

APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS, PBPT ACT
AT NEW DELHI

Date of Decision: 02.01.2019

FPA-PMLA-2633/RP/2018

Punjab National Bank ... Appellant

Versus

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

Advocates/Authorized Representatives who appeared

For the appellant : Shri Rajesh Kumar Gautam, Advocate

For the respondent : Shri Atul Tripathi, Advocate

CORAM

JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT
FPA-PMLA-2633/RP/2018

1. The present Appeal has been filed by the Appellants against the order dated 17.09.2018 passed by the Ld. Adjudicating Authority in O.C. No. 952 of 2018 in PAO No. 03/2018 dated 28.03.2018 in ECIR/RPSZO/01/2015 dated 13.01.2015.

2. Admitted facts are that the Respondent No.2 had approached the Appellant for availing Consortium Finance of Rs 546.77 Cr i.e. [Term Loan, Working Capital Limits, Fund Based and Non-Fund Based].

3. The Appellant Bank (Being the lead Bank in the consortium of Banks) pursuant to the request made by the Respondent No. 2, sanctioned Term Loan, Working Capital Limits, Fund Based and Non-Fund Based Rs 546.77 Cr to the Respondent No.2 Company on 27.06.2008.

4. The Respondent No.2 Company had executed memorandum of entry, inter alia, evidencing the creation of first charge by way of equitable mortgage and Hypothecation qua the property in issue.

5. By provisional attachment order No.3/2018 dated 28.03.2018 passed by Respondent no.1 in ECIR/RPSZO/01/2015, inter alia, the following Moveable/Immoveable asset which has been hypothecated/Equitably Mortgaged to the Appellant was attached. The details of the same is described herein below:-

S.N.	Description of the Property	Value (In Rs.)
1.	Plant and Machinery of M/s Vandana Vidhyut Ltd. Valued at Rs 1711,13,74,636/- situated at Katghora, District-Korba, Chattisgarh to the extent of Rs 335,46,23,910/-	Rs 335,46,23,910/-
2.	Factory Building of M/s Vandana Vidhyut Ltd, Valued at Rs 266,59,72,781/- situated at Katghora, District- Korba, Chattisgarh	Rs 266,59,72,781/-
3.	Land Valued at Rs 1,13,79,809/- of M/s Vandana Vidhyut situated at Katghira, District- Korba, Chhatisgarh.	Rs 1,13,79,809/-
TOTAL		Rs. 603,19,76,500/-

6. The Respondent no.1 lodged original complaint no.952/2018 before the Adjudicating Authority (PMLA). The appellant was arrayed as defendant no.3 in the original complaint no.952/2018.

7. The Adjudicating Authority, Pursuant to the original complaint no.952/2018 filed by the Respondent No.1 has issued a show cause notice dated 16.05.2018, inter alia, directing the Appellant herein to appear before Ld Adjudicating Authority.

8. The NCT Mumbai, vide order dated 26.04.2018 has declared Moratorium against the Respondent No.2 Company on the Application made by SBI [Being a Financial Creditor as well as a member of the Consortium of Banks] under Section 7 of the IBC Code, 2016.

9. The appellant on 30.07.2018 filed a detailed reply to the original complaint no.952/2018 filed by the Respondent No.1 before the Adjudicating Authority (PMLA).

The Respondent No.1 filled the rejoinder dated 13.08.2018 to the Reply filed by the Appellant before the Adjudicating Authority (PMLA).

10. The Adjudicating Authority confirmed the Provisional Attachment Order No. 3/2018 by the impugned order dated 17.09.2018, which has been Hypothecated/mortgaged to the Appellant Bank.

11. The present appeal has been filed on various grounds challenging the impugned order as well as the provisional attachment order.

12. This tribunal has, *inter alia*, time and again in large number of cases, held that the secured asset of a bank cannot be attached or confiscated when there is no illegality or unlawfulness in the title of the bank and that there is no charge of money laundering against the bank.

13. It was also propounded that the bank would be entitled to recover its dues by proceeding against the mortgaged/hypothecated properties under the provisions of SARFESI Act, 2002 and the RDDBFI Act 1993, as the Directorate of Enforcement would have no lien over the property which already stands legally transferred to the bank.

