**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**
**FIRST APPEAL NO. 335 OF 2022**
**WITH**
**INTERIM APPLICATION NO.9864 OF 2022**
**IN**
**FIRST APPEAL NO.335 OF 2022**

Aditya Birla Finance Limited, Through
Authorised Representative Mr. Nikhil Rodnigues ...Appellant

Versus

Directorate Of Enforcement, Government
Of India Through The Deputy Director
Ms. N. Ananthie ...Respondent

**WITH**
**FIRST APPEAL NO.338 OF 2022**

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Mr. Venkatesh Dhond, Senior Advocate a/w Mr. Rohan Kelkar, Mr. Ashutosh Thipsey, Mr. Lalit Katariya, and Mr. Ashish Chindarkar i/b Katariya & Associates for Appellant in FA/335/2022.

Mr. Cyrus Ardeshir a/w Mr. Ziyad Madan, Mr. Lalit Katariya and Ms Pooja Jhaveri i/b Katariya & Associates for Appellant in FA/338/2022.

Mr. Hiten Venegavkar a/w Mr. Bharat Mirchandani for Respondent No.1.

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**CORAM : K.R. SHRIRAM &**
**RAJESH S. PATIL JJ**
**DATED : 11th JANUARY 2023**

**P.C. :**

1 Appellant, in the first appeal is impugning an order dated 31st December 2020 passed by the Appellate Tribunal for SAFEMA, FEMA, PMLA, NDPS & PBPT Act, at New Delhi, while considering the appeal that appellant had filed against an order dated 16th January 2019 passed by the

Adjudicating Authority confirming provisional attachment order (PAO) No.11 of 2018 dated 31st July 2018. Respondent to the appeal, i.e., Directorate of Enforcement (PMLA) Chennai, have registered a case against various individuals/ firms / company for commission of offence under the provisions of Prevention of Money Laundering Act (PMLA). One of the accused is M/s Nathella Sampath Jewellery Pvt. Ltd., Chennai. Some of the properties, against which the provisional attachment order has been passed are charged to appellant herein. Appellant's case in the appeal is that the Tribunal erred in not considering favorably that appellant being a secure creditor under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), has right over the properties in priority over respondent under the provisions of PMLA.

2 Substantial questions of law and facts as raised in the appeal are as under:

> *"(a) Whether the rights of a secured creditor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) would prevail over an order of attachment under the PMLA Act, in the light of the provisions of the SARFAESI Act ?*
>
> *(b) Whether the security created in favour of a bonafide lender who has exercised due diligence can be adversely impacted by an order of attachment under the PMLA Act ?*
>
> *(c) Whether proceedings initiated by a secured lender for enforcement of its rights under the SARFAESI Act can be indirectly stayed by subsequent actions under the PMLA Act without following the procedure provided for the same under the SARFAESI Act ?*
> *(d) Whether the respondent could have passed the Provisional Attachment Order without recording in writing that it had reason to believe that the secured assets were the proceeds of crime and that they were likely to be transferred or dealt with in any manner which*

*may frustrate any proceedings relating to confiscation thereof ?*

*(e) Whether the respondent could have passed the provisional attachment order in the absence of any allegation that the appellant or its officers committed any offence ?*

*(f) Whether the secured assets are the proceeds of crime ?*

*(g) Whether the secured assets are likely to be transferred or dealt with in any manner which may frustrate any proceedings relating to confiscation thereof ?*

*(h) Whether the respondent has adequate reason to believe that the subject properties are the proceeds of crime and that the same are likely to be transferred or dealt with in any manner which may frustrate any proceedings relating to consideration thereof ? "*

3 In the mean while, appellant has taken out this Interim Application No.9864 of 2022 for the following reliefs:

"(*a) The Court Receiver, High Court, Bombay, be appointed Receiver of the said properties described in paragraph 1 of this Application, with all powers under Order XL, Rules 1, 2 and 3, of the Code of Civil Procedure, 1908.*

*(b) Upon the Receiver taking possession of said properties, the same be sold by and under orders of this Hon'ble Court, and all monies realised therefrom be deposited with this Hon'ble Court for disbursal in accordance with the final orders that may be passed in the captioned First Appeal;*

*(c) The costs of such sale, and of this Application be provided for and*

*(d) This Hon'ble Court be pleased to make such further order(s) or pass such other direction(s) as the nature or circumstances of the case may warrant."*

4 Mr. Venegavkar submitted that the grounds raised by appellant are neither tenable nor acceptable for the following reasons:

(a) The PMLA is a self contained code in itself containing its own procedure with respect to inquiry, search seizure, investigation, arrest, attachment etc.

