertain such claim for purposes of restoration of the property during the trial of the case [Section 8]. The jurisdiction to entertain objections to attachment conferred on the appellate tribunal on one hand and, on the special court, on the other, thus, may be co-ordinate, to an extent.

168. An argument, however, was raised, by the appellants that the respondents herein should have approached the special court, instead of the appellate tribunal, for consideration of their respective claims.

169. In view of above-noted legislative scheme, it must be clarified that if the order confirming the attachment has attained finality, or if the order of confiscation has been passed or, further if the trial of a case for the offence under Section 4 PMLA has commenced, the claim of a party asserting to have acted *bonafide* or having legitimate interest will have to be inquired into and adjudicated upon only by the special court.

170. But, the above exception cannot be applied to all cases of *bona fide* third party claimants so as to confer a general right to seek release of such property as last mentioned above from attachment even in cases where the encumbrance is created or interest acquired at a time around or after the date or period of criminal activity. In this category of cases, the third party will have the additional burden to prove that it had exercised due diligence having "*taken all reasonable precautions*" at the time of acquisition of such interest or creation of such charge, the jurisdiction to entertain and inquire into such claim and grant relief of release after order of attachment has attainted finality, or of restoration after order of confiscation, vesting only in the special court under Section 8(7) & (8) PMLA. The due diligence is to be tested amongst others, on the touchstone of questions as to whether the party had indulged in transaction after due inquiry about untainted status of the asset or legitimacy of its acquisition.

SUMMARISING THE CONCLUSIONS

171. It will be advantageous to summarise the conclusions reached by the above discussion, as under :-

(i). The process of attachment (leading to confiscation) of proceeds of crime under PMLA is in the nature of civil sanction which runs parallel to investigation and criminal action vis-a-vis the offence of money-laundering.

(ii). The empowered enforcement officer is expected to assess, even if tentatively, the *value* of *proceeds of crime* so as to ensure such proceeds or other assets of equivalent value of the offender of money-laundering are subjected to attachment, the evaluation being open to modification in light of evidence gathered during investigation.

(iii). The empowered enforcement officer has the authority of law in PMLA to attach not only a "*tainted property*" - that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence - but also any other asset or property of equivalent value of the offender of money-laundering, the latter not bearing any taint but being *alternative attachable property* (or *deemed tainted property*) on account of its *link* or *nexus* with the offence (or offender) of money-laundering.

(iv). If the "*tainted property*" respecting which there is evidence available to show the same to have been derived or obtained as a result of criminal activity relating to a scheduled offence is not traceable, or the same for some reason cannot be reached, or to the extent found is deficient,

the empowered enforcement officer may attach any other asset ("*the alternative attachable property*" or "*deemed tainted property*") of the person accused of (or charged with) offence of money-laundering provided it is near or equivalent in value to the former, the order of confiscation being restricted to take over by the government of illicit gains of crime.

(v). If the person accused of (or charged with) the offence of money-laundering objects to the attachment, his claim being that the property attached was not acquired or obtained (directly or indirectly) from criminal activity, the burden of proving facts in support of such claim is to be discharged by him.

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

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

(viii). The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting

which there is material available to show the same to have been "*derived or obtained*" as a result of "*criminal activity relating to a scheduled offence*" and consequently being "*proceeds of crime*", within the mischief of PMLA.

(ix). If the property of a person other than the one accused of (or charged with) the offence of money-laundering, i.e. a third party, is sought to be attached and there is evidence available to show that such property before its acquisition was held by the person accused of money-laundering (or his abettor), or it was involved in a transaction which had inter-connection with transactions concerning money-laundering, the burden of proving facts to the contrary so as to seek release of such property from attachment is on the person who so contends.

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

(xi). A party in order to be considered as a "*bonafide third party claimant*" for its claim in a property being subjected to attachment under PMLA to be entertained must show, by cogent evidence, that it had acquired interest in such property lawfully and for adequate consideration, the party

itself not being privy to, or complicit in, the offence of money-laundering, and that it has made all compliances with the existing law including, if so required, by having said security interest registered.

(xii). An order of attachment under PMLA is not illegal only because a *secured creditor* has a prior *secured interest* (charge) in the property, within the meaning of the expressions used in RDBA and SARFAESI Act. Similarly, mere issuance of an order of attachment under PMLA does not *ipso facto* render illegal a prior charge or encumbrance of a *secured creditor*, the claim of the latter for release (or restoration) from PMLA attachment being dependent on its *bonafides*.

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

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

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

and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

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

(xvii). If the order confirming the attachment has attained finality, or if the order of confiscation has been passed, or if the trial of a case under Section 4 PMLA has commenced, the claim of a party asserting to have acted *bonafide* or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court.

DECISION ON THE APPEALS

172. In view of the above conclusions, the impugned decisions of the appellate tribunal will have to be set aside. There is a need for further scrutiny particularly on facts, of the claims of the respondents, in their appeals which were presented before the said forum to challenge the orders of attachment, as confirmed by the adjudicating authority in the five cases. This may be illustrated hereinbelow.

173. It does appear that the assets which have been the subject matter of attachment in the appeals at hand are not "*tainted property*", the

same having been seemingly acquired prior to the criminal activity giving rise to accusations of money-laundering. But, they are sought to be attached and subjected to eventual confiscation on account of they being the *alternative attachable properties* or *deemed tainted properties*, which is permissible in law. The audi car (subject matter of first appeal) was acquired by a transaction which has no direct connection with the case of money-laundering. However, there is no clarity as to the value of proceeds of crime which are to be confiscated as against value of the attached property as indeed the extent of the debt yet to be recovered by the secured creditor. The monetary gains made by the transactions which are subject matter of the accusations of money-laundering on account of illicit foreign exchange transactions (third appeal) or the case of cheating by use of fabricated defence supply orders (fourth appeal), both involving public servants, require closer scrutiny as to the claim of the respondent banks of *bonafide* action. Though there is no such element of complicity on part of any of the officials of the respondent banks in the case relating to fictitious hospital equipment (second appeal) or the one involving consortium of banks (fifth appeal), scrutiny respecting legitimacy and *bonafide* of the claim on the touchstone, *inter alia*, of the subsisting value of the secured interest and chronology of events leading to attachment would be necessary.

174. It will be appropriate that such further scrutiny as is necessary on the touchstone of above principles is undertaken by the appellate tribunal after calling for further responses (and inputs) from each side.

175. Ordered accordingly.

176. Thus, the appeals are allowed. The impugned decisions of the appellate tribunal are set aside. The matters arising out of the appeals of the respondents stand revived and restored for further consideration by the appellate tribunal. The parties are directed to appear before the said forum on 15.04.2019.

177. The appeals, and the applications filed therewith, stand disposed of in above terms.

R.K.GAUBA, J.

April 02, 2019
nk/yg/vk