M.L. CASE NO 07 OF 2018
CNR-WBCS01-000592-2018
Present: Shri Soumendra Nath Das
JO Code No: – WB01132.
Chief Judge, City Sessions Court, Calcutta.

Order no. 61 dated 05.08.2024

Today is fixed for passing order in respect of the petition dated 20.11.2023.

Learned Advocate for the applicant/official liquidator Sanjit Kumar Nayek is present before this Court.

Learned Advocate for the Enforcement Directorate is also present.

Now the Petition dated 20.11.2023 and the objection petition dated 21.02.2024 is taken up together for passing order.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek submitted that the applicant, Sanjit Kumar Nayak, being the Official Liquidator of M/s. Skyrise Overseas Pvt. Ltd. (Formerly known as Saraf Impex Pvt. Ltd.) appointed by the Hon'ble National Company Law Tribunal, Kolkata Bench preferred the instant application under Section 8(8) of the Prevention of Money Laundering Act, 2002 and prayed for restoration of the attached property being one office bearing No. 112 of Super Built up Area 1489 Square feet (Net 1042 sq. ft.) and having one parking area of 1 car in the lower basement of the building No. 044 at first Floor of Building named "Diamond Prestige" having its address at 41A, Acharya Jagdish Chandra Bose Road, Police Station – Park Street, Kolkata, from the order of attachment dated 28.02.2022 in connection with ECIR/KLZO/09/2016/7785.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further submitted that the factual matrix of the case is that on the basis of a First Information Report being RCBSK2014E0001 dated 31.03.2014 registered by CBI, BS and FC against one M/S Prakash Vanijya Private Ltd a case was started under Sections 120B read with Section 420/467/471 of the Indian Penal Code, 1860 and Section 13(2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 at Park Street P.S and on the basis of which the Enforcement Directorate authority registered an ECIR being KLZO/09/2016 dated 05.09.2016. During enquiry, alleged involvement of M/s. Saraf Impex Pvt. Ltd. (presently known as Skyrise Overseas Pvt. Ltd.) was revealed and it was arraigned as an accused in the case. Subsequently, upon completion of investigation, the Enforcement Directorate Authority has filed a Petition of Complaint as well as a Supplementary Complaint before this Court. Based on the said petition of complaint the impugned proceedings being ML Case No. 07/2018 has been initiated under Section 3 and section 4 of the Prevention of Money Laundering Act, 2002.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that in terms of section 36 of Insolvency and Bankruptcy Code, 2016, the said Liquidator has formed the Liquidation Estate in relation to the Corporate Debtor which includes the property namely one office No. 112 of Super Built up Area of 1489 Square feet (Net area 1042 square feet)

and one parking area of one car in the lower basement of the building No. 044 at 1st Floor of the building named “Diamond Prestige” having its address at 41A, Acharya Jagdish Chandra Bose Road, Police Station Park Street, Kolkata.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that on 09.08.2019 the Hon’ble National Company Law Tribunal, Kolkata Bench initiated the corporate insolvency resolution process against one M/s Saraf Impex Private Limited, presently known as M/s Skyrise Overseas Private Limited and on 11.02.2020 upon non submission of any resolution plan before the Hon’ble National Company Law Tribunal, Kolkata Bench, the said Tribunal initiated the liquidation process and on 20.02.2020 the Hon’ble National Company Law Tribunal, Kolkata Bench replaced Mr. Vikram Kumar and appointed Mr. Sanjit Kumar Nayak i.e. the Applicant as the Official Liquidator.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that on 23.09.2021 the Directorate of Enforcement had asked the Applicant to produce the documents in relation to the investigation done against the Corporate Debtor and on 19.10.2021 the applicant expressed his inability to provide such documents and the applicant official liquidator also informed the Directorate of Enforcement about the Liquidation Process and apprised the Enforcement Directorate that as per section 33(5) of the Insolvency and Bankruptcy Code, 2016, no suit or other legal proceedings shall be instituted by or against the Corporate Debtor except any litigation in connection with the liquidation proceedings initiated by the secured creditor arising under section 52 of the Insolvency and Bankruptcy Code, 2016.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that on 28.02.2022 despite having full knowledge regarding the initiation of the liquidation process, Deputy Directorate, Kolkata in ECIR No. KLZO/09/2016/7785 passed a Provisional attachment order in respect of the said property and then on 16.03.2022 the applicant had requested the Enforcement Directorate authority to remove such provisional attachment order as because there is a specific bar for institution of attachment proceedings as per the provisions of in Insolvency and Bankruptcy Code, 2016 and as the said Code has an overriding effect and therefore there is no scope of attaching the property of the company upon liquidation being already ordered, however, the same yielded no fruitful result.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that on 22.08.2022 Learned Adjudicating Authority confirmed the provisional attachment order.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further argued that the original Complaint being OC-1669 of 2022 was filed before the Learned Adjudicating Authority, New Delhi but in the meanwhile in the year 2022 the Applicant preferred one Writ Petition bearing no NWP(CRL) 1348/2022 before the Hon’ble High Court, of New Delhi, seeking quashing of the provisional attachment order along with show cause notice issued by the Learned Adjudicating Authority but the applicant had to withdrew the said writ petition as being infructuous.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended

that the Applicant had thereafter preferred an appeal before the Hon'ble Appellate Tribunal at New Delhi (Under Prevention of Money Laundering Act, 2021) being No. FPA-PMLA-4880/KOL/2022 challenging the order of attachment dated 22.08.2022 passed by the Adjudicating Authority affirming the provisional order of attachment passed against the said property.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the provisional attachment order passed by the Directorate of Enforcement, which had subsequently been affirmed by the Learned Adjudicating Authority under Prevention of Money Laundering Act, 2002, creates the following difficulties and/or impediments in proceeding with the liquidation process and thereby not only delaying the process but also frustrating the object of the statute and circumventing the endeavour of giving effort to protect the interest of bona-fide third party on the attached property. The difficulties faced by the applicant are enumerated as follows: The Liquidator is required to complete the Liquidation Process in a time bound manner as per the Regulation 44 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. The Period of Liquidation has expired on 10/01/2024. An extension of 180 days has been given from 10th January, 2024 and only one month is left to complete the entire process of the Liquidation. The Liquidator is unable to start the process of selling the assets of M/s. Saraf Impex Private Limited (Presently M/s. Skyrise Overseas Private Limited)- the Corporate Debtor as per the Regulation 32 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 due to the pendency of the attachment order. Unless the sale of the assets is complete, the Liquidator is unable to distribute the sale proceeds to the Stakeholders of the Corporate Debtor who has suffered huge losses due to the Insolvency of the Corporate Debtor, as per section 53 of Insolvency & Bankruptcy Code, 2016. As the assets of M/s. Saraf Impex Private Limited (Presently M/s. Skyrise Overseas Private Limited) are under the order of attachment of Enforcement Directorate and therefore no Bidders will come forward to participate in the Bidding Process for the litigated assets of the said corporate debtor. Even if few Bidders participate, they will try to buy the assets at a throw away price for which the Stakeholders will suffer irreparable loss. In the Liquidation Process of M/s. Saraf Impex Private Limited (presently M/s. Skyrise Overseas Private Limited), the following authorities are the Stakeholders: State Bank of India (Financial Institution) (Stake holder to the extent of 40.83%), Federal Bank Limited (Financial Institution), PEC Limited (A Govt. of India Enterprise under Ministry of Commerce), State Trading Corporation, Assistant Commissioner of Customs, Kolkata, Joint Commissioner of Commercial Taxes, Esplanade, Kolkata.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further argued that the power of the Enforcement Directorate Authority under the Prevention of Money Laundering Act, 2002 to seize/attach the property of a corporate debtor has been eclipsed with the liquidation order being passed by the competent authority under Section 32 A of the Insolvency and Bankruptcy Code, 2016. It is contended that scope, ambit and object of Section 8(8) of the Prevention of Money Laundering Act, 2002 is to be correctly interpretated and approach need to be made rationally and is to adopt the proper procedure while deciding such an application preferred

by a bona-fide third party who is a rightful claimant of the property of the corporate debtor and who has suffered quantifiable loss due to the money laundering and is in no way been involved in the alleged Money Laundering case.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the delay in concluding the liquidation process can in no way be attributable to the liquidator and as such it cannot be counted against the bona-fide of the liquidation process and therefore the liquidation process can in no way be stalled on the ground of delay.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the jurisdiction of this Court is enshrined under the statute i.e the Prevention of Money Laundering Act, 2002 itself and is not eclipsed with availability of alternative remedy and/or identical application being pending before the different forum and harmonious construction of both the statutes is warranted for ensuring successful operation of both Insolvency and Bankruptcy Code, 2016 and Prevention of Money Laundering Act, 2002 in their respective fields. The judgements relied upon by the Enforcement Directorate are in applicable, rather recognizes only specific provisions in exception to the general restrictions of the application of Prevention of Money Laundering Act, 2002 for dealing with the application for restoring seized/ attached property at the instance of a bona-fide third party.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the Insolvency and Bankruptcy Code and the Prevention of Money Laundering Act are two separate statutes that operate in their own specific areas. However, the intervening domain of the Prevention of Money Laundering Act and the Insolvency and Bankruptcy Code has complex legal landscape in the existing legal system in India. The Insolvency and Bankruptcy Code was created to clarify the Bankruptcy procedure of corporate entity and individuals and to examine the possibility of restructuring the companies to maximize the interest of all stakeholders.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the Insolvency and Bankruptcy Code has been introduced in the legal system of India which has thereafter altered the insolvency landscape of our country.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the Insolvency and Bankruptcy Code is a dynamic legislation which was enacted with the objective of eradicating the uncertainty in the law relating to insolvency and eliminating the unnecessarily delay in proceeding with the insolvency and bankruptcy procedure relating to the corporate debtor who has failed to file an application for initiating a prepackaged insolvency resolution process. In order to complete the Insolvency resolution process the Insolvency and Bankruptcy Code provides a time bound process wherein, the control of the Corporate Debtor is in the hands of the creditor instead of the debtor. The legislative intent behind the enactment of Insolvency and Bankruptcy Code 2016 was to remove the ambiguity and simplify the process of the insolvency resolution process and liquidation of corporate persons existing in the earlier legislations on the subject. By introducing this new legislation, the legislature intended to consolidate the claims of all creditors with other pending liabilities of an insolvent entity for a

