

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.03.2020

DELIVERED ON : 02.06.2020

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
AND

THE HON'BLE MR.JUSTICE KIRSHNAN RAMASAMY

WRIT PETITION No.29970 of 2019 & WMP Nos.29872 & 34971 of 2019

Deputy Director,
Office of the Joint Director,
Directorate of Enforcement,
Chennai Zonal Office,
3rd Fkiir, C-Block,
Murugesu Naicker Complex,
Greens Road, Chennai-600 006.

...Petitioner

Vs.

1.Asset Reconstruction Company
(India) Ltd., (Arcil),
Mumbai.
The Ruby, 10th Floor 29,
Senapati Bapat Marg,
Dadar (West),
Mumbai-400 028.

2.Viceroy Hotels Ltd.,
Plot No.20, Sector-1,
Survey No.64, 4th Floor,
Huda Techno Enclave, Madhapur,
Hyderabad-500 081.

3.Koteswara Rao Karuchola,
Resolution Professional
In the matter of Viceroy Hotels Ltd.,
C/o K.K. Rao and Associates,
Cost Accountants,
2B, Samrat Residential Complex#5-9-12,
Saifabad, Opposite to AG's Office,
Hyderabad-500 004.

...Respondents

Writ Petition is filed under Article 226 of the Constitution of India to issue a writ of certiorari to call for the records of the NCLT pertaining to the impugned order dated 11.07.2019 passed in IA No.413 and 287 of 2019 by the NCLT in CP (IB) No.2019/7/HBD/2017 and quash the same.

For Petitioner : Mr.G.Rajagopalan,
Additional Solicitor General, Assisted by
Mr.Rajnish Pathiyil

For Respondents : Mr.AR.L.Sundaresan, S.C., for
Mr.Gaurav Chatterjee for R1

No appearance for R2

Mr.B.Kumar, S.C., for
Mr.S.Ramachandran for R3

ORDER

M.M.SUNDRESH, J.

Challenge in this writ petition is to the order passed by the National Company Law Tribunal, Hyderabad Bench-I, Hyderabad in I.A.Nos.413 and 287 of 2019 in CP(IB) No.219/HDB/2017 filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016. The applications filed seeking to set aside and grant stay on the impugned Provisional Attachment Order No.04/2019 with a consequential direction to Enforcement Directorate viz., the petitioner to raise the same are also on contest allowed.

2. BRIEF FACTS:-

2.1.Though we are concerned with purely a legal issue viz., the jurisdiction of the National Company Law Tribunal, Hyderabad Bench-I, Hyderabad, to adjudicate upon the issues sought to be raised before it through the applications filed by the first respondent before us, the factual matrix to the least extent possible are to be placed.

2.2. The Central Bureau of Investigation, BS & FC, Bangalore, has registered three criminal cases in FIRs vide RC.No.4(E)/2016/CBI/BS & FC/BLR dated 01.02.2016, RC No.04/2017 dated 03.02.2017 and RC No.14/2018 dated 16.07.2018 against M/s Best and Crompton Engineering Project Ltd., and their officials for the offences punishable under Sections 420, 468 and 471 of Indian Penal Code, 1960, among other offences on a complaint given by the Consortium of Banks lead by the Central Bank of India.

2.3. The crux of the complaint is that the officials of the said concern along with others hatched a criminal conspiracy at Chennai and Hyderabad during the period from 2010 to 2013 with the object of defrauding the consortium of the bankers lead by the Central Bank of India. In furtherance of the said conspiracy, Central Bank of India was made to submit a fraudulent Letter of Credit and the amount sanctioned was diverted for some other purpose other than the one sanctioned. Based upon the charge sheet laid, a prima facie case for an offence of money laundering appeared to have been made out leading to registration of case in ECIR No.CEZO/05/2016 on 27.04.2016.

2.4. The management of M/s Best and Crompton Engineering Project Ltd., was taken over by two persons through the acquisition of 100% shares on 29.03.2010, paper crony companies viz., M/s Global Forgings Ltd., M/s Tejaswini Engineering Private Ltd., M/s Ganga Exim Pvt., Ltd., and M/s Godavari Exports & Imports Pvt. Ltd., were created though not in existence. Imaginary transactions were made among them. The Forensic Audit conducted in the year 2014 indicated diversion through fictitious purchases and sales. One of the transactions as could be seen from the statement given under Section 50 of the Act brought to light a transfer of the sum of Rs.125 crores in favour of M/s Veceroy Hotels Ltd., through the company Mahal Hotel Pvt. Ltd.

