(2017) 04 ATPMLA CK 0002

In the Appellate Tribunal Under Prevention Of Money Laundering Act

Case No : FPA-PMLA-1448/HYD/2016

Tata Capital Financial Services Ltd. APPELLANT

Vs

Joint Director, Directorate Of Enforcement, Hyderabad RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Constitution Of India, 1950 — Article 141
Code Of Civil Procedure, 1908 — Order 40 Rule 1, Order 9 Rule 13
Prevention Of Money Laundering Act, 2002 — Section 3, 5(1), 8, 8, 8(1), 8(2), 24, 71
Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2017) 04 ATPMLA CK 0002

Hon'ble Judges : Manmohan Singh, J;Anand Kishore, Member

Bench : Division Bench

Advocate : Shravanth Paruchori, S.A. Saud

Final Decision : Allowed

Judgement

FPA-PMLA-1448/HYD/2016

1. The appellant M/s Tata Capital Financial Services Ltd. at the request off one M/s. Indu Projects Limited (â??Borrowerâ?), provided Credit Facility

(in the nature of term loan facility).

2. The appellant sanctioned to the Borrower various credit facilities by way of First Term Loan Agreement dated 10th July, 2009 and Second Term

Loan Agreement dated 30th March, 2010.

3. The Reschedulement Agreement dated 31st December, 2012 aggregating to Rs. 35,00,00,000/- (Rupees Thirty Five Crores) (hereinafter

collectively referred to as â??the Loan Agreementsâ??).

4. Under the Loan Agreements, the Borrower had agreed and accepted to abide by the terms of sanction of the credit facilities who had also

executed various other documents.

5. With a view to secure the said credit facilities together with interest, costs, charges, etc. equitable mortgage was created and first and exclusive

charge of land in favour of appellant by way of deposit of title deeds in respect of the immovable property located at Chilamathur Village & Mandal,

Anantpur District standing in the name of M/s. Lepakshi Knowledge Hub Private Limited (â??Mortgagorâ?) (hereinafter referred to as â??the

mortgaged propertyâ??).

6. The mortgaged property was a part and parcel of land sold by Andhra Pradesh Industrial Infrastructure Corporation Limited (â??APIICâ?) to the

Mortgager for certain specific purposes as agreed between the APIIC and the Mortgagor.

7. APIIC had issued a NOC dated 5th September, 2009 in favour of the Mortgagor whereby APIIC specifically granted itâ?s â??No Objectionâ? to

the Mortgagor to deposit the title deeds of the lands allotted by APIIC to secure the repayment of credit facility to be availed by the Borrower and

thereby to procure loans from banks and financial institutions.

8. In consideration of the Appellant granting the said credit facilities, the Mortgagor and Mr. Syam Prasad Reddy (hereinafter referred to as

â??Guarantorsâ?) executed guarantees for guaranteeing of the amounts due under the said credit facilities by the Borrower to the Appellant together

with interest, costs, charges etc. However, they failed to return the amount to the appellant.

9. In order to secure the amount of Rs. 35,85,39,403/- (Rupees Thirty Five Crores Eighty Five Lakhs Thirty Nine Thousand Four Hundred and Three

only) the appellant adopted proceedings before the Honâ?ble High Court at Bombay being Arbitration Petition No. 1126 of 2014 under Section 9 of

the Arbitration and Conciliation Act, 1996. By an Order dated 23rd July, 2014 (as the said agreement contains the arbitration clause) passed by the

Honâ??ble High Court at Bombay in the Arbitration proceedings.

10. The Court Receiver, High Court Bombay, was appointed as Receiver of the mortgaged property and the Court Receiver was not to dispossess the

Borrower or any third party found in possession but shall take formal possession until further orders.

11. As the Court Receiver, High Court Bombay was unable to take formal

possession of the property, the Honâ?ble Court by its Order dated 3rd

February 2015, in the Appellantâ??s Application) clarified that the Court Receiver shall visit the premises on 6th February, 2015 at 11:00 a.m. to comply

with the order passed by the Honâ??ble Court dated 23rd July 2014.

