

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW
DELHI
COMPANY APPEAL (AT) (Ins) No.935 of 2020**

IN THE MATTER OF:

**Directorate of Economic Offences
Govt. of West Bengal
5, Council House Street, 1st floor,
Kolkata-700001
Vs**

...Appellant

**1. Binay Kumar Singhania & Ors
C/o B.K.S. & Co. Diamond Heritage,
16, Strand Road, Unit 519, 5th Floor
Kolkata-700001**

...Respondents

**2. M/s Bengal Polypet
Jirat Road, New Baigachi,
Ashok Nagar, 24, Parganas(N)
Kolkata-743222 (WB)**

**3. M/s Pincon Spirits Ltd.
Wellesley House, 7 Redcross Place,
3rd Floor, Kolkata-700001 (WB)
Through the IRP Mr.Binay Kumar Singhania
C/o B.K.S. & Co. Diamond Heritage,
16, Strand Road, Unit 519, 5th Floor
Kolkata-700001**

Present:

For Appellant	:-	Ms Nandini Sen, Advocate
For Respondent	:-	Mr. Gaurav Mitra, Mr Kanishk Khetan, Mr Nipun Gautam, Advocates

J U D G M E N T

Jarat Kumar Jain: J.

The Appellant 'Directorate of Economic Offences, Government of West Bengal' (DEO, WB) filed this Appeal against the order dated 19.02.2020 passed by Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in CP (IB) No. 93/KB/2018 whereby Respondent No.1's Application CA(IB) 1741/KB/2018 under

Sections 33 (5), 60 (5) (c) and 238 of Insolvency and Bankruptcy Code, 2016 (IBC) was allowed directing the Appellant to de-attach all the properties attached vide notice dated 16.04.2018 and to restore possession thereof to the Respondent No. 1 (Liquidator).

2. Brief facts of this Appeal are that M/s Bengal Polypete, an Operational Creditor (Respondent No. 2) filed an Application under Section 9 of the IBC against M/s Pincon Spirits Ltd. Corporate Debtor (Respondent No. 3). It was registered as CP(IB) No. 93/KB/2018 and vide order dated 19.07.2018, the Application was admitted and Interim Resolution Professional (IRP) was appointed. Subsequently, Binay Kumar Singhania (Respondent No. 1) was appointed as Resolution Professional (RP) and vide order dated 30.09.2019, he was appointed as Liquidator.

3. There are many complaints against the group companies of Pincon, alleging fraudulent transactions by receiving deposits from the public at large. Therefore, First Information Report (FIR) was registered against the Directors and other officials of the Pincon Group of Companies at Police Station Khejuri Case No. 47/07 dated 19.02.2017 under Sections 406 and 420 of IPC and Section 3 of the West Bengal Protection of Interest of Depositories in Financial Establishment Act, 2013 (WBPIDFE Act). In connection with this offence, DEO, WB, vide notice dated 16.04.2018, sealed the registered office of the Corporate Debtor (Respondent No. 3) and attached the Bank Accounts, movable and immovable properties of the Corporate Debtor. After investigation, DEO, WB filed Charge Sheet No. 08/18 dated 31.01.2018 under Sections 406, 409, 420 and 120B of the IPC and under Section 3 (1) (e) of the WBPIDFE Act against 41 accused persons. The Government of West Bengal has in order to protect the rights of depositors enacted the WBPIDFE Act 2013. The case was registered as SPI (PIDFE) Case 01 of 2017 and tried by Designated Court of Economic Offence. The said

Court, vide Judgment dated 03.10.2020, convicted the mastermind accused Monoranjan Roy and others for the offence under Sections 406, 409, 420 and 120B of the IPC and Section 3 of WBPIDFE Act, 2013 and passed sentences accordingly and also directed that all the seized articles, documents, materials, instruments, furniture and other properties, cash Bank Accounts, movable and immovable properties, premises, factories landed properties will be in the custody of this Court as attached property, for realization of the dues of the depositors of the accused under Sections 15 to 18 WBPIDFE Act subject to the decision of the Appellate Court. The DEO, WB is directed to look after all the properties, movable and immovable, and also which are given in Zimma till realisation of the liability with the help of the local police stations.