2.5. Statements have also been obtained from various persons though a business transaction agreement was entered into, substantial amount was already paid even prior in favour of M/s Veceroy Hotels Ltd. Even though this was terminated by way of a Deed of confirmation of Termination dated 16.09.2013, no action was taken to get back the amount. Part of the amount was paid through M/s Bhagayanagar Investments & Trading Pvt. Ltd. This company is also stated to be one of the shell companies. Therefore, neither there existed a sale of any hotel nor a return of money in pursuant to the Deed of confirmation of Termination. According to the petitioner, multiple circular transactions were involved with the connivance of all the accused.

2.6. Thus, the petitioner is of the view that by fraud, M/s Best and Crompton Engineering Project Ltd., along with the accused persons through the various intermedia companies of Sujana Group by circular transactions diverted the fund, of which, substantial part of money reached the second respondent viz., M/s Veceroy Hotels Ltd. We may note that the so called object was to purchase a hotel by name J M Mariot at Chennai.

2.7. In a nutshell, money is stated to be diverted by the

borrower through Sujana Group Companies to various companies including M/s Veceroy Hotels Ltd., by adopting dubious and fraudulent means.

2.8. An application was filed against the Corporate Debtor viz., M/s Veceroy Hotels Ltd., before the National Company Law Tribunal, Hyderabad, invoking Section 7 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "the IBC"). The third respondent was appointed as the interim Resolution Professional, which was later confirmed as a Resolution Professional. The resolution plan was approved in terms of Section 36 of the IBC.

2.9. Upon knowing the order of attachment made by the petitioner professionally on 26.03.2019, the Resolution Professional filed an application in Application No.286 of 2019 while another one was filed by the financial creditor in I.A.No.413 of 2019, who have been arrayed as respondents 3 and 1 in this writ petition respectively. Another Application has also been filed by the Corporate Debtor seeking to implead the petitioner as the respondent in I.A.No.287 of 2019, which is filed to raise the attachment. Consequent upon the order passed in the impugned applications, this application was also allowed.

2.10. Before the Tribunal, respondents 1 and 3 contended that it has got jurisdiction to go into the said issue under Section 65 of the IBC. The property attached has not been purchased from the proceedings of the crime. It has been purchased much prior to that. There is an embargo under the Act in terms of Section 63 of the IBC for other proceedings.

2.11. Per contra, the petitioner contended that both the enactments are different and therefore, the Tribunal has got no jurisdiction. While accepting the submissions made by respondents 1 and 3, the objection raised by the petitioner was brushed aside by placing reliance upon Section 65 of the IBC with a factual finding that the property attached has been purchased much prior to the commission of the crime. We may note that the objection raised by the petitioner also includes the entitlement to proceed against the property though not part of the proceeds of the crime.

3. Submissions of the petitioner:

The learned Additional Solicitor General appearing for the petitioner submitted that the power under Article 226 of the Constitution of India is rather wide. We are dealing with the case of a forum exercising the power which it inherently lacks. The scope of enactments are distinct and different. The Tribunal has usurped the power not available to it. There is

no cause of action before the Tribunal. All the banks are situated at Chennai, proceedings have been initiated by the petitioner at Chennai and so also the order of attachment. The attachment made is also confirmed in view of the interim order of stay granted by this Court. Under the Prevention of Money-Laundering Act, 2002, (hereinafter referred to as "the PML Act") not only the tainted property, but also any other asset can be attached. The Tribunal ought not to have gone into the merits of the case. The judgment relied upon by the Tribunal in PUNJAB NATIONAL BANK VS. DEPUTY DIRECTOR, DIRECTORATE OF ENFORCEMENT (2019 SCC Online ATPMLA 5) has been stayed by the jurisdictional High Court in F.A No.13840 of 2018. Section 71 of the PML Act has got overriding effect. The amendment made by way of insertion through Section 32-A of IBC will not help the case of the respondents. It is prospective in nature apart from having no application. The fact that the National Company Law Tribunal has started functioning at Chennai, is not a ground when a challenge is made on the ground of lack of jurisdiction. Support has been drawn for the submission made through the reliance on the following decisions.

1. Embassy Property Developments Pvt. Ltd., Vs. State of Karnataka and others (2019 SCC Online SC 1542); and
2. The Deputy Director, Directorate of Enforcement Delhi and others V. Axis Bank and others (Manu/DE/1120/2019).