timely wrap-up of the resolution process. This ensured that assets of the Corporate Debtor are efficiently managed and do not deteriorate due to proceeding while also aiming to keep the debtor company as a going concern. To reach this end, Section 25(2)(a) of the Insolvency and Bankruptcy Code empowered the Resolution Professional to take possession of all assets of the Corporate Debtor and thus this provision ensures that these assets are not disposed of by the debtor hurriedly to escape the liability.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that a similar principle is being followed and applied in both the statutes while in the case of Insolvency and Bankruptcy code 2016 if a successful resolution application is not found and a successful resolution plan if could not be worked out for reviving the Corporate Debtor and the Corporate Debtor then is directed to be liquidated for liquidating the debts and its liabilities to different third parties and for dissolution of such corporate debtor. On the other hand, the object of Prevention of Money Laundering Act is to deny the right of criminals to reap benefit from the assets obtained from the illegal proceeds of crime.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the primary issue is to prevent the money laundering and to provide for confiscation of property derived from the proceeds of crime or involved in money laundering. The act of money laundering is an offence for which the prescribed punishment is provided under the statute itself. Therefore, Prevention of Money Laundering Act is a penal legislation which criminalizes the commission of money laundering. The Prevention of Money Laundering Act was passed by the Parliament to prevent money laundering in India and to provide adequate remedy in case such illegal gratifications occur. The scheme of the act envisaged attachment of assets as an interim measure before adjudicating the same on the merits of the case. This ensured that the properties which might have been acquired by the accused person illegally are not disposed of preventing the final remedy of confiscation.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that as proceedings under the Insolvency and Bankruptcy Code and the Prevention of Money Laundering Act have been initiated against the same entity in an overlapping timeline, conflict must arise due to the inherently different nature of the two legislations.

Ld. Advocate for the applicant/Official liquidator further argued that it was contended by the counsel for the Enforcement Directorate Authority that a person who is engaged and indulging in the offense of money laundering and accumulated wealth by way of an illegal act, such ill-gotten/tainted money which is defined as ‘proceeds of crime’ under the provisions of Prevention of Money Laundering Act cannot be used for repaying his debts to the respective customers/creditors and if the same is allowed to happen, then the assets which do not belong to him lawfully would then be used to discharge his civil legal liabilities which perhaps cannot be allowed but such argument is not tenable in law if we strictly interpret the provisions of Insolvency and Bankruptcy code 2016.

Ld. Advocate for the applicant/official liquidator Sanjit Kumar Nayek further contended that the proceeds of crime is defined under Section 2(1)(U) of the Prevention of Money Laundering

Act and the same is relating to any property derived or obtained directly or indirectly by any person as a result of a criminal activity relating to a scheduled offense 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. The definition of proceeds of crime as introduced in the statute include two kinds of properties, 'tainted property' that is the property which has been directly or indirectly obtained from a criminal activity that is a scheduled offense and 'deemed tainted property' that is if the tainted property of the offender is not available or is not traceable or is of a lesser value then, any other property of similar value can be attached.

Ld. Advocate for the applicant/official liquidator further contended that having regard to the definition of the proceeds of crime and its wide scope, any property accumulated by an offender by way of illegal activities and criminal activities is liable to be attached and confiscated for proceeding under Prevention of Money Laundering Act. However, such wide interpretation and application of the act will frustrate the legislative object of Insolvency and Bankruptcy Code, which is also negated by Prevention of Money Laundering Act, 2002 itself, otherwise exceptional provisions would not have been introduced in the said statute for 'restoring attached or confiscated property' in the interregnum. In view of the legislative mandate and the necessity of giving harmonious construction to both the statutes, some liberal interpretations and/or pragmatic approach is required to be undertaken while dealing with the peculiar circumstances like in the present case. Since the property in respect of which restoration prayer has been advanced is charged to a Public Sector Undertaking that is a 'Nationalized Bank' which is managed, controlled and monitored by the Central Government of India, the non-involvement of the said entity in the process of committing the offense of money laundering should have a reasonable bearing for deciding the merits of the prayer and In fact, that was the legislative intention behind incorporating an intermediatory procedure or process of introducing scope of restoring a provisionally attached and/or confiscated property during the pendency of any proceeding under Prevention of Money Laundering Act.

Ld. Advocate for the applicant/official liquidator further contended that the power of the authority under Prevention of Money Laundering Act, 2002 to seize or attach the property of a corporate debtor has been eclipsed with the liquidation order being passed by the competent authority under Section 32 A of the Insolvency and Bankruptcy Code, 2016.

He draws the attention to section 32A of the Insolvency and Bankruptcy Code which is as follows :- **Section 32A. Liability for prior offences, etc.--**(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-- (a) a promoter or in the management or control of the corporate debtor

or a related party of such a person; or (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court: Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled: Provided further that every person who was a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section. (2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not--(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

For the purposes of this sub-section, it is hereby clarified that-

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(iii) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

Ld. Advocate for the applicant/official liquidator further contended that a bare reading of

Section 32A of the Insolvency and Bankruptcy Code unerringly demonstrate that once a successful Corporate Insolvency Resolution Process is over that means the asset and management of the corporate debtor has been transferred to a successful resolution applicant through the process of concerned Corporate Insolvency Resolution Process or an order for commencing the liquidation process has been passed and the liquidation process pursuant to such order has actually commenced, no action can be taken under any law prevailing in India against the said corporate debtor or against its property for commission of an illegal and/or criminal act by the said corporate debtor prior to the commencement of the subject Corporate Insolvency Resolution Process.

In order to remove any impasse, the legislature by way of explanation appended to Section 32A of the Insolvency and Bankruptcy Code interpreted the 'action against the property' which include attachment, seizure, retention or confiscation of such property. Therefore, there is no ambiguity and/or no scope of giving any alternative interpretation so far as applicability of Section 32A of the Insolvency and Bankruptcy Code is concerned to the facts of this case.

Ld. Advocate for the applicant/official liquidator further contended that Section 32A of the Insolvency and Bankruptcy Code was introduced on 28th December, 2019. This assume significance in the context of conflicts with Prevention of Money Laundering Act, 2002 and the code being Insolvency and Bankruptcy Code itself. The Constitutional validity of Section 32A of the Insolvency and Bankruptcy Code was upheld by the Honble Supreme Court of India in the case of ***Manish Kumar vs Union of India reported in (2021) 5 SCC 1***.

- This section provides protection to the corporate debtor and its assets from actions of the of any other law including Prevention of Money Laundering Act and basically it adds a layer by explicitly shielding the corporate debtor from further prosecution for the offenses committed before the commencement of insolvency resolution process once the resolution plan is approved, or the liquidation process has commenced.
- However, this legislation explicitly curves out exceptions for continued liabilities in cases where promoters and directors were involved in the offenses covered under the Prevention of Money Laundering Act, which is not in the present case.
- Section 32A of the Insolvency and Bankruptcy Code restricts and shields the corporate debtor from post resolution actions but it preserves the liability of the promoters and directors of the concern irrespective of the shield given to the corporate debtor. This approach ensures that the human agency involved in committing the offense will be liable for the consequences and the corporate debtor since has gone through an ordeal of a cleaning process, its asset will be free from the consequences of the offense.
- It is a celebrated principle of interpretation that once a provision in the statute specifically includes a class of persons and exclude another class of person, the classification has been made purposely with a legislative intention and both the inclusion and exclusion has to be considered as mandatory and no exception or deviation from such mandate is permissible.
- It is immaterial whether the assets are retained or seized or forfeited or attached

or confiscated by any other law of the land including Prevention of Money Laundering Act.

Ld. Advocate for the applicant/official liquidator further contended that therefore, the legislative reforms must strike a balance to ensure that enforcement does not prevent the source of post-Corporate Insolvency Resolution Process distressed asset sale investment and to ensure full provision to firms' illness. This proposition of law will be further clarified in view of recent decisions passed by the different High Courts of the country, which placed emphasis on Section 32 A of the Insolvency and Bankruptcy Code and marks a pivotal development. It is clarified that this section protecting the corporate debtor from further prosecution once the resolution plan is approved or an order of liquidation has been passed ensuring a clean state for the entity post-insolvency resolution.

Ld. Advocate for the applicant/official liquidator then placed another judgment of the Hon'ble Supreme Court of India in the case of ***P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*****, (2021) 6 SCC 258** and interpreted the object and scope of Section 32A of Insolvency and Bankruptcy Code, 2016 in an exhaustive manner:

> "39. *The raison d'être for the enactment of Section 32-A has been stated by the Report of the Insolvency Law Committee of February 2020, which is as follows:*
> *17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP [Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.]*
> *17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29-A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.*
> *17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively. Liability where a Resolution Plan has been approved*
> *17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the adjudicating authority. [SBI v. Bhushan Steel Ltd., 2018*

SCC OnLine NCLT 32305, para 83(i)] Without relief from imposition of such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty-bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29-A. [For example, where the exemption under Section 240-A is applicable.]

17.7. Thus, the Committee agreed that a new section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased."

40. This Court in *Manish Kumar v. Union of India [Manish Kumar v. Union of India, (2021) 5 SCC 1]*, *upheld the constitutional validity of this provision. This Court observed: (SCC pp. 170-71, para 326)"*

It was further held by the Hon'ble Supreme Court in paragraph "*326 of the judgemnt*. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract

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

41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(*a*) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A (1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.

42. Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A (1) speaks of persons who are in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence" i.e. the offence referred to in sub-section (1), "as per the report submitted or complaint filed by the investigating authority …" *The report submitted here refers to a police report under Section 173 CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints. If the language of the second proviso is taken to interpret the language of Section 32-A (1) in that the "offence committed" under Section 32-A (1) would not include offences based upon complaints under Section 2(d) CrPC, the width of the language would be cut down and the object of Section 32-A (1) would not be achieved as all prosecutions emanating from private complaints would be excluded. Obviously, Section 32-A (1) cannot*

be read in this fashion and clearly incudes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process. Doubtless, a Section 138 proceeding would be included, and would, after the moratorium period comes to an end with a resolution plan by a new management being approved by the adjudicating authority, cease to be an offence qua the corporate debtor.