12. Accordingly, formal possession of the property was taken by the Court Receiver, High Court, Bombay on 6th February, 2015. The Court

Receiverâ?s report was filed by the Appellantâ?s Application before the Adjudicating Authority. The contention of the appellant before the High

Court was that the Borrower and Guarantors are liable to pay the Appellant, the outstanding dues aggregating to Rs.35,85,39,403/-(Indian Rupees

Thirty Five Crores, Eighty Five Lakhs Thirty Nine Thousand Four Hundred and Three Only) as on 10th June 2014 along with a further interest at the

rate of 13.25% per annum from 11/06/2014.

13. On or about April, 2015, the Appellant learnt of the order passed by the Joint Director Enforcement Directorate whereby Provisional Attachment

had been levied under Section 5(1) of the Act for a period of 180 days in respect of the properties mentioned therein which includes Mortgaged

property which is security of the Appellant, more particularly 204.41 acres of land (out of 8844.01 acres) situated at Chilamathur, Anantpur District.

14. After having the said knowledge gathered by the appellant about the provisional attachment order dated 25th March 2015, the Appellant filed its

representation under Section 8 of the Act dated 23rd June 2015 before the Respondent No.2 by filing of the Appellantâ?s Application) as a Secured

Creditor of the Borrower disclosing the facts in detail and requested for a hearing before any order is passed including confirming the Order of

attachment.

15. The Appellant by letter of 18th May 2015 had informed the Andhra Pradesh Infrastructure Corporation Ltd. and the Enforcement Directorate of

the charge on the property in question of the Appellant and also the appointment of the Court Receiver, High Court, Bombay. It was also informed

that the Court Receiver had taken symbolic/formal possession of the property on 6th February 2015. These facts were also communicated earlier vide

letter of 5th August 2014 to the then lawyers of the Appellant.

16. It is the case of the appellant that on 8th June 2015, the Appellant tried to file the representation in Delhi before the office of Adjudicating

Authority but it was informed to the Appellant that they are required to submit the said representation before ED at Hyderabad who in turn will give

them an acknowledgement which can be filed before the Adjudicating Authority (and that too) with due procedure. The Appellant was informed that

three spiral bound copies of the representation along with the representation (with annexures) on a CD was required to be submitted as per the

procedure. As the Appellant followed this process, as instructed, the representation could not be lodged before the Adjudicating Authority on or before

23rd June, 2015. Pending hearing of the representation dated 23rd June, 2015 are filed before the Respondent. The appellant has filed the proof of

service of representation received by Adjudicating Authority. The receipt of the same was not denied by the respondent before us which is available

at page 129 of the paper book.

17. However without considering the fact the properties in question were under the possession of the Honâ?ble High Court as per orders passed by

the Court from time to time prior to PMLA proceedings. The Adjudicating Authority thereafter passed an impugned order dated 24th July, 2015

whereby the Provisional Attachment of the Property in question is converted into a Final Attachment without appreciating or considering the

Representation filed before the Respondent.

18. For the safety side the appellant took the steps to implead Respondent no. 1 as a party to the Section 9 proceedings before the Honâ?ble High

Court at Bombay pursuant to the Order dated 5th August, 2015 passed by the Honâ?ble Court directing the to file its Affidavit and disclose the status

of attachment levied.

19. Thereafter, the appellant preferred an appeal before the Appellate Tribunal, New Delhi challenging the impugned order made by the Adjudicating

Authority on 23rd November, 2015. The said appeal bearing no. 1145 was heard on 8th January, 2016 and 12th January, 2016 respectively.

20. The Appellate Tribunal by its Order dated 12th January 2016 observed that the said Appeal was not maintainable as the Appellant was not a party

before the Adjudicating Authority, where while disposing of the appeal on 12.01.2015, the liberty was granted to the Appellant to file an application

invoking the right of hearing within 30 days before the Adjudicating Authority under section 8(2) of the Act.

21. In the said order dated 12th January, 2016 it was recorded by the Appellate Tribunal that the Appellant herein had stated that the letter dated 23rd

June 2015 was sent to the Adjudicating Authority. However, the Appellant was asked to file the same in the office of the Enforcement Directorate at

Hyderabad as the final attachment order dated 24th July 2015 had already been passed. This contention is not disputed.