(b) By virtue of Section 8(4) of PMLA , the Directorate is entitled to take the possession of the confirmed attached properties forthwith.

(c) The main object of PMLA is to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith on incidental thereto. As a matter of fact, the properties attached by the Directorate of Enforcement are involved in money laundering or proceeds of crime and the same shall be considered as case properties which are liable to be confiscated by the Special Court (PMLA) after successful prosecution.

(d) The PMLA provides for overriding effect to the provisions of Act. Section 71 of the PMLA clearly lays down that, "the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force." Furthermore, section 65 of PMLA further makes the position clear by stating that "the provisions of the Code shall apply, in so far as they are not inconsistent with the provisions of PMLA, even as regards arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other under the PMLA.

(e) A new provision in the shape of 2nd proviso of sub-Section 8 of Section 8 under the PMLA has been inserted by the amendment under the Finance At, 2018 which reads as under:

> *"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."*

(f) The Hon'ble Delhi High Court in the matter of Deputy Director, ED Vs. Axis Bank (Manu/DE/1120/2019) passed a judgment dated 2nd April 2019, wherein Hon'ble High Court held as under:

> *"(vi) The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and Insolvency Code, the latter three legislations do not prevail over the former.*
>
> *(vii). The PMLA, by virtue of section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto.*
>
> *(viii). The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.*
>
> *(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."*

(g) In terms of section 8(5) of PMLA the intention of the legislature is clear that on conclusion of trial for the offence of money laundering, the property involved in money laundering which can be used for commission of offence of money laundering shall stand confiscated to the Central Govt.

(h) Section 9 of PMLA specifically states that all rights and title in respect of the confiscated property shall vest with the Govt.

(i) In terms of Rule 5(6) of PMLA (Taking possession of attached or frozen properties confirmed by the adjudicating authority) Rules, 2013, the immovable property confirmed by the Adjudicating Authority is in the form or nature of productive asset or an establishment which is producing goods or a factory etc. and were the manufacturing process or activity is being carried out, the authorised officer may take possession with a direction to the person in-charge of the concerned establishment or factory that Gross Income or any other monetary benefits which accure there from shall be deposited in the account of Directorate of Enforcement.

(j) The possession of the properties covered in the interim application is with the Enforcement Directorate and the process of taking possession is stayed by the Appellate Tribunal, PMLA by way of order of Status Quo in the Appeal filed by the Accused. The department is in the process of getting the order of status quo vacated by way of approaching the Hon'ble Madaras High Court.

(k) The attachment has been confirmed and the issue of confiscation is pending with the Trial Court in the CC No.20/2019 the request of petitioner is not fit to be considered at this juncture.

(l) Property can be disposed by the Trial Court dealing with the prosecution complaint in which the issue of confiscation is to be decided by way of filing an application by petitioner herein under Section 8(7) or 8(8) in CC No.20/2019.

5 Prima facie, considering the appeal memo and interim application, it does appear that properties of additional respondent no.1 and additional respondent no.2 as mentioned in paragraph 1 of the appeal memo, have been charged / mortgaged to appellant.

It is possible that additional respondent nos.1 and 2 may argue that action by respondents under the provisions of PMLA was incorrect or malafide but that is a separate issue and that cannot deny the fact that the property has been secured to appellant.

6 In our view, these are issues which requires consideration. But until these issues are considered, if the property which has been attached under the provisions of PMLA, which are also secured to appellant are not disposed, the property may get wasted or encroached upon and the value would also get eroded. It would be to nobody's benefit. Therefore, purely by way of an interim adhoc arrangement, we pass the following order:

(a) The properties which are mortgaged / charged to appellant may be sold by appellant under the provisions of SARAFESI Act. The sale proceeds shall be deposited with the Registrar, Appellate Side, Bombay, of this court within one week of receiving the sale proceeds to be disbursed in accordance with any final order this court may pass in the appeal.

(b) As and when appellant deposits the money with the Registrar, the registrar shall invest the amount in a fixed deposit with a nationalised bank for a minimum period of 13 months to be renewed for the same period until the disposal of the appeal unless otherwise ordered.

(c) Since this is only an adhoc arrangement, we clarify that we have not expressed any opinion on appellant's case that they rank higher in priority as compared to respondent.

7 We should also note that pursuant to an order dated 7th December 2022 passed by this court, appellant has placed on record an affidavit of Ajay Kadam affirmed on 21st December 2022 confirming service of interim application upon additional respondent no.1 and additional respondent no.2. Nobody has appeared for them nor any affidavit opposing the application has been filed.

8 Interim Application disposed.

**(RAJESH S PATIL, J.)** **(K.R. SHRIRAM, J.)**