43. *A section which has been introduced by an amendment into an Act with its focus on cesser of liability for offences committed by the corporate debtor prior to the commencement of the corporate insolvency resolution process cannot be so construed so as to limit, by a sidewind as it were, the moratorium provision contained in Section 14, with which it is not at all concerned.* If the first proviso to Section 32-A (1) is read in the manner suggested by Shri Mehta, it will impact Section 14 by taking out of its ken Sections 138/141 proceedings, which is not the object of Section 32-A (1) at all. Assuming, therefore, that there is a clash between Section 14 IBC and the first proviso of Section 32-A (1), this clash is best resolved by applying the doctrine of harmonious construction so that the objects of both the provisions get subserved in the process, without damaging or limiting one provision at the expense of the other. *If, therefore, the expression "prosecution" in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in*."

The judgment of the Hon'ble Single Judge of Delhi High Court in the case of ***Rajiv Chakraborty, Resolution Professional of EIEL Vs. Directorate of Enforcement (2022) SCC Online Del 3703*** present an understanding of the provisions of Prevention of Money Laundering Act and Insolvency and Bankruptcy Code. This judgment presented a different aspect of interplay between the two legislations and relying upon another celebrated decision of *Nitin Jain Liquidators PSL Limited Vs. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director, Prevention of Money Laundering Act, 2002 (2021) SCC Online Del 5281* categorically observed *that no action can be taken against the properties of a corporate debtor in respect of the offenses committed prior to commencement of the corporate insolvency resolution process, once the resolution plan comes to be approved or sale of liquidation starts taking place*.

Ld. Advocate for the applicant/Official liquidator after placing the above judgments further contended that the logic behind the observation was that both the resolution plan and the liquidation process must be allowed to take its effect in a smooth and hassle-free manner and should forward to its logical conclusion in a time bound manner unhindered. This interpretation of Section 32A of the Insolvency and Bankruptcy Code is in the larger interest of stakeholders.

Ld. Advocate for the applicant/official liquidator further contended that the fact involved in the judgement of *Rajiv Chakraborty (Supra)* was the prevention of money laundering authority to freeze seventy four accounts of the corporate debtor when it was charged under the offence of money laundering and the same was undergoing the process of Corporate Insolvency Resolution Process. It was held by the Honble Delhi High Court that just because a particular property may have come to be provisionally attached under the provisions of Prevention of Money Laundering Act, it does not confer over the enforcing authority under the Prevention of Money Laundering Act as a superior or justified authority to supersede the provisions of the Insolvency and Bankruptcy Code and utilise the proceeds that it may receive upon selling of those property. There has to be a pragmatic approach in interpreting the operation or the application of both the legislation and while deciding the operation or effective application of Section 32A of the Insolvency and Bankruptcy Code.

It is argued by the Ld. Advocate for the applicant/official liquidator that the rigor of Prevention of Money Laundering Act has to be overpowered/Superseded as the section 32 A of the Insolvency and Bankruptcy Code provides for immunity to corporate debtor and/or their assets upon approval of a resolution plan and/or upon commencement of the liquidation subject to the conditions prescribed under the statute. Therefore, once a Corporate Insolvency Resolution Process is either ended in successful resolution plan or ended in a direction passed for liquidation of a corporate debtor, there cannot be any attachment pertaining to any property or asset of the said corporate debtor and with this limited purpose, the provision of Section 32A of the Insolvency and Bankruptcy Code will supersede the provisions of Prevention of Money Laundering Act.

Ld. Advocate for the applicant / official liquidator strenuously placed the judgment in the case of ***Nitin Jain Liquidators PSL Limited Vs. Enforcement Directorate through: Raju Prasad Mahawar, Assistant Director, Prevention of Money Laundering Act, 2002 (2021) SCC Online Del 5281,*** the Hon'ble Delhi High Court, while allowing the Liquidator to proceed with the liquidation proceeding and vacated the restriction imposed thereon observed as follows:

> 102. Upon a conspectus of the aforesaid discussion, the Court records the following conclusions:—
>
> H. The issue of reconciliation between the IBC and the PMLA, in so far as the present cause is concerned, needs to be answered solely on the anvil of Section 32A. Once the Legislature has chosen to step in and introduce a specific provision for cessation of liabilities and prosecution, it is that alone which must govern, resolve and determine the extent to which powers under the PMLA can be permitted in law to be exercised while a resolution or liquidation process is ongoing.
>
> I. The SOA as well as the contemporaneous material noted above, indubitably establishes a conscious adoption of a legislative measure to insulate the resolution applicant from the prospect of prosecution in respect of offenses that may have been committed by the corporate debtor prior to the commencement of the CIRP. This legislative guarantee stands enshrined in Section 32A (1). Similarly, the provision

unmistakably also insulates the properties of the corporate debtor from any action that may otherwise be taken in respect thereof for an offense committed prior to the commencement of the CIRP in terms of Section 32A (2).

J. Undisputedly and as has been explained in the decisions of the Supreme Court noticed above, maximization of value would be clearly impacted if a resolution applicant were asked to submit an offer in the face of various imponderables or unspecified liabilities. The amendment to sub-Section (1) of Section 31 and the introduction of Section 32A undoubtedly seek to allay such apprehensions and extend an assurance of the resolution applicant being entitled to take over the corporate debtor on a fresh slate. Section 32A assures the resolution applicant that it shall not be held liable for any offense that may have been committed by the corporate debtor prior to the initiation of the CIRP. It similarly extends that warranty in respect of the properties of the corporate debtor once a resolution plan stands approved or in case of a sale of liquidation assets.

K. A close reading of Section 32A (1) and (2) establishes that the legislature in its wisdom has erected two unfaltering barriers. It firstly prescribes that the offense, which may entail either prosecution of the debtor or proceedings against its properties, must be one which was committed prior to the commencement of the CIRP. Secondly the cessation of liability for the offense committed is to occur the moment a resolution is approved by the Adjudicating Authority or upon sale of liquidation assets.

L. The principal consideration which appears to have weighed was the imperative need to ensure that neither the resolution nor the liquidation process once set into motion and fructifying and resulting in a particular mode of resolution coming to be duly accepted and approved, comes to be bogged down or clouded by unforeseen or unexpected claims or events. The IBC essentially envisages the process of resolution or liquidation to move forward unhindered.

M. The Legislature in its wisdom has recognized a pressing and imperative need to insulate the implementation of measures for restructuring, revival or liquidation of a corporate debtor from the vagaries of litigation or prosecution once the process of resolution or liquidation reaches the stage of the adjudicating authority approving the course of action to be finally adopted in relation to the corporate debtor.

N. Section 32A legislatively places vital import upon the decision of the Adjudicating Authority when it approves the measure to be implemented in order to take the process of liquidation or resolution to its culmination. It is this momentous point in the statutory process that must be recognized as the defining moment for the bar created by Section 32A coming into effect. If it were held to be otherwise, it would place the entire process of resolution and liquidation in jeopardy. Holding to the contrary would result in a right being recognized as inhering in the respondent to move against the properties of the corporate debtor even after their sale or transfer has been approved by

the Adjudicating Authority. This would clearly militate against the very purpose and intent of Section 32A.

O. It becomes pertinent to recollect that one of primary objectives which informed the introduction of this provision was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor. The imperative for the extension of this legislative guarantee subserves the vital aspect of maximization of value.

P. The issue of creation of an offense or its nullification is a matter of legislative policy. An offense or a crime on a jurisprudential or foundational plane must be founded in law. Manoj Kumar has duly taken note of this aspect when it held that the creation or cessation of an offense is ultimately an issue of legislative policy. The Parliament upon due consideration deemed it appropriate and expedient to infuse the clean slate doctrine bearing in mind the larger economic realities of today.

Q. Regard must also be had to the fact the cessation of prosecution stands restricted to the corporate debtor and not the individuals in charge of its affairs. The PMLA and its provisions stand steadfast and do not stand diluted in their rigor and application against persons who were in control of the corporate debtor. It was this delicate balance struck by the Legislature which met approval in Manish Kumar.

R. Section 32A in unambiguous terms specifies the approval of the resolution plan in accordance with the procedure laid down in Chapter II as the seminal event for the bar created therein coming into effect. Drawing sustenance from the same, this Court comes to the conclusion that the approval of the measure to be implemented in the liquidation process by the Adjudicating Authority must be held to constitute the trigger event for the statutory bar enshrined in Section 32A coming into effect. It must consequently be held that the power to attach as conferred by Section 5 of the PMLA would cease to be exercisable once any one of the measures specified in Regulation 32 of the Liquidation Regulations 2016 comes to be adopted and approved by the Adjudicating Authority.

S. The expression “sale of liquidation assets” must be construed accordingly. The power otherwise vested in the respondent under the PMLA to provisionally attach or move against the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority comes to approve the mode selected in the course of liquidation. To this extent and upon the Adjudicating Authority approving the particular measure to be implemented, the PMLA must yield.

T. The Court thus comes to hold that from the date when the Adjudicating Authority came to approve the sale of the corporate debtor as a going concern, the cessation as contemplated under Section 32A did and would be deemed to have come into effect.”

Ld. Counsel for the applicant/official liquidator then referred judgement of the Hon'ble High Court at Calcutta in the matter of ***Ramswarup Industries Limited and Others Vs. Union of India (2022) SCC Online Cal 2571***, wherein it is observed that Section 32A of the Insolvency and Bankruptcy Code literally excludes the operation of Prevention of Money Laundering Act, granting protection under the Insolvency and Bankruptcy Code that overrides the power of the Enforcement Directorate to attach properties under the said statute. Because provisional order of attachment being passed subsequent to the order passed under Section 32 A of Insolvency and Bankruptcy Code, 2016, is vitiated and *de-hors* the lawful authority of the respondents.

Ld. Counsel for the applicant/official liquidator also referred to another judgement in the case of ***Shiv Charan and Ors. Vs. Adjudicating Authority under the Prevention of Money Laundering Act, 2002, Department of Revenue and Anr. (2024) SCC Online (BOM) 701*** *and* reiterated that upon passing an order under Section 32A of Insolvency and Bankruptcy Code, 2016 there is no scope of passing any order of attachment/seizure/forfeiture by the Enforcement Authority and as such directed release/restoration of the properties attached/seized.