22. In view thereof, the Appellant filed an Application under section 8(2) of the Act as a Secured Creditor of the Borrower on various grounds. On

21st July 2016 Respondent No.2 passed the impugned order rejecting the said Application. The main reasons given in the impugned order are

mentioned in para 20 & 21 and the same are reproduced herein under:-

20. As has been observed in the order dated 24.07.2015 itself in the findings which is reproduced herein above (at page no. 9 & 10), it is

concluded in Para 23 as quoted â??23. PMLA, Appellate Tribunal has upheld that the claim of mortgagee is at best an encumbrance on the

property and provisions of Section 71 of the PMLA have overriding effectâ?. Further to quote â??26. Provisions of Section 71 have

overriding effect.â??

Thus the claim of the Applicant is at best an encumbrance on the property. By virtue of the provisions of the Act, the said property being the

proceeds of crime is indeed liable to be attached for the purpose of the provisions of Chapter-Ill of PMLA. The attachment thereof, which is

duly confirmed is legitimate and correct. There are no reasons nor any possibility of revising, reversing or setting aside the said

confirmatory order passed by the Adjudicating Authority. The Applicant herein has a claim over the property attached. The Applicant was

not issued/ served with any notice under the proviso of sub-section 8(1) of PMLA. The applicant is given an opportunity in proviso of sub-

section 8(2) of Act. Though the Applicant did not raise any claim earlier, by virtue of the directions and resorting to the said directions the

Applicant has filed the present Application. The Applicant is given an opportunity of hearing. Though the Applicant has shown that prima-

facie the Applicant has a claim in respect of some of the properties attached, however the Applicant has failed to prove that the property is

not involved in money laundering. In fact there are no grounds raised in the

Application itself to show that the property is not involved in

money-laundering. Nor are any arguments advanced to the said effect. A party may be having claim over a property which is involved in

money-laundering, but merely because a party has a claim, it cannot be said or concluded that because of such claim the property is not

involved in money-laundering. The Applicant has miserably failed to prove the said aspect. On the other hand there is adequate evidence,

which justifies that the properties Provisionally Attached are involved in money-laundering. Hence there is no question of exempting any

property from the attachment, which attachment is duly confirmed by the Adjudicating Authority. The application of the applicant therefore

fails and the same is rejected.

In view of the consideration of the Application filed in terms of section 8(2), the Applicant having raised a claim in respect of part of the

properties; and in view of the conclusion herein made, the observations made in para 28 (pg 54 of the order) dated 24.07.2015, would not

be applicable to the Applicantâ??s case now.

21. In view of the factual and legal position herein above discussed, there is no substance in the Application filed by the Applicant. The

same deserves to be rejected.Hence the said MA filed by M/s. Tata Capital Financial Services Ltd. is hereby rejected.â??

23. Being aggrieved by the impugned order dated 21st July, 2016 the appellant filed the present appeal interalia on various grounds. We have gone

through the same. It is necessary to refer certain share admitted facts in the matter.

24. It is admitted position that the appellant alongwith affidavit dated 12th January, 2016 its representative referred all facts before the Adjudicating

Authority about the service of the letter dated 23rd June, 2015 but the respondent no. 2 did not accept the contention of the appellant.

25. The Respondent No. 2 despite of having the knowledge of the adjudication the Appellant chose not to make an application directly to the

Adjudicating Authority without appreciating the fact that when the representation was made on 23rd June 2015 to the Adjudicating Authority reject

the same. While reading paragraph 11 page 31 of the impugned order the impression was given by the Enforcement Directorate that he not aware of the symbolic possession resting with the Court Receiver, High Court Bombay and the same could therefore not have been taken into account. The

said findings are correct in the letter dated 18th May, 2015 which is served upon the Enforcement Directorate. The orders of the High Court cannot

be ignored in this manner. Even at the time of hearing of the application filed by the appellant, all the facts about the passing of order of possession

were mentioned. The same cannot be twisted in the fashion as mentioned in the impugned order. Every authority has to give the due respect to the

order passed by the Court and is duty bound to comply to the same.