This Tribunal has perused and examined the material available on records and has also heard the arguments of the learned counsels for both the parties and gone through the written submission filed.

14. The Respondent-Deputy Director is relying upon the non-obstante clause in Section 71 of PMLA to claim priority over their debts due to the Appellant Bank. Section 71 of PMLA reads as under:-

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

15. There is no denial on behalf of respondent that appellant is a Secured Creditor and is entitled to priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority.

16. The amended provisions of Section 26E of the SAR-FAESI Act, 2002 as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 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.”

17. The amended provisions of Section 31B of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 which reads as under:-

“31B. — Priority to secured creditors. —

Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realize secured debts due and payable to them by sale of assets, over which security interest is created, shall have priority and shall be paid in priority over all other debts and government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.”

18. It was brought to our notice of this Tribunal that the above mentioned provisions had come into force w.e.f. 16.08.2016, empowering this Appellant Bank to have priority over the mortgaged property.

19. The Hon'ble Supreme Court, wherein it has been categorically held that if non-obstante clause is contained in two enactments, the non-obstante clause in the later enactment shall prevail over the non-obstante clause in the earlier enactment. In the case of *Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd.* (2001) 3 SCC 71, the Supreme Court was considering the effect of the non-obstante clause contained in Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 and Section 13 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

20. The Hon'ble Supreme Court has categorically held that the non-obstante clause in the later Act must prevail over the non-obstante clause in the earlier Act. The following is the relevant portion of the decision of the Hon'ble Supreme Court :-

“9. It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail”

21. The Hon'ble Supreme Court, while deciding this issue unequivocally, was pleased to uphold its own catena of decisions echoed earlier, which are reported in-

- (i) AIR 1956 SC 614 - Ramnarayan vs. Simla Banking and Industrial Company Ltd.
- (ii) (1977) 1 SCC 750 - Sarvan Singh vs Kasturi Lal
- (iii) (1993) 2 SCC 144 = Maharashtra Tubes Ltd. vs State Industrial Investment Corporation of Maharashtra Ltd.
- (iv) (2000) SCC 406 - Allahabad Bank vs. Canara Bank

22. The Hon'ble Supreme Court in the said case of Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd. has approved the decision of the Special Court rendered by the Hon'ble Mr. Justice Variava, as he was then of the Bombay High Court reported in (1997) 89 Comp cases 547 clarifying that the non-obstante clause in the later enactment will prevail over the non-obstante clause in the earlier enactment.

23. The following is the relevant portion of the decision of the Special Court, as appearing at Para 10 of the said Supreme Court Judgment:-

“Where there are two special statutes which contain non-obstante clauses, the later statute must prevail. This is because at the time of enactment of the later

statute, the Legislature was aware of the earlier Legislation and its non-obstante clause. If the legislature. still confers the later enactment with a non-obstante clause, it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail, then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.”

24. The afore-stated principle laid down by the Hon'ble Supreme Court has been followed by the Full Bench of the Hon'ble Madras High Court in a recent decision dated 10.11.2016 in W.P. Nos. 2675 (authored by Hon'ble Mr. Justice S.K. Koul, who is now the Hon'ble Judge of Supreme Court). The Assistant Commissioner (Commercial Taxes) Vs. Indian Overseas Bank], in which the Hon'ble High Court upheld the provisions of the amended Section 31B of Recovery of Debts due to Banks and Financial Institutions Act, 1993. The following is the relevant portion of the said decision:-

“3. There is, thus, no doubt that the right of a secured creditor to realize secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority.”*

25. The said principle laid down by the Hon'ble Supreme Court has also been followed by the Hon'ble Madras High Court in another decision dated 22.12.2016 in W.P. No.27504 of 2015 and has upheld the provisions of the amended Section 26E of SARFAESI Act. The following is the extract of the relevant portion of the said decision of the Madras High Court:-

“8. Concededly, the mortgage in favour of the petitioner Bank was created on 26.05.2005, which was prior to the date of attachment. The date of attachment, as indicated above, was 19.01.2015. To be noted, attachment entry was made by respondent No. 3, on 13.08.2015. This apart, the matter is now

put beyond the pale of doubt, as during the pendency of the writ petition, an amendment has been made to the 2002 Act with the insertion of Section 26E. "

26. It is clear from the material placed on record that the Appellant - Bank being a Secured Creditor, since it had lent its own money to the Predicate Offender earlier, is entitled to priority over all other debts and government dues, including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority. Hence, the Respondent - Deputy Director has no power to attach the property of the mortgagors.