Ld. Counsel also referred to another judgement in the case of ***Directorate of Enforcement, Headquarters Investigation Unit, New Delhi-110011 Vs. Sh. Manoj Kumar Agarwal, Resolution Professional and Ors. (2021) SCC Online NCLAT 121*** the Hon'ble National Company Law Appellate Tribunal, Delhi held that keeping in mind the objectives of the Insolvency and Bankruptcy Code, the authorities under the Prevention of Money Laundering Act that is the Enforcement Directorate are barred from exercising the power to arrest goods after the moratorium. Therefore, the scope of Insolvency and Bankruptcy Code has been further widened. It is reiterated by the Hon'ble NCLT, Mumbai Bench that the attachment of the assets by the Enforcement Directorate could not continue after the inclusion of the corporate debtor in the Corporate Insolvency Resolution Process and the issue of deciding fate of such attachment can also not be kept pending till conclusion of criminal trial.

Ld. Counsel also referred to another judgement in the case of ***Jagat Pal Paliwal and Anr. Vs. Jassum Propcon Projects Private Limited (2023) SCC Online NCLT 329***,*wherein* it has been categorically observed by the Hon'ble NCLT, Delhi Bench that *the power of the authorities under Prevention of Money Laundering Act to seize or confiscate property ceases when a liquidation plan has been approved or walked upon*.

Ld. Counsel also referred to another judgement in the case in the case of ***JSW Steel Ltd. Vs. Mahender Kumar Khandelwal and Ors. (2020) SCC Online NCLAT 431***, it is further clarified that upon approval of a resolution plan i.e. basically an order passed under Section 32 A of Insolvency and Bankruptcy Code, 2016, it becomes binding on all stakeholders including the government agencies. Therefore, the argument that the attachment has been made by the prescribed authority under the Prevention of Money Laundering Act in exercise of their power under the statute itself has no relevance for the purpose of appreciating the applicability of Section 32A of the Insolvency and Bankruptcy Code. The Act has been performed and discharged of official duty

is not an accepted argument in this consonance or the branch of law.

In view of the aforementioned submissions so advanced, it is explicit that *Section 32-A of the Insolvency and Bankruptcy Code in unambiguous terms specifies*

- the *approval of the resolution plan* in accordance with the procedure laid down in chapter-II or *liquidation* as laid down in chapter-III of the Insolvency and Bankruptcy Code, 2016 *as determining factor for exclusion of applicability of other statutes pertaining to the subject property*.
- The *power to attach any asset or property as conferred by Prevention of Money Laundering Act would cease to be exercisable once anyone of the measures specified in section 32A of the Insolvency and Bankruptcy Code comes to be adopted and approved by the concerned authority*.
- The expression both *the successful resolution plan* and *liquidation* need to be interpreted and/or construed accordingly. The expression "sale of liquidation assets" must be construed accordingly. The power otherwise vested in the respondent under the PMLA *to provisionally attach or move against the properties of the corporate debtor would stand foreclosed once the Adjudicating Authority comes to approve the mode selected in the course of liquidation*. To this extent and upon the Adjudicating Authority approving the particular measure to be implemented, the PMLA must yield.
- The power otherwise vested with the authority under the Prevention of Money Laundering Act *to provisionally attach or move against the properties of the corporate debtor would stand automatically foreclosed once the adjudicating authority approves the resolution plan or the liquidation of the corporate debtor*.

Therefore, it is rightly observed by the Hon'ble Delhi High Court in *Rajiv Chakraborty, Resolution Professional of EIEL Vs. Directorate of Enforcement (Supra)* under the heading 'Attachment and Effect' that

"Para 115 *Through Section 32A, the Legislature has authoritatively spoken of the terminal point whereafter the powers under the PMLA would not be exercisable*. The events which trigger its application when reached would lead to the erection of an impregnable wall which cannot be breached by invocation of the provisions of the PMLA. *The non obstante clause finding place in the IBC thus can neither be interpreted nor countenanced to have an impact far greater than that envisaged in Section 32 A*."

Ld. Advocate for the applicant/official liquidator further contended that hence, having a cumulative appreciation and consideration regarding Interpretation of non obstante clause appearing in both these statutes restrictive operation of attachment, forfeiture, confiscation under the corporate debtor while an order of liquidation has been passed under section 32A of Insolvency and Bankruptcy Code, 2016 completely rules out the scope of continuing with the attachment order ignoring the liquidation order already passed as the same is non-est in the eyes of law.

He streneuosly contended that interpretation of scope, ambit and object of Section 8(8) of Prevention of Money Laundering Act, 2002 and approach need to be adopted while deciding such an application preferred by a bona-fide third party who is a rightful claimant of the property,

suffered quantifiable loss due to money laundering and has no way been involved in alleged Money Laundering.

Ld. Advocate for the applicant/official liquidator further argued that the Prevention of Money Laundering Act in its substantive provision criminalises money laundering and provides a framework for the investigation, prosecution and confiscation of the proceeds of crime. The act encompasses various offense related to financial transactions and provides a comprehensive mechanism for the attachment and confiscation of tainted asset. The primary objectives of the statute are explicitly outlined in its long title "an act to prevent money laundering and to provide for the confiscation of the property derived from or involved in money laundering." The focus is on securing the integrity of the financial system by carving illicit financial activities and dismantling the intricate wave of money laundering. In Roman law Confiscation means freezing or taking into the hands of the emperor and transferred to the imperial fiscus or treasury. The same principle is applicable for the goods or assets or the property. Under the provision of the Prevention of Money Laundering Act, the 'tainted property' in respect of which a proceeding under Prevention of Money Laundering Act has been initiated is liable to be forfeited, seized, attached and ultimately to be confiscated. Therefore, seizure or forfeiture and attachment are preceding steps to confiscation which is the ultimate steps to be taken under the statute itself. The person by his act, forfeits his property, the state thereupon appropriate it, that is confiscate hence to confiscate property implies that it has first been forfeited but to forfeit property does not necessarily imply that it will be confiscated. Upon the property is being confiscated, the same is vested with the Central Government. The word vesting has also been defined under different dictionary and law lexical in different manner. The accepted definition of 'vesting' is to give a legally fixed immediate right or personal or future enjoyment to grant, endow, clothe with a particular authority or a right or property.

Ld. Advocate for the applicant/official liquidator further argued that on confiscation of the property involved in money laundering it is vested in the central government as if it is free from all encumbrances. Section 9 of the Act deals with the vesting of property in central government in the event when an order of confiscation is passed by special Court. The scope and application of confiscation/forfeiture as appearing under respective provisions of Prevention of Money Laundering Act including Section 5 Section 8 and Section 9 of the same need a harmonious construction and interpretation so that both the statues being Prevention of Money Laundering Act as well as Insolvency and Bankruptcy Code, can co-exist and have their complete operation in the respective fields. This harmonious construction or interpretation is required for achieving the legislative purpose behind introducing the statutes which is considered as primary objective of any legislation being introduced.

Ld. Advocate for the applicant/official liquidator further argued that the circumstances on which a pragmatic interpretation is required to be given to the provision relating to confiscation seizure, forfeiture and attachment as appearing under prevention of Prevention of Money Laundering Act, 2002, is further detailed herein below: The subject application has been preferred by the Liquidator of the Company for protecting interest of a nationalised bank i.e. a public sector

undertaking, managed, controlled and administered by the central government itself, who is a bona-fide claimant and has a rightful claim over the property. The issue involved in this application relates to money of a nationalised bank, which is basically public money or public funds and the same cannot be allowed to be blocked, misused or unrecovered or misappropriated unnecessarily for a considerable period of time. Since the assets which are subject matter of the subject application are charged with the bank and insolvency resolution has been pursued under the Insolvency and Bankruptcy Code in connection with the said assets which ultimately resulted into passing a direction for liquidation, there is no scope of restrictive interpretation of confiscation or forfeiture and attachment or releases of the same. The authorities under the Prevention of Money Laundering Act must recognise the pragmatic reality that insolvency proceedings under the Insolvency and Bankruptcy Code does not designate to shield individual from the legitimate action arising out of financial crime, rather it provides a structured mechanism for the resolution of the distressed entity. Charging assets to the bank enhances the chances of successful resolution or liquidation for mitigating the liabilities of the corporate debtor ensuring the financial systems remains robust and *further keep this property in the reach of law* which is the prime consideration for issuing a direction for attachment under the Prevention of Money Laundering Act, 2002.

The argument advanced by the Ld. Advocate for the applicant/official liquidator that for rebutting the prayer advanced in the subject application is that operation of Insolvency and Bankruptcy Code absolutely has civil consequences and/or it is civil in nature, whereas, operation of Prevention of Money Laundering Act involves both civil and criminal consequences and as such Insolvency and Bankruptcy Code has no bearing for determining the scope and applicability of the provision of Prevention of Money Laundering Act.

Ld. Counsel for the applicant/official liquidator streneously argued that the Prevention of Money Laundering Act deals with money laundered in two folds namely the confiscation and the prosecution. The confiscation proceeding being civil in nature dealing with the proceeds of crime that begin with the attachment of the property and the prosecution relates to so far as the punishment to be inflicted on the offenders. It is argued that it has been categorically observed by different Hon'ble High Courts of this country that a procedure for preliminary attachment before a final decision on confiscation is taken under the Prevention of Money Laundering Act is nearly a preventive measure and not a punishment under the said Act. It has also differentiated attachment of property from the ultimate remedy of confiscation of the property. The attachment proceedings are civil in nature under the Prevention of Money Laundering Act. The procedure of attachment involved under the Prevention of Money Laundering Act, 2002 mandates following several steps including reasonable opportunity of hearing as mandated under the civil law of the land. It cannot be applied to the detriment of the third party who is no way involved in the offence of money laundering and is an innocent creditor having a bona-fide claim over the property. The said contention is further fortified by the decision in the case of Biswanath Bhattacharya Vs. Union of India and Ors. reported in (2014) 4 SCC 392 as held by the Hon'ble Supreme Court. It was held in the said judgement of the Hon'ble Apex Court that the power of the attachment which stands

comprised under Section 5 and 8 of the Prevention of Money Laundering Act is basically the procedure for adoption of principles of civil forfeiture. The legislative intent of which is that offender of money laundering offences does not enjoy the fruits of the property purchased from illgotten money. The attachment of property under Section 5 of the Prevention of Money Laundering Act is an aspect of civil feature permissible and available to the sovereign when property is illegally acquired. There is no right to enjoy the property that is derived from unlawful conduct and thus, the non-conviction-based asset forfeiture is an internationally accepted practice in the fight against organised crime and money laundering.