26. Even copy of letter dated 23.06.2015 was served to the Adjudicating Authority before passing the main order of confirmation dated 24th July, 2015

without dealing with the main issue that possession of the properties in question was with the Court receiver and no permission was sought by the

Adjudicating Authority before confirming the provisional orders. The said act of the Adjudicating Authority is not in accordance with orders of the

Honâ??ble High Court.

27. Respondent no. 2 ought to have understood that on 6th February, 2015, the Court Receiver of the Honâ?ble Bombay High had already taken

possession of this mortgaged property when even provisional attachment order was not passed. It is matter of fact that with effect from 6th February,

2015 the mortgaged property was Cusodia Legis and thus, it was not open for any authority to attach the property which was in the

possession/custody of the Court Receiver, High Court Bombay.

28. Respondent No.2 without appreciating that once the Court Receiver is appointed as Receiver for any property as per settled law by the Apex

Court, no other rights can be created and/or no attachment can be levied on the same till such property continues to be in possession / custody of the

Court Receiver. Any authority without the permission of the same very court as the property in question is in the custody of the Court.

29. The Respondent No. 2 was wrong in coming to the conclusion that there is nothing brought on record by the Appellant in the present proceedings

to show that the Appellant corresponded with the Directorate in relation to the properties in question (over which the Appellant has a charge) with

regard to the proceedings before the Honâ?ble Bombay High Court as the Appellant was never aware of the adjudication proceedings till April 2015.

The letters dated 18th May 2015 and 23rd June 2015 are self-explanatory. It is incorrectly stated in the impugned order that as the Enforcement

Directorate was not aware of the symbolic possession of the Court Receiver, absence of such knowledge entitles the Enforcement Directorate to

attach the property in question. On the date of passing the confirmation order dated 24th July, 2015 both ED and Adjudicating Authority were deemed

aware that the Bombay High Court has already passed the order of appointment of Receiver and the properties were in the physical possession of the

court receiver. Even, on the date of hearing the application, the date of decision, the date of filing of an appeal and the date of passing the present

judgment, it is matter of fact that the physical possession of the same very property was/is with the Court Receiver. No one has a right to give

different meaning of the orders passed by the Courts.

30. The Respondent no. 2 has wrongly come to the conclusion that as per the provisions of the Act, despite the Court Receiver being appointed by the

Honâ?ble High Court and the property being Custodia Legis, the Enforcement Directorate was entitled to attach the said property without following

the principles laid down by Supreme Court in the case of Kanhaiyalal V. Dr. D.R. banaji and others [1959 SCR 333: AIR 1958 SC 725]. It is settled

law that proceedings taken in respect of a property which is in the possession taken in respect of a property which is in the possession and

management of a Receiver appointed by Court under Order 40, rule 1 of the Code of Civil Procedure without leave of that court are illegal in the

sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and

that the proceedings so held do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who, ultimately,

may be adjudged by the Court to be entitled to the same. The proposition canvassed are appropriately considered in rendering the findings.

â??It is also settled law that proceedings taken in respect of a property which is in the possession and management of a Receiver appointed

by Court under Order 40, Rule 1 of the Code of Civil Procedure, without the leave of that Court, are illegal in the sense that the party

proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who,

ultimately, may be adjudged by the Court to be entitled to the same. The learned counsel for the respondent was not able to bring to our

notice any ruling of any Court in India, holding that a sale held without notice to the Receiver or without the leave of the Court appointing

the Receiver in respect of the property, is void ab initio. In the instant case, we do not think it necessary to go into the question raised by the

learned counsel for the respondents that a sale of a property in the hands of the Court through its Receiver, without the leave of the Court,

is a nullity. The American Courts appear to have taken the view that such a sale is void. In our opinion, it is enough to point out that the

High Court took the view that the sale was voidable and could be declared illegal in a proper proceeding or by suit. We shall assume for

the purposes of this case that such a sale is only voidable and not void ab initio.