4. Submissions of the Respondent:

The learned Senior Counsel appearing for respondents 1 and 3 submitted that the Tribunal was also dealing with the disbursement of the public money. The petitioner ought not to have initiated and proceeded further in view of moratorium available under Section 14 of the IBC. Section 65 read with Section 63 of the IBC gives sufficient power to the Tribunal. The Tribunal has passed a reasoned order. The impleadment of the petitioner has not been challenged. The petitioner is not a creditor. The professional attachment order would come within the purview of the civil proceeding. In any case, the matter can be adjudicated before the appellate forum. Therefore, the discretionary power available under Article 226 of the Constitution of India is not required to be exercised. The learned Senior Counsels on their part placed reliance on the following decisions.

1. Punjab National Bank Vs. Deputy Director, Directorate of Enforcement (2019 SCC Online ATPMLA 5);
2. Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited

and others ((2018) 16 Supreme Court Cases 94); and

3. Solidaire India Limited V. Fairgrowth Financial Services Limited and others ((2001) 3 Supreme Court Cases 71).

5. The one and only issue for consideration is to the jurisdiction of the Tribunal in entertaining the application and deciding on merit. Thus, the question of going into the merit by us would arise once this issue is decided. Therefore, this Court places the attention on this issue.

6. The fundamental facts with respect to the initiation of proceedings are not in dispute. This includes a registration of the cases both by Central Bureau of Investigation and by the petitioner. The PMLA is a distinct one having its own object and reasons. This object is not only to prevent money laundering but also the recovery. Taking note of the object and special reasons contained under the enactment, we can safely conclude that it is a special one. Confiscation is one of the mode of recovery. Therefore, it involves an overriding public interest. After all, economy is the hot line of any country. Though a proceeding towards attachment is stated to be having the trappings of a civil adjudication, one has to see the object of enactment as a whole. To put it differently, both civil and criminal proceedings under the Act complement each other. The idea is to achieve the object.

7. The Code aims on giving a legal frame work for effective and timely resolution of insolvency and bankruptcy through the adjudicative forum. The need was felt to have a common forum in this regard.

8. Section 14 of the IBC speaks of moratorium. A declaration has to be made through an order by the Adjudicatory Authority in this regard. If one carefully goes through the said section, there is no way professional attachment order passed under the provisions of the PMLA would automatically invite a moratorium. This provision only speaks about the consequence for institution of the suit, for continuance and other proceedings against the Corporate Debtor. Therefore, Section 14 of the IBC is consequent upon an order passed by the Adjudicative Authority declaring moratorium. This would not apply to a special enactment which travels on its own path. After all, one cannot presume a conflict between two enactments having it distinct roles with their objections. As stated, it only speaks about the follow up action over a property, which is subject matter of the proceedings before the National Company Law Tribunal under the IBC. Thus, Section 14 would not bar a proceeding under the PMLA.

9. Section 32-A of the IBC deals with the liability for prior offences. This provision would get attracted in a case where the resolution plan has been approved by the Adjudicating Authority under Section 31 of the IBC. Therefore, when no such approval has taken place, the Adjudicating Authority will not have any power or authority to exercise the power under Section 32-A of the IBC. We may note, this insertion by way of an amendment came into being with effect from 28.12.2019 onwards.

10. Section 60 of the IBC comes under Chapter VI. Chapter VI of the IBC deals with the Adjudicating Authority for corporate persons. Section 65 of the IBC gives jurisdiction to the Tribunal to entertain and dispose of any application on proceeding by or against the Corporate Debtor. Even this proceeding would not apply to a statutory Authority in another enactment and that too, a special one. As observed, the scope of enquiry under PMLA is rather wide and comprehensive.

11. Section 63 prohibits a Civil Court from having jurisdiction over which the National Company Law Tribunal exercises. In the case on hand, we are not either dealing with the Civil Court or an authority which in fact deals with such a jurisdiction which is vested upon the Tribunal.

12. The issue sought to be raised including the power under Article 226 of the Constitution of India is no longer res integra. In a recent pronouncement, the Apex Court in Embassy Property Developments Pvt. Ltd., Vs. State of Karnataka and others (2019 SCC Online SC 1542) has dealt with the same, which we profitably quote.

"Jurisdiction and the powers of the High Court under Article 226:-

13. What is recognized by Article 226 (1) is the power of every High Court to issue (i) directions, (ii) orders or (iii) writs. They can be issued to (i) any person or (ii) authority including the Government. They may be issued (i) for the enforcement of any of the rights conferred by Part III and (ii) for any other purpose. But the exercise of the power recognized by Clause (1) of Article 226, is restricted by the territorial jurisdiction of the High Court, determined either by its geographical location or by the place where the cause of action, in whole or in part, arose. While the nature of the power exercised

by the High Court is delineated in Clause (1) of [Article 226](#), the jurisdiction of the High Court for the exercise of such power, is spelt out in both Clauses (1) and (2) of [Article 226](#).