27. The Hon'ble Andhra Pradesh High Court in the case of B. Rama Raju vs. Union of India &Ors. reported in (2011) 164 Comp Cases 149 in which the Hon'ble High Court has held that if the Adjudicating Authority is satisfied as to the bona fide acquisition of property, it should relieve such property from provisional attachment by declining to pass an Order of confirmation of the provisional attachment.

28. The following is the relevant portion of the Para 103 of the said decision passed by the Hon'ble Andhra Pradesh High Court :-

"103. Since proceeds of crime is defined to include the value of any property derived or obtained directly or indirectly as a result of criminal activity relating to a scheduled offence, where a person satisfies the adjudicating authority by relevant material and evidence having a probative value that his acquisition is bona fide, legitimate and for fair market value paid thereof the adjudicating authority must carefully consider the material and evidence on record (including the Reply furnished by a noticee in response to a notice issue under Section 8(1) and the material or evidence furnished along therewith to establish his earnings, assets or means to justify the bona fides in the acquisition of the

property); and if satisfied as to the bona fide acquisition of the property, relieve such property from provisional attachment by declining to pass an order of confirmation of the provisional attachment.”

29. The Adjudicating Authority also has no power to confirm the Attachment under Section 8(2) of PMLA. Similarly, it is a simple case of recovery by the Appellant-Bank from its Borrower its own stressed Asset, since the Bank had already lent the money owned by it, which the Bank is entitled to recover the same.

30. The principle laid down in the above decisions of the Hon'ble Supreme Court and the Hon'ble Madras High Court has been followed by this Appellate Tribunal, Prevention of Money Laundering Act, New Delhi, in its catena of decisions, including the decision dated 14.07.2017 in a batch of Appeals filed by various Banks, namely, the State Bank of India vs. The Joint Director Directorate of Enforcement (and connected Appeals) against the Provisional Attachment Order. The Tribunal has held that as per the amended provisions of Section 26E of SARFAESI Act and 31B of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, a secured creditor will have priority over all other debts and government dues, including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority and accordingly, set aside the Provisional Attachment Orders. .

31. The following are the relevant Paragraphs of the said Judgment dated 14.07.2017:-

“46. In the present case, it is undisputed fact that the attached property were purchased much prior to the period when the facility of loan was sanctioned to borrowers. The Bank while rendering the facilities were bona fide parties. It is not the case of the respondent that the attached properties were

purchased after the loan was obtained. The mortgage of the properties were done as bona fide purposes. None of the bank is involved in the scheduled offence.

47. *In view of the entire gamut of the dispute, we are of the considered opinion that the conduct of the banks are always bona fide. Both banks are innocent parties.*

58. *Thus in the present case even though the Ld. Adjudicating Authority had all the reasons to believe that the above mentioned were mortgaged to the Appellant Bank and that the Appellant/SBI had prior charge over the subject matter — 5 properties ;still the Ld. Adjudicating Authority confirmed the provisional attachment order of the respondent no. 1 and thus causing huge loss to the appellant SBI.*

60. *We also find that the Adjudicating Authority has not examined the law on mortgages and securities.*

63. *The property of the Appellant bank. cannot be attached and confiscated when there is .no illegality or unlawfulness in the title of the appellant.*

64. *The respondent has no lien over the said properties as the appellant banks are now the legal transferees of the said properties.*

65. *From the entire gamut of the matter, we . are of the view that there is no nexus whatsoever between the alleged crime and the two banks who are mortgagees of all the properties which were purchased before sanctioning the loan. Thus no case of money-laundering is made out against banks who have sanctioned the amount which is untainted and pure money. They have priority as secured creditors to recover the loanamount/debts by sale of assets over which security interest is created, which remains unpaid.”*

This Tribunal in the above Judgment dated 14.07.2017 has also relied upon its own earlier Judgment dated 22.06.2017 in the case Indian

Performing Right Society Ltd. vs. The Deputy Director, Directorate of Enforcement, Mumbai, wherein the Tribunal held as follows :-

“55. Whether innocent party whose properties i.e. movable or immovable are attached can approach the Adjudicating Authority for release of attached property.