Ld. Counsel for the Applicant/Official Liquidator thereafter argued that it has been rightly observed by the Hon'ble Delhi High Court in ***Deputy Director, Directorate of Enforcement, Delhi versus Axis Bank & Ors. (2019) SCC Online DEL 7854*** wherein Hon'ble Court held as followes:-

"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. However, the said proposition or the restriction provided under the statute has no manner of application in the case at hand, because the application over here has been preferred by a third party i.e. the Liquidator of the Company for protecting interest of a third party i.e. State Bank of India, a public sector undertaking who is a bona-fide creditor having a rightful claim over the property of the corporate debtor and is no way associated with the money laundering.

The scope, ambit and application of 'restoration of attached property' under Section 8 (8) of Prevention of Money Laundering Act, 2002 requires an interpretation on the aforementioned aspect and factual palate involved in the instant case.

Like 'Confiscation' and 'forfeiture', the term 'release of property' or 'restoration of property' is also not defined under Section 2 of the Prevention of Money Laundering Act, 2002 but it means that the property shall be returned to the person from whom such property was seized or chosen. Sub-Section (6) and (7) of Section 8 of the Prevention of Money Laundering Act, 2002 deals with 'release of property' by the Learned Special Court if such property is not involved in money laundering through the person entitled to receipt if after having regard to the material before it.

On the other hand, Sub-Section (8) of Section 8 of Prevention of Money Laundering Act, 2002 deals with 'restoration of property' during interregnum period or the trial being pending by the Learned Special Court. Restoration means 'restoration of something is the act of bringing back a system, law etc. that existed previously'. In other words, bringing up property to its previous status. Section 8(8) of Prevention of Money Laundering Act deals with restoration of property confiscated by the authority under Prevention of Money Laundering Act, 2002, by the Learned Special Court."

Section 8 of Prevention of Money Laundering Act, 2002 reads as under:

"(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 [1][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 [2][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 [3][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 [4][investigation for a period not exceeding [5][three hundred and sixty-five days] or] the pendency of the proceedings relating to any [6][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; Explanation- For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.(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 [10][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 money laundering 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."

It is appearing from plain reading of Section 8 of Prevention of Money Laundering Act, 2002 that on conclusion of a trial for the offence of money laundering, the property attached shall be confiscated to the Central Government. If at any stage it is found that such confiscation is bad in law and order for restoration of such property may be passed by the Special Court. Section 8(8) of Prevention of Money Laundering Act provides for restoration of the confiscated property.

It is also contended by placing the Judgement of Axis Bank that originally such provision was not there in the parent act but by way of amendment sub-section (8) was inserted in section 8 with effect from 14.05.2015.

The above provision clearly stipulates that the confiscated property may be restored by an order of the Learned Special Court and for passing such order following essential ingredients have to be kept in view:

a. The property has been attached/seized/forfeited or confiscated to the central government under Sub Section 5;
b. Claim shall be filed for restoration of the property illegally confiscated;
c. The claimant of the properties shall have acted in good faith;
d. Special Court has to follow the procedures for restoration of the property;
e. Special Court may direct the Central Government to restore such confiscated property or part thereof to the rightful claimant;
f. The claimant shall have a legitimate interest in the property;
g. The claimant may have suffered a quantifiable loss as a result of the offense of money laundering and
h. Satisfaction of the special Court that the claimant has suffered the loss despite having taken all reasonable precaution and is not involved in the offence of money laundering;

All these essential conditions have to be fulfilled for passing an order of restoration of property by the Special Courts on its satisfaction, during the trial or after conclusion of the trial.

Ld. Advocate for the applicant/official liquidator further argued that from the scheme of the Act, it is apparent that an order of confiscation or release or restoration of the property must be relating to 'proceeds of crime' and therefore, the property which is being subjected to confiscation or in respect of which any prayer for restoration is being made or an order thereof is passed has to be in respect of a property acquired from the 'proceeds of crime' otherwise the section itself has no manner of application. Unless and until the property in respect of which prayer for release or restoration has been advanced is 'proceeds of crime', in connection with the subject prosecution of Prevention of Money Laundering Act, there will be no reasonable apprehension that it will be confiscated in connection with the said proceeding and there is no scope of restoring the same to a third party in terms of Section 8(8) of Prevention of Money Laundering Act.

Section 8(8) of Prevention of Money Laundering Act, 2002 is an exception to the general principles of Prevention of Money Laundering Act, 2002 which prescribes the property attached has to be kept in the custody of the Court till conclusion of trial. The exception has been introduced by amendment to the original Section and subsequently by inserting proviso clause to the said sub-section to protect the interest of a third party.

Ld. Advocate for the applicant/official liquidator further argued that where a property has been attached with third party interest in that property it has to be protected. For example, if there is any secured debt over the property and the property has been attached, interest of the creditors shall be protected and the subject matter of this case is identical with such principle.

Ld. Advocate for the applicant/official liquidator further argued that the Hon'ble Delhi High Court in the celebrated decision of **Deputy Director, Directorate of Enforcement, Delhi versus Axis Bank & Ors. (2019) SCC Online DEL 7854** while dealing with the issue that is claim of a third party for release of the property has held as follows:

"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 it 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)."

(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 interconnection 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 PMLA law, such declaration cannot be made rendering such property unavailable for attachment and confiscation under PMLA, free from such encumbrance.

(xi). A party in order to be considered as a "bona-fide 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 bona-fides.

(xiii). If it is shown by cogent evidence by the bona-fide third party claimant (as aforesaid), stating 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 bona-fide third party claimant (as aforesaid), stating 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 prescribed 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 bona-fide third party claimant (as aforesaid) is a "secured creditor", pursuing enforcement of "security interest" in the property (secured asset) sought to be attached, it being an alternative attachable property (or deemed tainted property), it having acquired such interest from person(s) accused of (or charged with) the offence of money-laundering (or his abettor), or from any other person through such transaction (or inter-connected transactions) as involve(s) criminal activity relating to a scheduled offence, such third party (secured creditor) having initiated action in accordance with law for enforcement of such interest prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge or encumbrance of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

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

He referred to another jugement in the Case of ***Kiran Mazumdar versus Deputy Director, Directorate of Enforcement as reported in (2018) SCC online ATPMLA 42*** while considering the claimant's interest who acted under bona-fide relief, the appellate authority under Prevention of Money Laundering Act held as under:

"76. As regard to plea as to whether right of the appellant would prevail over the rights of the other secured creditors, no opinion is being expressed. The said aspect would be considered by the Court where the prayer of execution of sale deed is pending or before the Special Court who is also empowered to pass such order under the proviso of amended provision of section 8(8) of the Act (Act of 2018). All secured creditors including DRT and banks are at liberty to raise the objection as per law as admittedly this tribunal is not deciding the fate of title of the flat in question.

77. The second proviso of sub-section 8 of section 8 has been incorporated by the Act, 13 of the 2018. Both proviso of section 8(8) is read as under: —

"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."

78. From the entire gamut of the matter, it is evident that the appellant was the claimant in the flat. By making the entire payment, the appellant is becoming the stake-holder as the amount paid by the appellant was not proceeds of crime. The appellant is also not involved in the money laundering. The question of link and nexus in the criminal activities directly or indirectly does not arise.

79. As far as the impugned order dated 11.2.2016 is concerned, the said order is not sustainable in law and in the facts of the present case. The same is set-aside against the appellant with regard to flat in question. The provisional order is also quashed accordingly by allowing the appeal."

The interest of the third party is to be protected has been upheld by the Hon'ble High Court of this country in different judgment. The Hon'ble High Court at Bombay has upheld this contention in the case of ***Himanshu Kothari Versus Pen Coop. Urban Bank Limited (2016) SCC Online BOM 12835.***

The decision of the Hon'ble High Court as mentioned above substantiates the contention that the property confiscated under the Prevention of Money Laundering Act, 2002 shall be restored or released to protect the interest of the third party of the person to whom it belongs, as the case may be.

- The person having bona-fide interest in the property such as bona-fide purchaser, mortgagee, public sector undertaking unit etc. may seek redressal towards protection of its bona-fide interest in the Court of competent jurisdiction.
- Any person other that the person accused of the offence of money laundering, who otherwise has a lawful interest in the property which is provisionally attached by the Enforcement Directorate would qualify to be a third party.
- Although the Act does not define a third party or stipulates the rights and remedies available to such bona-fide third party, this issue was dealt with in detail by the Hon'ble Delhi High Court in the decision of ***Deputy Director, Directorate of Enforcement Delhi & Ors. Versus Axis Bank & Ors. (Supra)***.

It is contended that in this judgement several banks and financial institutions had granted credit facilities against hypothecation/charge over certain assets, the title holder of which assets

were charged under the Act and attachment orders were passed in respect of these assets deemed as proceeds of crime, thereby affecting the rights vested with the banks and financial institutions under various other statutes. The Appellate Tribunal under the Prevention of Money Laundering Act has set aside the attachment order on certain grounds and the orders of the appellate Tribunal were challenged before the High Court of Delhi separately. The High Court of Delhi clubbed all the appeals together and held that right under the statute and the act must coexist and be enforced in harmony without one being in derogation of the other. The High Court at Delhi held that an order of attachment under the Act is as lawful as an action claimed by a third party and such an order of attachment is not rendered illegal merely because the third party has acquired interest in the property.

The High Court of Delhi further observed that mere issuance of the order of attachment cannot render illegal and bona-fide third party's interest in the property unless it was created to defeat the object of the act and the balance ought to be struck between the two competing principles. According to the High Court of Delhi, the scheme of the Prevention of Money Laundering Act, 2002 itself makes a way for a balance between these interests for instance, the Act provides an opportunity to a person claiming legitimate interest to approach the forum under the Act to provide that he had acted in good faith took all reasonable precautions, is himself not involved in money laundering and to seek a release or a restoration of the property under Section 8(8) of Prevention of Money Laundering Act.