24. Therefore in so far as the question of exercise of the power conferred by [Article 226](#), despite the availability of a statutory alternative remedy, is concerned, Anisminic cannot be relied upon. The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when [Article 226](#) is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.

28. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as observed by this court in [Sub-Committee on Judicial Accountability vs. Union of India](#),²⁴ flows from the concept of a higher law, namely the Constitution. Paragraph 61 of the said decision captures this position as follows:

"But where, as in this country and unlike in England, there is a written Constitution which constitutes the fundamental and in that sense a "higher law" and acts as a limitation upon the legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain and the concept is one of 'limited government'. Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the

limits of the powers of the various organs of the State which derive power and authority under the Constitution and that the judicial wing is the interpreter of the Constitution and, therefore, of the limits of authority of the different organs of the State. It 24 (1991) 4 SCC 699 is to be noted that the British Parliament with the Crown is supreme and its powers are unlimited and courts have no power of judicial review of legislation."

29. The NCLT is not even a Civil Court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT."

Scope of Section 60 of IBC:-

"37. From a combined reading of Subsection (4) and Sub section (2) of Section 60 with Section 179, it is clear that none of them hold the key to the question as to whether NCLT would have jurisdiction over a decision taken by the government under the provisions of MMDR Act, 1957 and the Rules issued thereunder. The only provision which can probably throw light on this question would be Sub section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Subsection (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate

Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results."

13. The learned single Judge of the Delhi High Court in the Deputy Director, Directorate of Enforcement Delhi and others V. Axis Bank and others (Manu/DE/1120/2019) has dealt with the similar issue in extenso. Ultimately, the following conclusion has been arrived at.

"171.(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.

.....

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

.....

(viii) The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

.....

(xii) An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest (charge) in the property, within the meaning of the expressions used in RDBA and SARFAESI Act.

Similarly, mere issuance of an order of attachment under PMLA does not ipso facto render illegal a prior charge or encumbrance of a secured creditor, the claim of the latter for release (or restoration) from PMLA attachment being dependent on its bonafides."

Thus, we have no hesitation in holding that the NCLT has got no jurisdiction to go into the matters governed under the PMLA.

14. The Tribunal has also made reliance upon the judgment of the Apex Court in Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited and others ((2018) 16 Supreme Court Cases 94). The matter was pertaining to the initiation and continuance of an arbitrary proceedings. It was nobody's case that the NCLT did not have any jurisdiction. The criminal case was also registered after the admission of the application filed invoking Section 7 of the IBC. Hence, we do not find any application in the abovesaid judgment to the present case.

15. As stated, we are not inclined to go into the merits of the case in view of our conclusion arrived at. This would also include the entitlement of the petitioner to proceed against the asset which is also the one of the subject matters of the proceeding before the Tribunal. As discussed, proceedings have been initiated before the jurisdictional Court by the petitioner pursuant to the Final Report filed by the Central Bureau of Investigation within the territorial jurisdiction of this Court. A mere fact that NCLT has been established now at Chennai would not be a ground to drive the petitioner to go on an appeal before it especially when arguments have been heard at length.

16. As stated, we are not dealing with the merits of the case and therefore, even on that count, there is no need to direct the petitioner to file an appeal when the Tribunal lacks inherent jurisdiction. In such view of the matter, we are inclined to set aside the order under challenge. However, considering the facts of the case and invoking Section 14 of the Limitation Act, 1963, we grant a further period of six weeks to respondents 1 and 3 to take appropriate action in accordance with law under the PMLA by exhausting the remedy provided therein. We also take note of the fact that the confirmation of the attachment order has been passed on 11.09.2019, during the pendency of the writ proceedings and in view of the interim order granted. On a perusal, we find that both respondents 1 and 3 have also participated. Accordingly, the writ petition stands allowed giving liberty to the respondents 1 and 3 as

aforesaid. All the issues on fact except the question of law decided in this writ petition are left open. No costs. Consequently, connected writ miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Deputy Director,
Office of the joint Director,
Directorate of Enforcement,
Chennai Zonal Office,
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Resolution Professional in the matter of Viceroy Hotels Ltd,
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Pre-delivery Order in
W.P.No. 29970 of 2019

KKV/20/07/2020