"The Scheme of Prevention of Money Laundering Act clearly provides the mechanism whereby the innocent parties can approach the Adjudicating Authority for the purpose of release of properties which have been attached in terms of the provisions of Section 5 of the Act. This can be seen by reading Section 8(1) and the proviso to Section 8(2) of the Act whereby Adjudicating Authority has to rule whether all or any of the properties referred to in the notice are involved in money laundering or not."

32. In the present case, this Appellant - Bank is an innocent party since it had already lent its own money to the Predicate Offender and the property in question being mortgaged to the Bank which is provisionally attached by the Respondent— Deputy Director ought to have been released by the Adjudicating Authority under Section 8(2) of PMLA.

33. The Adjudicating Authority did not appreciate that the afore mentioned moveable/Immoveable property cannot be said to have been acquired out of “proceeds of crime” as defined in section 2 (1) (u) of the Prevention of Money Laundering Act (PMLA), 2002 and therefore, the same (cannot be Attached under Section 5 of the PMLA by the Enforcement Directorate vide PAO No 03/2018 dated 28.03.2018.

34. The Adjudicating Authority did not appreciate the appellant's grievance against the order of provisional attachment dated 28.03.2018, inter alia, since the same was not justified and tenable under the law as the same was passed

in violation of Section 5 of the Act and there was no material on the basis of which the hypothecated/Equitably Mortgaged asset could be provisionally attached.

35. The Adjudicating Authority did not appreciate that no case of money laundering is made out against the Appellant Bank who is an innocent party, who sanctioned Consortium finance amounting to Rs 546.77 Cr (which is untainted and pure money) to the Respondent No.2 Company against the hypothecation/Equitable Mortgage of the moveable/Immoveable property in issue.

36. The Adjudicating Authority failed to appreciate that the provisions of the Prevention of The Money Laundering Act, 2002 do not override the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as also those of Recovery of Debts and Bankruptcy Act, 1993, wherein, Under the aforesaid two special enactments, a bank or financial institution is entitled to recover its dues by non-adjudicatory and adjudicatory mechanism respectively.

37. In the present case, it is admitted by the respondent no. 1 that the Adjudicating Authority by themselves and have not disputed the fact that the Consortium Finance sanctioned by the Appellant herein is untainted and pure money and in an utter disregard to the settled position of law went ahead with the confirmation of the PAO bearing no 03/2018 vide impugned order dated 17.09.2018. However, both the Adjudicating Authority and respondent failed to appreciate that the it is an admitted position of the Respondent No.1 that the credit facility granted by the appellant was untainted and legal money,

therefore, the same could not have been attached by the Respondent No.1 vide PAO bearing no 03/2018 dated 28.03.2018.

38. The Adjudicating Authority did not appreciate that the provisions of The Prevention of Money-Laundering Act, 2002 do not constitute any overriding statutory charge so as to defeat and make sub servient the rights of the bank as a secured creditor. It is no longer *res integra* that crown debts have no priority over the claim of a secured creditor under a contract of loan.

39. The Prevention of Money-Laundering Act, 2002 does not override the provisions of The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest. Act, 2002 should be construed harmoniously so as to give effect to both. The realization of public money through the Securitization& Reconstruction of Financial Asset & Enforcement of Security Interest Act, 2002 cannot be held to be, in any manner, inconsistent with and violative of the purpose and enforcement of provisions of The Prevention of Money-Laundering Act, 2002.

40. The PMLA Act cannot be applied to the detriment of the Appellant being a Secured creditor (Public Sector bank) as held by this tribunal in a catena of judgments. The Adjudicating Authority did not appropriate that even if the two Acts namely The Prevention of Money-Laundering Act, 2002 and The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 are held to be inconsistent with each other, The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 shall prevail over The Prevention of Money-Laundering Act, 2002 as The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 is a special law applicable to

secured assets wherein Security Interest has been created in favour of banks and financial institutions. The respondent no. 1 and adjudicating authority have ignored the decisions of various High Courts and the Supreme Court which were referred by this Tribunal in number of judgments delivered by this Tribunal.