8. On the assumption that the sale held in this case without the leave of the Court and without notice to the Receiver, is only voidable and

can be declared illegal on that very ground, the suit had been instituted for the declaration that the sale by the revenue courts was illegal.

The plaint was subsequently amended by adding the relief for recovery of possession, â??because in the meanwhile, the auction-purchaser

had obtained delivery of possession of the property through the revenue authorities, some time in 1940. The general rule that property in

custodia legis through its duly! appointed Receiver is exempt from judicial process except to the extent that the leave of that court has been

obtained, is based on a very sound reason of public policy, namely, that there should be no conflict of jurisdiction between different Courts.

If a court has exercised its power to appoint a Receiver of a certain property, it has done so with a view to preserving the property for the

benefit of the rightful owner as judicially determined. If other Courts or Tribunals of co-ordinate or exclusive jurisdiction were to permit

proceedings to go on independently of the Court which has placed the custody of the property in the hands of the Receiver, there was a

likelihood of confusion in the administration of justice and a possible conflict of jurisdiction. The Courts represent the majesty of law, and naturally, therefore, would not do anything to weaken the rule of law, or to permit any proceedings which may have the effect of putting

any party in jeopardy for contempt of court for taking recourse to unauthorised legal proceedings. It is on that very sound principle that

the rule is based. Of course, if any Court which is holding the property in custodia legis through a Receiver or otherwise, is moved to grant

permission for taking legal proceedings in respect of that property, the Court ordinarily would grant such permission if considerations of

justice require it. Courts of justice, therefore, would not be a party to any interference with that sound rule. On the other hand, all Courts

of justice would be only too anxious to see that: property in custodia legis is not subjected to un-controlled attack, while, at the same time,

protecting the rights of all persons who may have claims to the property.â??

31. The Respondent no. 2 is not correct while coming the conclusion that Section 9 of the Act has an overriding effect over all other law for the time

being in force and the property attached vests free of encumbrances in the Central Government. Under the present facts and circumstances available

in the present case, there is no provision and it cannot be held by the authority that the PMLA has overriding effect under these circumstances also

one the property in question is in the possession of the Court and the same can be vested with the Central Government without the leave of the Court.

32. Respondent no. 2 was not correct while passing the order of provisional attachment on 25th March 2015, the Adjudicating Authority was not

aware of the fact that the Court Receiver had taken possession of the mortgaged property on 6th February 2015. No doubt upto the stage of passing

of provisional attachment order, the Adjudicating Authority was not aware, but at the time of confirmation of order dated 24th July, 2015, the Authority

was fully aware that the Bombay High Court on 6th February, 2015 had already attached the properties by appointing Court Receiver. This is not valid

justification when after having the knowledge of Courtâ??s orders, in the confirmation orders the High Court order was ignored.

33. The Respondent No.2 ought to have decided that once the property is Custodia Legis, no attachment can be levied on the said property. In view of

the judgment of the Supreme Court permission of the Court in the absence of the knowledge of the said orders appointing Court Receiver and/or of the fact that the Court Receiver is in possession of the mortgaged property, cannot be the basis of confirming the provisional attachment. In any case,

on 24th July 2015, as the Appellant had already put the Adjudicating Authority to the notice of their rights in the mortgaged property, the order of

Bombay High Court appointing Court Receiver and also the fact that the Court Receiver was already in the possession of the mortgaged property.

Thus, considering the possession of the Court Receiver, the Adjudicating Authority was wrong in passing order on 24th July 2015. It was the duty of

the Respondent No.2 ought to have considered the aspect of possession of Court Receiver in the appellantâ?s application and ought not to have

rejected the said contention of the appellant on the ground that on the date of provisional attachment, mainly on the reasons that the Adjudicating

Authority was not aware of the order passed by the Honâ?ble Bombay High Court and the fact the Court Receiver had taken symbolic possession of

the mortgaged property. The said finding in the impugned order are contrary to facts and any logic.

34. There is no provision in the said Act which authorizes the authorities to attach the property which is believed to be proceeds of crime even when

the property is in custody of the Court Receiver, High Court Bombay and has become Custodia Legis. It is settled law that when the property

becomes Custodia Legis, the owner of such property loses all its right and interest therein. Therefore Respondent No. 2 has wrongly observed that the

authorized officer was empowered to attach the property despite of such a situation.