4. Liquidator (Respondent No. 1) filed an Application under Sections 33 (5), 60 (5) (c) and 238 of the IBC (IA No. 1741 of 2019) stating that the registered office of the Corporate Debtor was attached and sealed by DEO, WB under Section 3 of WBPIDFE Act. The documents kept in the registered office are essential to conduct the liquidation process. Hence, the interest of the Creditors to recover their dues from the Corporate Debtor is jeopardized. Therefore, Liquidator requested to pass an order directing the DEO, WB to de-attach all the properties attached as per notice dated 16.04.2018 and to handover the possession of properties to the Liquidator for the purpose of liquidation process.

5. The DEO opposed the Application on two grounds. Firstly, although the Appeal CA(AT) (Ins) No. 1361-1362 of 2019 filed by DEO before this Appellate Tribunal challenging the order of admission of the Petition, wherein CIRP had been initiated against the Corporate Debtor, was dismissed, the DEO is preparing to file an Appeal before the Hon'ble Supreme Court. Thus, the order of admission has not attained

finality. Secondly, the Corporate Debtor is under the control of Pincon Group and the Pincon Group Companies collected deposits from the public fraudulently and such amount was transferred to the Corporate Debtor and the attached properties were purchased by such amount. Thus, the attached properties claimed by the liquidator are not Assets of the Corporate Debtor. Therefore, such Assets are out of the purview of Section 14 (1) (a) of the IBC. The declaration of moratorium under Section 14 of the IBC is not applicable to the proceedings initiated under Section 3 of the WBPIDFE Act, 2013 and the legal proceeding initiated by the DEO are not at all a bar under Section 33 (5) of IBC.

6.(a). Ld. Adjudicating Authority observed that earlier the DEO has filed an application CA(IB) 577/KB/2019 challenging the initiation of CIRP as against the Corporate Debtor that Corporate Debtor company being a Financial Service provider and a chit fund company fraudulently accepting the deposits therefore, proceedings initiated against the Corporate Debtor is illegal and liable to be dismissed. The Adjudicating Authority dismissed the Application stating that (i) there is no material to prove that Corporate Debtor is a financial establishment as defined under Section 2(e) of WBPIDFE Act and the Company failed or fraudulently defaulted in payment of deposit after specified period; and (ii) Hon'ble High Court of Calcutta in WP No. 24110 (W) of 2016 vide order dated 23.04.2019 held that Assets and Properties of M/s Pincon Spirits Ltd. (Corporate Debtor) be kept outside the purview of sale.

6.(b) Ld. Adjudicating Authority, while passing the impugned order, reiterated the aforesaid grounds and also held that provision under Section 3 of WBPIDFE Act, 2013 is inconsistent with Section 14 of the IBC and therefore, Section 14 as well as sub-section 5 of Section 33 of the IBC will prevail over Section 3 of WBPIDFE Act and

accordingly allowed the Application (CA(IB) 1741/KB/2018 filed by the Liquidator and directed the DEO to de-attach all the properties attached vide notice dated 16.04.2018 and to restore the possession thereof to the liquidator within 15 days from the receipt of this order.

7. Being aggrieved with this order, the Appellant (DEO) has filed this Appeal.

8. Ld. Counsel for the Appellant submitted that Ld. Adjudicating Authority has allowed the Liquidator's Application mainly on the ground that the earlier application filed by the DEO, WB was dismissed vide order dated 30.09.2019 assuming that the earlier findings attained finality.

9. It is further submitted that after attaching the property of Corporate Debtor the same was produced before the Designated Court of Economic Offence and the Court vide its Judgment dated 03.10.2020 confiscated the attached property and directed that such property will be in the custody of Court for realisation of dues of the depositors under Sections 15 to 18 of WBPIDFE Act subject to the decision of the Appellate Court. In the present situation, when the attached property is in custody of the Court, the DEO, WB (Appellant) cannot de-attach the property and handover possession to the liquidator as the property is not in the possession and control of the DEO, WB (Appellant).