The appreciation of the principles of law as interpreted by the Hon'ble High Courts of this country unerringly demonstrate that

- once a right of a third party over a property which has been attached in connection with a proceeding under Prevention of Money Laundering Act has been made and an application has also been preferred which disclose innocence, due diligence and rightful claim of the third party over the said property, the Learned Special Court before whom the criminal trial is pending has every authority to pass an order for restoration of the said property in favour of the said third party.
- The order of restoration is passed having regard to the essence and object of necessity of passing any order for immediate restoration in favour of the third party which in reality will mitigate the continuous loss it has suffered.
- The viability of the merit of the attachment order, does not have much bearing while exercising the power under Section 8(8) of Prevention of Money Laundering Act and the finality of the confiscation order which could have been passed is also not very much relevant in the case.

It is contended that having regard to the settled propositions of law and from the record itself, it is explicit that the conditions precedent for invoking or exercising power under Section 8(8) of Prevention of Money Laundering Act is very much existing in the case in hand and there is no scope for refusing the prayer so advanced on the premise that the trial is pending or the restriction under Prevention of Money Laundering Act does not permit such restoration. In fact, these arguments are contrary to the provisions of Section 8(8) of Prevention of Money Laundering Act itself and should not have any bearing in the eyes of law.

It was strenuously contended that allowing the restoration of the property as preferred in the application is no way similar to allowing an individual or an accused charged with the offence of money laundering to enjoy the property for his own benefits in spite of committing the offence under the Prevention of Money Laundering Act rather restoration actually sub-serve the object and purpose of the liquidation process, allows it to proceed to its logical conclusion within the period as prescribed under the law of the land itself and to comply with the order of a court of law in accordance with law.

It was also contended that the delay in concluding the liquidation process no way can be attributed to the liquidator and as such cannot be counted against the bona-fide of the liquidation process.

It was further argued that in order to give proper effect to the respective orders passed by Hon'ble NCLT, Kolkata Bench including the order dated 14.03.2024, the liquidation process had to be completed within the prescribed period i.e. 1 year from the commencement of liquidation as mandated under Regulation 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016. In terms of the provision of Section 5 (17) of Insolvency and Bankruptcy Code, 2016 the Liquidation Commencement date is the date on which the liquidation commences in terms of Section 33 of Insolvency and Bankruptcy Code, 2016. In the case in hand the date of Commencement of Liquidation process is 11th February, 2020.

Ld. Counsel also contended that it is needless to mention that from February, 2020 there was sudden outbreak of pandemic COVID-19 for which the regular lifestyle of the entire world got restricted and the movement of individuals were restrained. It is argued that the Hon'ble Supreme Court of India in the case of ***Cognizance for Extension of Limitation, reported in (2022) 3 SCC 117*** has categorically held that the period between March, 2020 to February, 2022 will be excluded for the purpose of calculating any period of limitation either for initiation or for termination of any liquidation proceedings.

He further submitted that therefore, the argument advanced by the Enforcement directorate that there is unexplained inordinate delay on the part of the Liquidator in completing the liquidation proceeding within prescribed period and the order of provisional attachment does not stand in the way of liquidation process as claimed has no force in the eyes of law.

Ld. Advocate for the applicant/official liquidator further submitted that In terms of Regulation 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the liquidator has to complete the entire liquidation process within a period of one year from the date of commencement of the liquidation process and in case of his failure to complete the same, the liquidator has to give an explanation to the concerned Bench of the National Company Law Tribunal thereby clarifying the reason for delay in completion of the process and has to pray for an extension of the period of limitation. Section 8(8) of Prevention of Money Laundering Act, 2002 also mandates restoration of the seized property at the earliest to protect the interest of the third party otherwise the bona-fide interest of the third party will be jeopardized.

Ld. Counsel for the applicant/official liquidator referred to the Judgement of the **Hon'ble NCLAT** in **Bank of India Vs. Deputy Director Directorate of Enforcement (2018) SCC**

Online ATPMLA 49 wherein the Hon'ble Court held as follows :-

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

Ld. Advocate for the applicant/official liquidator further argued that the cumulative appreciation of the respective provisions of law surely demonstrates that only the Learned Special Court before whom the criminal trial is pending under the Prevention of Money Laundering Act, 2002 has the exclusive authority to entertain any prayer as well as to pass an order of restoring any property seized/attached/forfeited in connection with the said PMLA proceeding, during pendency of trial and irrespective of any finality being reached in confiscation proceeding as well as alternative remedies available under the Statute.

It is further submitted that the order of attachment passed by the Enforcement Directorate and confirmed by the Adjudicating authority is itself beyond the jurisdiction and in complete violation of the mandate of law. Appeal is already pending before the appellate authority assailing legality, propriety and correctness of the same. It is explicit that the order of attachment has been passed and subsequently been confirmed ignoring the liquidation order passed by the Hon'ble NCLT, Kolkata Bench on a much prior date under Section 32 A of Insolvency and Bankruptcy Code, 2016 and as such there was no scope of passing any order against the property of the corporate debtor. It is argued that therefore, the order passed by the adjudicating authority is a nullity and non-est in the eyes of law. Pendency of appeal against such an order of adjudicating authority shall not stand in the way of exercising the power of this Court under Section 8(8) of Prevention of Money Laundering Act, 2002 as the same is independent of the other provisions/alternative remedies available under the statute. Any such interpretation and/or introduction of the restriction as intended by the authority will frustrate the legislative object itself and as such the argument need to be rejected in limine.

It is argued that the power, discretion and authority of the Special Court under Section 8(8) of Prevention of Money Laundering Act, 2002 is irrespective of the merits of the case i.e. whether the property is liable to be confiscated or not, whether the same is tainted or not and whether there are any other alternative remedies for addressing the grievances of the applicant or not. The only determining factor will be whether the application is preferred by or on behalf of a bona-fide third party, who is not involved in the alleged offence of money laundering and having rightful claim over the subject property or not and whether passing such immediate direction for restoration is for protecting the right of such third party or not.

Ld. Advocate for the Applicant further submitted that in view of the arguments advanced above and the reiteration of the propositions of law, the pith and substance of the argument advanced by the Enforcement Directorate that the application is a premature one, it amounts to forum shopping, there is no explanation for the delay in not completing the liquidation process within the prescribed period after the order has been passed, the property being proceeds of crime

cannot be used for reducing the liability of the defaulter and as such cannot be released, there is no scope of restoring the property till the trial is over and the same if proved to be obtained and releasing the same during interregnum will take the same out of the reach of law, the provisions of Prevention of Money Laundering Act supersedes the provisions of Insolvency and Bankruptcy Code and last but not the least this Court has no jurisdiction to deal with the application as there is an alternative remedy which attracts the principles of res judicata-has no manner of application and are contrary to the settled propositions of law and completely frustrates the legislative object of Prevention of Money Laundering Act, 2002 as well as Insolvency and Bankruptcy Code, 2016 and further submits that it is the clear dichotomy to the legislative intention of introducing provision for restoration of an attached/confiscated property during trial in terms of Section 8(8) of the Prevention of Money Laundering Act.

Ld. Counsel for the Applicant submitted that an exceptionally justifiable case has been made out for exercising the power and discretion by this Court and thereby restoring the property being office No. 112 of Super Build Area 1489 Sq. ft. (Net 1042 sq. ft.) & one parking area of 1 car in the lower basement of the building No. 044 at 1st Floor of Building named "Diamond Prestige" Address: 41A, Acharya Jagdish Chandra Bose Road, Police Station – Park Street, Kolkata, in favour of the Applicant so that the liquidation process can be proceeded towards the logical conclusion at the earliest and the interest of the third parties/ creditors can be protected.

In reply, Ld. Advocate for the Directorate of Enforcement raised objection and submitted that it is an admitted fact that the CIRP (Corporate Insolvency Resolution Process) was initiated on August 09, 2019. However no successful resolution plan was furnished before the Hon'ble National Company Law Tribunal and by an order dated February 11, 2020 the Learned NCLT, Kolkata Bench initiated liquidation process of the accused company. Thereafter by an order dated 20.02.2020 Learned NCLT, Kolkata Bench replaced Mr. Vikram Kumar (erstwhile Liquidator) and appointed Mr. Sanjit Kumar Nayak the Applicant herein as the Liquidator in his place.

Ld. Advocate for the Directorate of Enforcement further submitted that Regulation 44(1) of the Liquidation Regulations as a part of the Insolvency and Bankruptcy Code ("IB Code") provides that liquidation process with respect to a corporate debtor ("CD") ought to be completed within one year from the liquidation commencement date ("LCD") and that was not complied with in the instant case.

Ld. Advocate for the Directorate of Enforcement further submitted that the Provisional attachment order no. 06/2022 dated 28.02.2022 was made with respect to the property of the M/s Skyrise Overseas Pvt Ltd and formerly known as Saraf Impex Private Ltd. Thereafter by an order dated 22.08.2022 the Learned Adjudicating Authority (under Section 8 sub section (3) of the PML Act, 2002) confirmed the said provisional attachment order. In pursuance of the said Provisional Attachment Order, and original complainant as OC - 1669 of 2022 was filed before the Learned Adjudicating Authority, New Delhi. It is an admitted fact that the said provisional attachment order and said OC-1669 of 2022 was subject matter of adjudication before the learned Adjudicating

authority and the same is evident from the pleadings of the applicant at paragraph 4 of the application of the Official liquidator Sanjit kumar Nayek.

Ld. Advocate for the Directorate of Enforcement further contended that on this aspect of the matter there are various judgement and out of which one of the landmark judgement is that of Nazir Ahmad vs King Emperor (AIR 1936 PC 252 (2) : (1935-36) 63 IA 372) which clearly says "The Rule which applies is the different and not less well recognized rule – namely, that where the power is given to do certain things in a certain way the thing must be done that way or not at all. Other methods of performance are necessarily forfeited. This doctrine has often been applied to Courts -Taylor vs. Taylor.

Ld. Advocate for the Directorate of Enforcement further submitted that in our case and from the details given hereinabove the official liquidator already had two years time before any provisional attachment and/or any other case was started by the Enforcement Directorate and if they were not able to complete the liquidation process within one year under Regulation 44(1) of the Liquidation Regulations and waited for 5 Years they could very well wait for some more time or till the outcome of this case as no sky would fall and there are no perishable goods as to which there is such urgency. After elapsing of five years all of a sudden the urgency has arisen from nowhere at the instance of the official liquidator.