35. It is undisputed possession that the appellant has claimed over the mortgaged property. Lifting the attachment on the mortgaged property (which is

in custody and possession of the Court Receiver) would be contrary to scheme of the Act and is contrary to well settled law. The Appellant has

bonafide claim against the Borrower which is secured by the mortgaged property.

36. The Respondent no. 2 was wrong in holding that the property which is allegedly â??proceeds of crimeâ?? is liable to be attached irrespective of the

claims of innocent third parties and the provisions of Section 9 of the Act has overriding effect over all other laws for time being in force. The said

findings are contrary to plain reading of Section 9 of the Act. Section 71 of the Act states that the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. It is evident, the Section does not deal any overriding effect of the

provisions of the Act as held by Respondent No. 2. The contentions of the appellant are not in any manner â??inconsistentâ? with any provision of

the Act particularly once the same property is in custody with the court receiver.

37. Counsel for the respondent has referred to the decision of Division Bench in the case of Brizo Reality Company Pvt. Ltd. Vs. Aditya Birla

Finance Ltd., Mumbai reported in 2014(4) Mh. L.J. 849 para 7

â??7. The contention that the show cause notice does not state that the Adjudicating Authority has reason to believe that the petitioner has

committed an offence under section 3 of the Act or is in possession of proceeds of crime is not well founded. The notice has. for all practical

purposes, adopted, incorporated the complaint in toto. The notice, fairly read, indicates that the Adjudicating Authority, on the basis of the

material in the complaint had reason to believe that the ingredients necessary for the attachment order existed. So read, it follows that the

Adjudicating Authority stated in the show cause notice that he had reason to believe that there existed the factors necessary to serve the

notice. The reasons, in turn, stand incorporated in the notice from the complaint. It is apparent that the notice has been issued based on the

reasons to be found in the complaint and the documents which have been expressly referred to in the complaint. The complaint itself

expressly sets out the reason to believe. If. on the basis of the facts disclosed in the enclosures, the Adjudicating Authority had formed the

opinion that there was no reason to believe the existence of the factors mentioned in section 8. he would not have issued the show cause

notice. That he did indicates that he had reason to believe the existence of the said factors. In the facts and circumstances of the case this is

sufficient compliance.â??

38. The said decisions have no bearing to the facts of the present case. The same was on aspect of movable property. Secondly, in the said decision

the Judgment of the Supreme Court 1958 S.C. 725 in the case of Kanhaiyalal (Supra) was not referred wherein it was mandated that if the possession

and management of a receiver had been appointed by the court, such attachment is illegal without leave of that court. Thus, the ratio of the said case cannot be applied in the present case particularly when we are dealing with immovable properties.

39. The decision of the Supreme Court is always binding in nature and the same cannot be ignored after the decision of the Supreme Court attaining

finality. Para 11-15 reads as under:-

11. We have heard the learned counsel at length and have also considered the submissions made, the judgments relied upon by the counsel,

the earlier judgment delivered by this Court in South Central Railway Employees Coop. Credit Society Employees' Union v. Registrar of

Coop. Societies and the impugned judgment. In our opinion, the High Court has committed a grave error by taking a different view than the

one which had been taken by this Court in South Central Railway Employees Coop. Credit Society Employeesâ?? Union v. Registrar of Coop.

Societies, especially when the rules governing the promotion policy had not been amended after the aforestated judgment was delivered by

this Court. It is pertinent to note that a review application had been filed in the aforestated South Central Railway Employees Coop. Credit

Society Employeesâ? Union v. Registrar of Coop. Societies and the same had been rejected and therefore, the judgment delivered by this

Court in South Central Railway Employees Coop. Credit Society Employeesâ?? Union v. Registrar of Coop. Societies had become final.

12. Once in pursuance of a judgment delivered by this Court orders had been issued by the Society to its employees who had been wrongly

promoted, the High Court could not have held that the orders were not valid because there were certain other factors which had made the

promotions given to the employees concerned valid.