10. It is also submitted that the attached properties of the Corporate Debtor and the properties confiscated by the Designated Court are same. In this regard, he drew our attention towards the Annexure A -2 to A-5 which contain the name of Company and the description of the properties (see Affidavit of Rathindra Nath Boxi and documents Diary No. 25314 Pg. 240 to 265)

11. Ld. Counsel for the Appellant also submitted that there was no direction to the DEO, WB by Hon'ble High Court of Calcutta to de-attach the properties of the Corporate Debtor (see reply affidavit and documents filed by respondents Diary No 2408 Pg. 30 to 35). However, Ld. Adjudicating Authority erroneously observed in the impugned order that:

“The Assets of the Corporate Debtor have been excluded by the Hon'ble High Court vide order dated 23.04.2019 holding that Assets and Properties of Pincon Spirits Ltd., the Corporate Debtor herein should be kept outside purview of such sale”

12. Ld. Counsel for the Appellant also submitted that the IBC and WBPIDFE Act are legislated on two different fields and with two different aims and, therefore, they should be read harmoniously. The public interest is in a non-negotiable factor. The interest of depositors had to be protected as there would be no means to compensating them from the wrongs done to them.

13. Legislation inserted Section 32-A w.e.f. 28.12.2019 to clarify the liability of a Corporate Debtor for an offence committed prior to the commencement of CIRP. Hon'ble Supreme Court recently in the case of Manish Kr. Vs. Union of India (W.P (Civil) No.26 of 2020) Judgment dated 19.01.2021 held that such amendment is not ultra vires and clarified conditions when the property of a Corporate Debtor may have been at risk of attachment, seizure or confiscation. In the present case, in the 7th meeting of CoC held on 05.04.2019, the CoC has decided not to proceed with CIRP and recommended liquidation. The properties were already attached by the DEO, WB prior to recommendation of liquidation. Therefore, the properties cannot be de-attached. Section 32-A of the IBC in this case did not grant immunity to the Corporate Debtor and

the DEO, WB acted in accordance with law. Therefore, the order of de-attachment could not sustain in law and it is liable to be set aside.

14. Per contra, Ld. Counsel for Respondent Nos. 1 and 3 submitted that the DEO, WB filed CA(IB) 577 of 2019 challenging the order of admission, this Application was dismissed by the Adjudicating Authority by its order dated 30.09.2019, against this order DEO preferred Appeal CA(AT) (Ins) Nos. 1361-1362 of 2019 which was restricted only to payment of costs and was not pressed qua merits. Therefore, this Appellate Tribunal vide order dated 05.02.2020 set aside the costs only. Thus, the order dated 30.09.2019 attained finality and same cannot be re-agitated once again in this Appeal.

15. It is submitted that M/s Pincon Spirits Ltd. Corporate Debtor (Respondent No. 3) is not a Chit fund company, does not have any depositors, is not a financial establishment as defined in Section 2(e) of WBPIDFE Act and on the contrary is a company engaged in the manufacture and supply of alcohol. Respondent No. 1 intervened in the proceedings before the Hon'ble High Court of Calcutta and vide orders dated 09.04.2019 and 23.04.2019, it *inter alia* directed the Appellant to co-operate with Respondent No. 1 and assist him in discharging his statutory duties and functions and also keep the assets and properties of M/s Pincon Spirits Ltd. Corporate Debtor outside the purview of sale of assets and properties under the WBPIDFE Act. However, despite such direction, the Appellant failed to assist/cooperate with Respondent No. 1 thereby frustrating the entire CIRP of Corporate Debtor.

16. Ld. Counsel for the Respondent No 1 and 3 submitted that Ld. Adjudicating Authority rightly held that IBC is a complete Code and the provisions of the WBPIDFE Act are inconsistent with Sections 14 and 33(5) of the IBC. Therefore, such provisions shall have overriding effect on the provisions of the WBPIDFE Act.

17. It is also submitted that the Hon'ble Supreme Court in the case of Manish Kr. (supra) has upheld the constitutional validity of Section 32-A of the IBC and also held that taking actions against the property of the Corporate Debtor after the Corporate Debtor goes into liquidation would be contrary to the interest of value of maximization of the Corporate Debtor's Assets and as such, the same ought to be protected from enforcement action. For this purpose, he drew our attention towards Para 250 (17.9 to 17.11) of the Manish Kumar's case (supra).