Ld. Advocate for the Directorate of Enforcement further contended that the applicants have filed IA (I.B.C) 1927 (KB) 2023 before the Honble NCLT, Kolkata Bench and submitted that an identical prayer for lifting of attachment order has been made by the Enforcement Directorate and the said prayer has been moved before the said Tribunal and therefore filing the current application on the self same prayer is barred by law of resjudicata and for that reason the application dated 21.02.2024 be rejected.

Ld. Advocate for the Directorate of Enforcement further contended that "proceeds of crime" as defined under Section 2(1)(u) of PML Act 2002 is not an operational debt as per the provisions of Section 5(21) of the Insolvency and Bankruptcy Code 2016. It is also submitted that Enforcement Directorate (hereinafter referred to as "ED") would not fall within the definition of an operational creditor as defined by Section 5(20) of the Insolvency and Bankruptcy Code 2016 and therefore proceeds of crime cannot be utilitized for the purpose of paying back the liabilities of the corporate debtor.

Ld. Advocate for the Directorate of Enforcement further submitted that when the ED proceeds to attach properties representing the proceeds of crime, it is not doing so by virtue of being a creditor of the corporate debtor and therefore the question of lifting of the order of attachment does not arise.

Ld. Advocate for the prosecution further submitted that an operational debt would mean a debt arising under any law for the time being in force and proceeds of crimes stand on a completely different pedestal and relates to ill gotten assets derived or obtained from the commission of a scheduled offence. In view of the aforesaid, it is submitted that it would be wholly incorrect to

proceed on the basis of the fact that orders of attachment made in respect of properties which constitute proceeds of crime is akin to an action taken by a creditor against the assets of a debtor.

Ld. Advocate for the prosecution further submitted that furthermore it is submitted that while proceeding to attach and confiscate proceeds of crime, the action of the ED authority is essentially aimed at taking away from a person or an entity all that may have been illegitimately secured by indulging in prescribed criminal activity. Reliance upon the following passages as appearing in the decision of this Court in **Deputy Director Deputy Director of Enforcement, Delhi v. Axis Bank & Ors** reported in **2019 SCC OnLine Del 7854** is set out herein below:-

"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."

In support of his contention as to whether **section 71 of the PML Act 2002** has an overriding effect over **section 238 of the IBC** Ld. P.P cited some landmark judgements before this Court and they are as follows:-

Vijay Madan Lal Choudhary & Ors. v/s Union of India & Ors., 2022 SCC Online SC 929;
Nazir Ahmad vs King Emperor (AIR 1936 PC 252 (2) : (1935-36) 63 IA 372);
Deputy Director Deputy Director of Enforcement, Delhi v. Axis Bank & Ors 2019 SCC OnLine Del 7854;
Deputy Director vs PNB Housing Finance Limited;
Rajiv Chakarborty Resolution Professional of EiEL Vs. Directorate of Enforcement;
Northern Plastics Ltd. vs Hindustan Petroleum (1997) 91 ELT 502 SC;
Kanwar Singh Saini vs High Court of Delhi 2012 (4) SCC page 307.

Ld. P.P drew the attention of this Court to the relevant portion of the above judgements cited by him and argued that the object of the PMLA is to prevent money laundering and to provide for confiscation of the property derived from such illgotten wealth. As per Section 2(1)(p), PML Act "Money Laundering" has the meaning assigned to it in Section 3 of PMLA. Hon'ble Supreme Court observed and held in **Vijay Madan Lal Choudhary & Ors. v/s Union of India & Ors. 2022 SCC OnLine SC 929** *as follows*:

"242. The Preamble of the 2002 Act reads thus:

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

WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;
AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;
AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration."

Even the Preamble of the Act reinforces the background in which the Act has been enacted by the Parliament being commitment of the country to the international community. It is crystal clear from the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgamation of several facets essential to address the scourge of money-laundering as such. In one sense, it is a sui generis legislation.

243. As aforesaid, it is a comprehensive legislation dealing with all the related issues concerning prevention of money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for coordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. While considering the challenges to the relevant provision(s) of the 2002 Act, we cannot be oblivious to the objects and reasons for enacting such a special legislation and the seriousness of the issues to be dealt with thereunder including having transnational implications. Every provision in the 2002 Act will have to be given its due significance while keeping in mind the legislative intent for providing a special mechanism to deal with the scrouge of money-laundering recognized world over and with the need to deal with it sternly."

Ld. Counsel for the Enforcement Directorate thereafter referred to Section 71 of the PMLA and that states "the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." Therefore, the provisions of the PMLA would prevail and override other laws containing anything inconsistent thereto.

Ld. Counsel for the Enforcement Directorate contended that the Judicial Pronouncements on the issue of interplay between PMLA and IBC is discussed in the case of **Deputy Director, Directorate of Enforcement, Delhi vs. Axis Bank and others** referred to in **2019 SCC Online Del 7854**, wherein the Hon'ble Delhi High Court has observed as under:

"141. This court finds it difficult to accept the proposition that the jurisdiction conferred on the State by PMLA to confiscate the "proceeds of crime" concerns a property the value whereof is "debt" due or payable to the Government (Central or State) or local authority. The Government, when it exercises its power under PMLA to seek attachment leading to confiscation of proceeds of crime, does not stand as a creditor, the person alleged to be complicit in the offence of money-laundering similarly not acquiring the status of a debtor. The State is not claiming the prerogative to deprive such offender of ill gotten assets so as to be

perceived to be sharing the loot, not the least so as to levy tax thereupon such as to give it a colour of legitimacy or lawful earning, the idea being to take away what has been illegitimately secured by criminal activity.

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."

It is further held in Para **171 in Axis Bank** Judgement (supra) that:

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.

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.

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.

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.

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.

Ld. Counsel for the Enforcement Directorate thereafter cited the case of **Deputy Director vs. PNB Housing Finance Limited** CRA-S-4326-SB-2017(O&M) **(Punjab & Haryana High Court)**, wherein it was observed and held as follows:-

"We have gone through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "SARFAESI Act") as well as Prevention of Money Laundering Act, 2002 (in short "PMLA"). The purpose of both enactments is different. The PMLA is a special Act. Section 71 reads as under:- "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." The attention of the Court has been drawn towards Section 26E of the SARFAESI Act, which reads as under:-"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.

On the conjoint reading of both the Acts, we are of the considered view that PMLA would prevail over the SARFAESI Act. The adjudicating authority could not release the properties during the pendency of trial which commenced pursuant to the FIR dated 25.03.2013."

Ld. Counsel for the Enforcement Directorate thereafter referred to the judgement of the Hon'ble Delhi High Court in the case of **Rajiv Chakraborty, Resolution Professional Of EIEL Vs. Directorate Of Enforcement, W.P.(C) 9531/2020 (Delhi high Court)** wherein the Hon'ble Delhi High Court held as follows :-

"94. The Court then deems it pertinent to observe that while proceeding to attach the tainted property, the respondents are not in essence effacing the property rights that may be claimed by an individual. It is a symbolic taking over of the custody of the property and for its preservation till such time as the proceedings that may be initiated under the PMLA come to a conclusion. Attachment thus is not liable to be viewed as an effacement of all rights that may exist or be claimed to be exercisable in respect of a property. Attachment essentially seeks to stamp the tainted property of having been found to represent proceeds of crime pursuant to the adjudicatory process which is undertaken under Sections 5 and 8 of the Act. It is essentially a seizure of property bringing it into the constructive possession of a court or as in this case, the authorities under the PMLA. Attachment under the PMLA, as was noted hereinabove, is not an attachment for debt but principally a measure to deprive an entity of property and assets which comprise proceeds of crime.

97. The aforesaid principles would establish that an attachment is essentially aimed at preventing private alienations. It does not confer a title on the authority which has taken that step. The attachment only enables the authorities under the act to restrain any further transactions with respect to the aforesaid property till such time a trial with respect to the commission of an offence of money laundering comes to an end. Attachment under the PMLA does not result in an extinguishment or effacement of property rights. It is essentially a fetter placed upon the possessor of that property to deal with the same till such time as proceedings under the aforesaid enactment come to a definitive conclusion on the question of confiscation. As was noted hereinabove, it is essentially an action aimed at bringing into the control of a court or an authority, property over which multiple claims may exist. In any case, since the act of attachment does not result in the effacement of rights in property, it would clearly stand and survive outside the scope of a moratorium or an action relating to an action in respect of a debt due or payable.

113. Viewed in the aforenoted backdrop it is manifest that an order of attachment when made under the PMLA does not result in the corporate debtor or the Resolution Professional facing a fait accompli. The statutes provide adequate means and avenues for redressal of claims and grievances. It could be open to a Resolution Professional to approach the competent authorities under the PMLA for such reliefs in respect of tainted properties as may be legally permissible. Similarly, and as was explained by Axis Bank, a PAO made by the ED under the PMLA does not invest in that authority a superior or overriding right in property. Ultimately the claims of parties over the property that may be attached and the question of distribution and priorities would have to be settled independently and in accordance with law."

Ld. Counsel for the Enforcement Directorate thereafter referred to in the case of **Kiran Shah vs. Enforcement Directorate, Kolkata, CA (AT)(Insolvency) bearing no 817/2021** wherein it was observed by Hon'ble NCLAT that:

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

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

Further, the objective of PMLA was also discussed and it was held that:

"96. As seen from the 'Prevention of Money Laundering Act, 2002', the purpose of the Act is to prevent 'Money Laundering' and it deals w ith confiscation of property derived from or concerned with 'Money Laundering' etc. In fact, 'The Prevention of Money Laundering Act, 2002' is to fulfill our Country's obligation in adhering to the United Nations Resolutions and in regard to Assets/Properties being the 'Proceeds of Crime', it takes a 'primacy and precedence' over the 'Insolvency and Bankruptcy Code, 2016' which promotes "Resolution' as its objective over Liquidation in the considered opinion of this 'Tribunal'.

98. Besides this, the objective, purpose of two enactments (1) 'I & B Code' and (2) 'PMLA' even though at the first blush appear to be at logger heads, there is no repugnancy and inconsistency between them, in lieu of the fact the text, shape and its colour are conspicuously distinct and different, operating in their respective spheres. More importantly, when confiscation of the 'Proceeds of Crime' takes place, the said Act is performed."