41. The Adjudicating Authority as well as the Respondent No.1 has admitted the fact that the property in issue has been Hypothecated/Equitably Mortgaged by the Respondent No.2 Company in favour of the Appellant Bank is a secured asset, however, in utter disregard to the settled position of law has confirmed the PAO 03/2018 vide the impugned order dated 17.09.2018. The banks are innocent parties. They are not involved in any criminal matter. The property attached was mortgaged property which was not purchased from the proceed of crime as per complaint.

42. The Adjudicating Authority did not appreciate that the only reason averred by the Contesting Respondent No.1 in the OC bearing No 952/2018, for the Attachment of the afore mentioned moveable/immoveable property which has been hypothecated/Equitable Mortgaged with the Appellant Bank is that Rs 603,19,76,500/- as received by the Respondent No.2 Company as equity shares and premium amount by issuance of fresh shares after the allocation of the "Fatehpur East Coal Block" during FY 2007-08 to 2013-14 is considered to have been derived out of criminal activity relating to schedule offences and thus the same constitute as Proceeds of Crime, and that the Respondent No.2 Company had used the said POC amount towards the purchase of land, construction of Factory Building, plant and machinery and commissioning of the proposed power plant. The counsel for the appellant in the present appeal is merely pressing the relief against the respondent no. 1.

43. The Adjudicating Authority did not appreciate that a bare perusal of the afore mentioned section 2(1)(u) of PMLA very clearly stipulates that the property can be attached under the provisions only when, such property has either been derived or obtained, directly or indirectly as a result of a criminal activity relating to a scheduled offence. However, the complainant has failed to prove/establish that the moveable/immoveable property that has been lawfully hypothecated/Equitably Mortgaged with the Appellant Bank has either been derived or obtained, directly or indirectly as a result of a criminal activity relating to a scheduled offence. The only reason given by the Respondent No.1 in the present OC 952/2018 is that Rs 603,19,76,500/- as received by the Respondent No.2 Company as equity shares and premium amount by issuance of fresh shares after the allocation of the “Fatehpur East Coal Block” during FY 2007-08 to 2013-14 is considered to have been derived out of criminal activity relating to schedule offences and thus the same constitute as Proceeds of Crime, and that the Respondent No.2 Company had used the said Proceeds of crime amount towards the purchase of land, construction of Factory Building, plant and machinery and commissioning of the proposed power plant. It is further submitted that the said moveable/immoveable property is not a property that has been derived or acquired, directly or indirectly through the “*Proceeds of crime*”. Therefore, the OC 952/2018 is not maintainable and therefore, the Respondent No.1 had no jurisdiction to attach the afore mentioned moveable/immoveable property under the provisions of the PMLA and that the PAO bearing No. 03/2018 was liable to be set aside.

44. The provisions of The Prevention of Money-Laundering Act, 2002 cannot be construed and implemented to the detriment of third parties having no connection with and involvement in the scheduled offences which fall within the domain of the Act. The provisions of the Act can only entail penal consequences on those who are not guilty of committing of scheduled offences.

The rights of a third party having no involvement in the scheduled offences cannot be jeopardized and decimated by the operation of Act as the same would be violative of their legal right under *bond fide* contracts.

45. By virtue of conjoint effect of Sections 31B and 26E of The Recovery of Debts and Bankruptcy Act, 1993 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the secured creditor i.e. Appellant herein (Punjab National Bank) shall have priority to the secured asset to satisfy their respective dues which shall prevail over and supersede the other debts government dues, revenues, taxes, cesses and rates due to the Central Government, State Government and local authorities.

46. The credit facilities which were sanctioned to Respondent No.2 Company was as per the terms and conditions of the various loaning and security documents, therefore, the same is not at all concerned with the proceeds of crime or the alleged offences in any manner. Further the moveable/immoveable asset which has been provisionally attached are not proceeds of crime as defined in section 2(1)(u) of The Prevention of Money Laundering Act, 2002.