13. In our opinion, the High Court should not have considered any other factor especially when this Court had come to a final conclusion

that the policy with regard to reservation in the matter of promotion to the employees was not legal and proper.

14. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in South Central Railway

Employees Coop. Credit Society Employees' Union v. Registrar of Coop. Societies was per incuriam

15. If the view taken by the High Court is accepted, in our opinion, there would

be total chaos in this country because in that case there

would be no finality to any order passed by this Court. When a higher court has rendered a particular decision, the said decision must be

followed by a subordinate or lower court unless it is distinguished or overruled or set aside. The High Court had considered several

provisions which, in its opinion, had not been considered or argued before this Court when CA No. 4343 of 1988 was decided. If the

litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher court and on that

ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio

decidendi will have to be rewritten and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court,

the High Court or the subordinate courts would also be violating the provisions of Article 141 of the Constitution of India.

40. Thus the decisions referred by the respondent have no force and even otherwise distinguishable in view of the different facts.

41. Therefore, we are of the view that once the Enforcement Directorate and Adjudicating Authority ought to have held that the possession of the

properties were with the Court Receiver, the Authority was duty bound to take the permission of same very court. The other decisions, referred in the

impugned order, are also on different facts.

42. Lastly, it was submitted on behalf of respondent that the order dated 12.01.2016 passed the Tribunal while granting the liberty to the appellant to

approach the Adjudicating Authority was bad as no review lies once the final order of confirmation was passed on 24th July, 2015. The submissions

have force. Firstly, the order dated 12th January, 2016 has not been challenged by the respondent in the higher court. Secondly, the ratio laid down by

the Honâ?ble Supreme Court of India in the matter of Kapra Mazdoor Ekta Union V/s. Birla Cotton Spinning and Weaving Mills Ltd. & Anr. (2005

13 SCC 777); South Central Railway Employees Cooperative Credit Society Employees Union V/s. B. Yashobai & Ors. (2015 SCC 72;7)

Kanhaiyalal V/s. Dr. D.R. Banaji & Ors. (1959 SCR 333.) The said three Judgments are applicable to the present case and ought to have been

considered by the Respondent No. 2.

43. Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and weaving mills ltd and another [2005 13 SCC77].

a. Review on merits and procedural review. Review on merits is permissible only in case forum in question is vested with power of review by

statute, expressly or by necessary implications. There exist no inherent power for the same. However, procedural review belongs to a

different category, power for which is inherent. In case of procedural review, party seeking the same does not have to prove any of the

grounds necessary to warrant review on merits, such as error apparent on face of records. Rather it has to be established that the

procedure followed by forum concerned suffered from such illegality that it vitiated the proceeding and in validated the order made therein.

In such cases, the matter has to be reheard in accordance with Law and without going into merits or order impugned.

B. South Central Railway employees Cooperative credit society employees union V.B. Yashobai and others [2015 SCC 727]

When a higher Court has entered a particular decision, the said decision must be followed by a Subordinate or lower court unless it is

distinguished or overruled or set aside.

C. Kanhaiyalal V. Dr. D.R. banaji and others [1959 SCR 333 AIR 1958 SC 725,] it is settled law that proceedings taken in respect of a

property which is in the possession and management of a Receiver appointed by Court under Order 40, rule 1 of the Code of Civil

Procedure without leave of that court are illegal in the sense that the party proceeding against the property without the leave of the Court

concerned, is liable to be committed for contempt of the Court, and that the proceedings so held do not affect the interest in the hands of the

Receiver who holds the property for the benefit of the party who, ultimately, may be adjudged by the Court to be entitled to the same.

The proposition canvassed are appropriately considered in rendering the findings.