Ld. Counsel for the Enforcement Directorate thereafter placed the case of **Northern Plastics Ltd. vs Hindustan Petroleum reported** in **(1997) 91 ELT 502 SC** wherein it has been held as follows :-

"If he has not been subject to a legal wrong has suffered no legal grievance, then, he has no legal or justiciable claim to hang on, he is not a person aggrieved and has no locus standi to challenge the order."

Ld Counsel for the Enforcemnt Directorate thereafter discussed the judgement in the case of **Kanwar Singh Saini vs High Court of Delhi** reported in **2012 (4) SCC 307** wherein it has been held as follows:-

"when a statute gives a right and provides a forum for adjudication of claims remedy has to be sought under the provisions of the Act."

Ld Counsel for the Enforcemnt Directorate further submitted that it is pertinent to mention that the dissolution proceedings under IBC are purely civil proceedings whereas proceedings under PMLA are in the nature of civil/criminal proceedings and the purpose of

PMLA is to prevent money laundering and confiscation of the properties. It was contended that the attachment of the properties in this case against accused company has been already confirmed by Ld. Adjudicating Authority vide order dated 22.08.2022 and thus, shall continue despite initiation of CIRP as there is no legal mandate upon the Directorate to release the confirmed properties in case any proceedings are initiated under IBC and further the confirmed property is a case property before the Special Court wherein confiscation was sought of the properties involved/used in the offence of money laundering as per Section 8 (5) of PMLA. In addition and most importantly when a statute gives a right and provides a forum for adjudication of claims remedy has to be sought under the provisions of the Act. In so far as anyone aggrieved by any decision or order of the 'Adjudicating Authority' of the PMLA, then it is open to him to pefer an appeal before the Appellate Tribunal, PMLA by resorting to the relevant provision(s) of the "Prevention of Money Laundering Act, 2002'. Moveover, as against any decision or order of the Appellate Tribunal, PMLA, the concerned person/entity may file an "Appeal" to the Hon'ble High Court under section 42 of the PMLA.

Now let me consider the submissions of both sides on the point of restoration of the properties of the corporate debtor to the applicant/official liquidator Sanjit Kumar Nayak.

Perused the materials on record and the application dated 20.11.2023 filed by one Sanjit Kumar Nayak, the Official Liquidator of M/s. Skyrise Overseas Pvt. Ltd. (Formerly known as Saraf Impex Pvt. Ltd.) appointed by the Hon'ble NCLT, Kolkata Bench, Kolkata who had preferred the instant application under Section 8(8) of the Prevention of Money Laundering Act, 2002, praying for restoration of the attached property being Office No. 112 of Super Build Area 1489 Sq. ft. (Net 1042 sq. ft.) and one parking area of one car in the lower basement of the building No. 044 at 1st Floor of Building named "Diamond Prestige" having its address at 41A, Acharya Jagdish Chandra Bose Road, Police Station – Park Street, Kolkata, from the order of attachment in connection with ECIR/KLZO/09/2016/7785.

On perusal of the materials on record and the submissions of the Ld. Advocate for the applicant/official liquidator, I find that the main contention of the Ld. Advocate for the applicant is that once a Corporate Insolvency Resolution Process is initiated, it either ends in a successful resolution plan or it ends in a direction passed for liquidation of a corporate debtor and there cannot be any attachment pertaining to that property or asset of the said corporate debtor and with this limited purpose, the provisions of Section 32-A of the Insolvency and Bankruptcy Code will supersede the provisions of Prevention of Money Laundering Act, more so, in view of Section 8 Sub-section 8 of PML Act which has empowered the Special Court to direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property.

However, I have carefully perused the provisions of Section **71 of the PML Act** wherein it is stated as follows:

"the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

Therefore, I am of the view that the provisions of the PML Act would prevail and shall have an overriding effect over other laws like Insolvency and Bankruptcy Code containing anything inconsistent thereto.

I am unable to accept the contention of the Ld. Advocate for the applicant/official liquidator that the section 32A of the Insolvency and Bankruptcy Code protects the corporate debtor from further prosecution once the resolution plan is approved or an order of liquidation has been passed ensuring a clean state for the entity post-insolvency resolution specifically in view of Section 71 of the PML Act, 2002 which indicates that the PML Act has an over-riding effect over the Insolvency and Bankruptcy Code, 2016.

I am of the considered view that a person indulging in money laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liabilities towards his creditors for the simple reason that such assets are not lawfully his to claim.

I find some substance in the submission of the Learned Counsel for the applicant/official liquidator that the period from 15-03-2020 till 28-02-2022 shall stand excluded for the purposes of calculating limitation of liquidation proceeding in terms of Regulation 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 due to onset of Covid pandemic in view of the Judgement of the Hon'ble Apex Court ***In Re*** **Cognizance for extension of limitation** reported in **(2022) 3 SCC 117.** I also find that the provisional attachment order has been passed in connection with the instant case on 28th February, 2022 and as such no steps could be taken for proceeding with the liquidation process during the Covid pandemic period.

I also find some substance in the submission of the Ld. Counsel for the Enforcement Directorate that Regulation 44(1) of the Liquidation Regulations as a part of the Insolvency and Bankruptcy Code ("IB Code") provides that liquidation process with respect to corporate debtor ("CD") ought to be completed within one year from the liquidation commencement date ("LCD") but the official liquidator in the instant case has already taken two years time before the issuance of the order of provisional attachment and/or otherwise the case was started by the Enforcement Directorate and if they were not able to complete the liquidation process within the stipulated time of one year as per the Regulation 44(1) of the Liquidation Regulations and then in such circumstances the official liquidator needs to wait till the outcome of this case pending before the Hon'ble Appellate Authority.

On perusal of the record, I also find that the attachment of the properties against the accused/company has been already confirmed by the Ld. Adjudicating Authority vide order dated 22.08.2022 and so, anyone aggrieved by any decision or order of the 'Adjudicating Authority' of the PMLA, has to prefer an appeal before the Appellate Tribunal, PMLA by taking recourse to the relevant provision(s) of the "Prevention of Money Laundering Act, 2002'. Moreover, as against any decision or order of the Appellate Tribunal, PMLA, the concerned person/entity may file an "Appeal" to the Hon'ble High Court under section 42 of the PMLA, 2002.

Now I refer to proviso clause to the **Section 32A(3) of the Insolvency and Bankruptcy Code, 2016** which states as follows :-

"Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

Now I also refer to the Judgement of **Vijay Madanlal Choudhary vs Union of India** in **Special Leave Petition (Criminal) No 4634 of 2014** wherein paragraph 105 clearly states as follows :-

"105. In that, the offence of money laundering ought to proceed for trial only before the Special Court designated to try money-laundering offences where the offence of money-laundering has been committed. This is a special enactment and being a later law, would prevail over any other law for the time being in force in terms of Section 71 of the 2002 Act."

I also again refer to the Judgement in the Hon'ble High Court at Delhi in the case of the **Deputy Director of Enforcement, Delhi vs Axis Bank** and Others decided on 02.04.2019 which states as follows :-

"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 and 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 in the issue, the objective of the legislation in PMLA being distinct for 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.

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 any 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."

I also refer to the judgement of the **Hon'ble Punjab and Haryana High Court at Chandigarh** in the case of **Deputy Director Vs. PNB Housing Finance Limited** wherein the Hon'ble Court has held as follows :-

"We have gone through the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "SARFAESI Act") as well as Prevention of

Money Laundering Act, 2002 (in short "PMLA"). The purpose of both enactments is different …… On the conjoint reading of both the Acts, we are of the considered view that PMLA would prevail over the SARFAESI Act. The adjudicating authority could not release the properties during the pendency of trial which commenced pursuant to the FIR dated 25.03.2013."

I also refer to the order of the National Company Law Appellate Tribunal Principal Bench, New Delhi (Appellate Jurisdiction) COMPANY APPEAL (AT) (INSOLVENCY) NO.817/2021 in the case of **Kiran Shah Vs. Enforcement Directorate, Kolkata** which states as follows :-

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

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

Now I referred to **Rule 3-A of the Prevention of Money-Laundering (Restoration of Property) Rules, 2016** which clearly indicates that property can be restored only after framing of charges and in the instant case the charge is yet to be framed.

On perusal of the record and the judgments as discussed above, this Court is unable to allow the prayer of the applicant/official liquidator as it is manifest that an order of attachment when made under the PML Act, does not result in the corporate debtor or the resolution professional facing a fait accompli.

Relying on the judgment of the **Hon'ble Delhi High Court** in the case of **Rajib Chakraborty Resolution Professional of EIEL Vs. Directorate of Enforcement**, I am of the view that the statutes provides adequate means and avenues for redressal of claims and grievances. It could be open to a resolution professional to approach the competent authorities under the PML Act for such reliefs in respect of such tainted properties as may be legally permissible and here in this case the competent authority is the appellate authority PMLA.

In such backdrop, I find that the applicant has also preferred an appeal before the **Hon'ble Appellate Tribunal at New Delhi (Under Prevention of Money Laundering Act, 2021) being No. FPA-PMLA-4880/KOL/2022** and therefore only resort of the applicant/official liquidator is now to apply before the Hon'ble Court challenging the order, if any, of the Appellate Authority by invoking section **42 of the PML Act, 2002**.

I also find that the Applicant had preferred a **Writ Petition NWP(CRL) 1348/2022** before the Hon'ble High Court, New Delhi, seeking quashing of the provisional order along with show

cause notice issued by Learned Adjudicating Authority but the said writ Petition was rejected as withdrawn being infructuous.

Considering all such facts and circumstances, I am of the view that this Court is not the Court having the jurisdiction to decide the fate of the application preferred by Sanjit Kumar Nayak, being the Official Liquidator of M/s. Skyrise Overseas Pvt. Ltd. (Formerly known as Saraf Impex Pvt. Ltd.) appointed by the Hon'ble NCLT, Kolkata Bench.

Thus, the Petition dated 20.11.2023 is devoid of any merit and thus the same is **rejected**.

Todate i.e. **20.08.2024** for hearing of the petition dated 29.07.2024 on behalf of the Central Bank of India.

D & C by me

Sd/-

Chief Judge
City Sessions Court, Calcutta.

Sd/-

Chief Judge
City Sessions Court, Calcutta