47. Counsel for the respondent no. 1 has admitted during hearing that mortgaged property have not been acquired out of the proceeds of the crime. There is no evidence and material to establish that the hypothecated/Equitably mortgaged moveable/immoveable property have been acquired by the Respondent No.2 company by proceeds of crime at all. It is further submitted that the same was acquired by obtaining Consortium Finance facilities from the Appellant i.e. PNB (being a Public sector Bank and the Lead Bank in the consortium of Banks). He also admits that the banks are victim parties who are entitled to recover the money from the borrowers. However, they are entitled only when the trial against the borrowers is over before the Special

Court. The same would take number of years. The second submission of the counsel for respondent no. 1 is that the banks should approach to the Special Court if they wish to dispose of the mortgaged properties before trial. The said argument is without any force as no-one would purchase the said attached properties unless they attachment is lifted. The only jurisdiction in this regard lies with this Tribunal.

48. The Appellant Bank cited the judgments passed by this Appellate Tribunal at the time of arguments i.e. judgment and order dated 14.07.2017 in the case of State Bank of India vs. Joint Director, Directorate of Enforcement Kolkata”, judgment and order dated 25.01.2018 in the case FPA – PMLA – 1373/GOA/2016 titled as “Punjab National Bank vs. Joint Director, Directorate of Enforcement Goa”, judgment and order dated 02.08.2018 in the case FPA – PMLA – 1604/MUM/2017 titled as “Standard Charter Bank vs. The Deputy Director, Directorate of Enforcement Mumbai, however, the Adjudicating Authority after taking cognizance of the afore mentioned judgements passed by this Hon’ble Tribunal has declined to follow the judgments passed.

49. It is admitted by the respondent counsel that no direct link which the Respondent No.1 could produce in order to lead to the belief that the hypothecated/Equitable Mortgaged assets which stood provisionally attached are the properties which has been acquired out of Proceeds of crime either directly or indirectly by the Respondent No.2 Company.

50. The Appellant bank has initiated Recovery Proceedings against the Respondent No.2 Company and had already taken symbolic possession of the property in issue under section 13(4) of the SARFAESI Act, there was no

likelihood that the property in issue were likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings under the PMLA. Therefore, the order of provisional attachment of the Hypothecated/Equitable Mortgaged properties was bad and illegal and the same could not have been confirmed.

51. It is also a matter of fact that the PAO no. 03/2018 dated 28.03.2018 passed by the Respondent No.1 was not bonafide in as much as the said PAO was issue by the Respondent No.1 only after the Appellant Bank had initiated recovery measures under the SARFAESI and RDB Act on 26.05.2016, 17.10.2016 and 03.08.2017, respectively.

52. Thus, the provisional attachment order is legally erroneous and untenable and could not have been passed more particularly in view of the fact that the complainant was aware of the fact that there is an exclusive and paramount claim of the Appellant Bank, therefore, The Adjudicating Authority had no justification/jurisdiction for attachment of the aforesaid hypothecated/Equitably Mortgaged Moveable and immovable properties.

53. The Adjudicating Authority has failed to understand that the NCLT Mumbai vide order dated 26.02.2018 has declared moratorium under Section 14 of the IBC, 2016, inter alia, the said section 14 of the IBC, 2016 prohibits the continuation pending suits or proceedings against the corporate debtor (i.e. Respondent No.2 herein), therefore, the Adjudicating Authority could not have confirmed the PAO bearing No. 03/2018 dated 28.03.2018 passed by the Respondent No.1.

54. By virtue of Section 4A of the RDB Act, 1993, the property of the Borrowers/mortgagors/guarantors becomes the custodial egis on the institution of the OA for recovery of dues under the Act. It is admitted fact in the present case that the OA bearing No. 410/2017 has been filed by the Appellant Bank before the DRT, Jabalpur and the Ld DRT has been pleased to issue notice to the Respondent No.2 Company on the said OA, therefore, the Respondent No.1 could not have attached the property in issue as the same is now the custodial egis.

55. The NCLT passed Moratorium order 26.04.2018 under Section 14 of the IBC, 2016, inter alia, prohibiting institution or continuation of pending suits or proceedings against the Corporate Debtor i.e. M/s Vandana Vidhyut Ltd. including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority, therefore, in view of the order passed by the NCLT under section 14 of the IBC, 2016, the Respondent No.1 i.e. Enforcement Directorate could not have passed the PAO 03/2018 dated 28.03.2018.