â??17. The question still remains whether the Tribunal had jurisdiction to recall its earlier award dated 12-6-1987. The High Court was of

the view that in the absence of an express provision in the Act conferring upon the Tribunal the power of review the Tribunal could not

review its earlier award. The High Court has relied upon the judgments of this

Court in Kuntesh Gupta (Dr.) v. Hindu Kanya

Mahavidyalaya and Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji wherein this Court has clearly held that the power of review

is not an inherent power and must be conferred by law either expressly or by necessary implication. The appellant sought to get over this

legal hurdle by relying upon the judgment of this Court in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal. In that case the

Tribunal made an ex parte award. The respondents applied for setting aside the ex parte award g on the ground that they were prevented

by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex parte award on being

satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the Code of Civil Procedure and accordingly set aside the

ex parte award. That order was upheld by the High Court and thereafter in appeal by this Court.

18. It was, therefore, submitted before us, relying upon Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal that even in the absence of

an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be

rejected as misconceived. The submission does not take notice of the difference between a procedural review and a review on merits. This

Court in Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal5 clearly highlighted this distinction when it observed: (SCC p. 425, para

13)

â??Furthermore, different considerations arise on review. The expression â?? reviewâ? is used in the two distinct senses, namely (1) a

procedural review , which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a

misapprehension by it, and

(2) a review on merits when the error sought to be corrected is one1 ,of law and is apparent on the face of the record. It is in the latter

sense1 that the Court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously

when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito to prevent the abuse of its process, and such power inheres in every court or Tribunal.â??

19. Applying these principles it is apparent that where a court or quasi-judicial authority having jurisdiction to adjudicate on merit

proceeds to do its judgment or order can be reviewed on merit only if the court or the quasi-judicial authority is vested with power of review

by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the court or

quasi-judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits (sic ascertains whether it has

committed) a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order

passed therein. Cases where a decision is rendered by the court or quasi-judicial authority without notice to the opposite party or under a

mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a

date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a

case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error

apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the

court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein,

inasmuch as the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than

the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be reheard in

accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it

is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which

went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal5 it was held

that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be reheard and decided again.â??

44. Therefore the submissions of the respondent cannot be accepted and the order dated 12.01.2016 was contrary to law in view of the facts and

circumstances in the present case.

45. Respondent No. 2 was wrong in coming to the conclusion that the attachment thereof, which is duly confirmed is legitimate and correct. There are

no reasons or any possibility of revising, reversing or setting aside the said confirmatory order passed by Respondent No.2. Respondent No. 2 ought to

have appreciated that the Appellant had made out a case for setting aside the order dated 24th July 2015.

46. The Appellant in the present case has discharged the burden and in fact, Respondent No.2 had in the impugned order mentioned that it is thus not

disputed that the Appellant has by virtue of equitable mortgage a claim over the said mortgaged property. In view thereof, Respondent No.2 ought to

have allowed the Appellantâ?s application. Respondent No.2 did not appreciate that a person who is not an accused or having committed the offence

under Section 3 is not imposed the burden of proof enjoined by Section 24 as has been held by the Honâ?ble High Court of Andhra Pradesh in

judgment of B. Rama Raju, S/o B. Ramalinga Raju [2011]108SCL491(AP)).

47. In the facts of the present case Respondent No. 2 was duty bound to take cognizance of the proceedings pending before the Honâ?ble Bombay

High Court which was disclosed and the orders passed therein before the impugned order dated 25th March 2015 was passed by the Jt. Director,

Enforcement Directorate, Hyderabad Zonal Office resulting in Final Attachment of the property which property was Custodia Legis in light of the

orders passed by the Honâ?ble Bombay High Court. As Respondent No. l had been made party to the Section 9 proceedings before the Honâ?ble

Bombay High Court and the same is sub judice, the Order passed by Respondent No.2 confirming the attachment is not sustainable. The impugned

order passed by the Respondent No.2 is bad in law, contrary to the provisions of the Act and without appreciating the material on record and thus the

same is liable be set aside. The appeal is accordingly allowed. The application filed by the appellant in view of order dated 12th January, 2016 is

allowed. Even the provisional attachment order is also set aside.

48. In case, the respondent no. 1 & 2 still wish to attach the properties in

question under the PMLA as canvassed by them before us, they are at

liberty to approach the Bombay High Court to seek liberty, where the properties are in the possession of the Court Receiver. However such

application, if filed, will have to be decided on merit.

49. No costs.