56. In view of the non-obstante clause as contained In Section 238 of the IBC, 2016, the Adjudicating Authority could not have continued with the Attachment proceedings under the PMLA after 26.04.2018 and passed the impugned order dated 17.09.2018. The afore mentioned submissions has been rejected by the Adjudicating Authority on the ground that the non-obstante clause comes into operation only when there is inconsistency between the statute and not otherwise.

57. The Reasoning of the Adjudicating Authority is not wholly bias as it is a settled law that Non-Obstante clause of the later act shall prevail over the non-

obstante clause of the prior act. It is further submitted that the IBC, 2016 being a subsequent legislation than the PMLA, therefore, the Non-obstante clause of the IBC,2016 shall prevail over the PMLA.

58. The proceedings before the Adjudicating Authority is civil in nature, therefore, in view of the Section 14 of the IBC, 2016 the proceedings before the Adjudicating Authority cannot continue as there is clear prohibition under the said section of the IBC,2016.

59. The Appellant Bank and other consortium members pursuant to the order of the moratorium have filed their claim before the IRP amounting to Rs 2677.74 Cr.

60. In earlier matters, it was also observed by this tribunal that the bank if told to wait for the conclusion of the trial, the economy would collapse.

61. It appears that the said PAO 03/2018 which has been passed by the Respondent No.1 is creating an hindrance on the Appellant Bank to recover its legitimate dues.

62. The relevant paragraph of the impugned order dated 17.9.2018 passed by the Adjudicating Authority reads as under:-

“In view of the legal provisions above referred and the object sought to be achieved by the PMLA, I humbly and with great respect cannot concur with the view expressed by the Appellate Tribunal, PMLA in the judgments of the Appellate Tribunal cited by D-3.

In view of the findings hereinabove, the Provisional Attachment Order issued is rightly issued and deserves acceptance and confirmation. The Provisional Attachment Order is therefore, hereby confirmed.”

63. The Adjudicating Authority is bound by the law laid down by the higher courts. No authority has any justification to ignore the law laid down by the Supreme Court and various High Courts and this Tribunal, who on the basis of decisions of Hon'ble Supreme Court and various High Courts, has delivered orders. Unless each and every judgment is distinguished or are on different facts, the different conclusion cannot be arrived. The facts and legal issues are almost same and the Adjudicating Authority has incorrectly passed the impugned order by saying that it cannot "Concur" with the law laid down by this Tribunal. The appellant is a Public Sector Bank. The money must come to the public forthwith not after the trial of criminal case against the borrowers which may take many years. The banks are in crisis, no attempt should be made to block the loan amount in order to avoid worsen positions in the commercial market. The trial may continue against the borrowers. One is failed to understand why the bank loan amount be blocked in view of settled law.

64. This Tribunal is of the considered opinion that the proceeding u/s 8 of PMLA,2002 before the Adjudicating Authority is a civil proceeding and the Adjudicating Authority should have stayed the proceedings on passing of the moratorium order by the NCLT. The continuation of the proceedings from the date of commencement of the moratorium order is contrary to the intention of the legislature hence the consequential order of confirmation of PAO is contrary to law. In the facts of the present case, it appears that hurdle has been created in the process after passing the order of NCLT which ought not to have been done. The question of registering ECIR does not arise. The passing of provisional attachment order was not application of mind and without consulting the facts and law.

65. It is a matter of fact that ED has registered the ECIR and passed the provisional attachment order after the moratorium order is passed by the NCLT. Thus, on the face of record, it is evident that the ED and the Adjudicating Authority have not understood the legal issues involved rather they have ignored the settled law and passed the impugned order. The serious situation is that ED has registered ECIR on the basis of FIR which was registered at the request of banks' complaint as borrowers who failed to pay the loan amount. The banks have now become victim. Therefore, both the impugned order and provision attachment order are set-aside qua the appellant bank.

66. The period of continuation of proceedings before the Adjudicating Authority, PMLA, and before this Tribunal till the passing of the present judgment and order, from the date of commencement of the moratorium order, be treated as excluded while calculating limitation of the period of completion of the Corporate Insolvency Resolution Process.

67. The appeal is allowed.

68. No cost.

69. Copy of Order be given '*Dasti*' to both parties.

(Justice Manmohan Singh)
Chairman

New Delhi,
2nd January, 2019
'D'