18. Ld. Counsel for the Respondents submitted that a perusal of the Judgment dated 03.10.2020 passed by the Designated Court of Economic Offence makes it abundantly clear that Corporate Debtor i.e. M/s Pincon Spirits Ltd. was not a party to the said proceedings and thus, the said Judgment is not applicable to the Corporate Debtor. In fact, the findings in the said Judgment speaks about Pincon Group Company i.e. Pincon Infrastructure Ltd. and not Corporate Debtor. Moreover, it is relevant to state that the aforementioned specific orders passed by the Hon'ble High Court of Calcutta, whereby the assets and properties of the Corporate Debtor were directed to be kept outside the purview of sale, are binding on the Designated Court of Tamluk. Thus, the Appeal is liable to be dismissed with costs.

19. We have heard the Ld. Counsel for the parties and gone through the record and the citations.

20. Firstly, we would like to appreciate the facts of the Appeal. We made it clear that after passing of the impugned order dated 19.02.2020 Designated Court of Economic Offences (ASJ) 3rd Court, Tamluk, Purba, Medinipur on 03.10.2020 pronounced the Judgment. Copy of the Judgment is filed by the Appellant before this Appellate Tribunal. Therefore, the Adjudicating Authority has no occasion to consider such Judgment.

However, we have considered the findings of this Judgment while appreciating the facts of this case.

21. Ld. Adjudicating Authority has passed the impugned order on the basis of findings given in its earlier order dated 30.09.2019 while dismissing the Application CA (IB) No. 577/KB/2019 filed by the DEO, WB. Ld. Adjudicating Authority, vide order dated 30.09.2019 also decided another application being CA (IB) No. 1122/KB/2018 filed by the RP for lifting attachment of the various properties of the Corporate Debtor attached by the DEO, WB. The operative part of the order is as under: -

“7. The Hon’ble Delhi High Court in Dy. Director, Directorate of Enforcement, Delhi Vs. Axis Bank & Ors. (Cr.Appeal No. 143 of 2018) has held that:-

“Object of PMLA being distinct from the purpose of the RDDA, SARFAESI and the Code. The later three legislations do not prevail over the former”

8. It appears to us that provisions of Act of 2013 do prevail over the provision of the code and therefore, we could not determine the title in regard to the disputed property under attachment by the DEO, WB and unable to pass an order for de-attaching of the property by DEO, WB Act, 2013 as prayed for by the RP. It is self-contained Act wherein Section 19 enables the liquidator to prefer an Appeal against the order of the authorities before the Hon’ble High Court at Calcutta. That being so we cannot pass any order in the pending application at the issue arises for consideration in the said Applications is left open to the parties for taking appropriate legal courses.”

22. As aforesaid, the Ld. Adjudicating Authority disposed of the Application of RP (now liquidator) showing inability to pass an order for de-attachment of the property of the Corporate Debtor with the liberty to take appropriate legal courses. Thereafter, the liquidator has filed the application with the same prayer for de-attaching the property of the Corporate Debtor. Surprisingly, Ld. Adjudicating Authority by the impugned order allowed the Application i.e. I.A No. 1741/KB/2018 of Liquidator and directed to de-attach all the properties attached by the DEO, WB and to restore possession thereof to the liquidator (Respondent No 1).

23. The following issues arise for our consideration: -

- (i) Whether the property of Corporate Debtor who is not a financial establishment as defined under Section 2(e) WBPIDFE Act can be attached?
- (ii) Whether High Court of Calcutta in WP No. 24110(W) of 2016 vide order dated 23.04.2019 directed that the assets of the Corporate Debtor should be kept outside the purview of sale?
- (iii) Whether the provision of Section 3 of the WBPIDFE Act is inconsistent with Sections 14 and 33(5) of the IBC. Therefore, Section 14 as well as Section 33(5) of the IBC shall prevail over Section 3 of WBPIDFE Act?

Issue No. (i)

24. The properties of Corporate Debtor (M/s Pincon Spirits Ltd.) were attached in connection with the Khejuri P.S. Case No 47/7 under Sections 406 and 420 of I.P.C and Section 3 of the WBPIDFE Act in different dates between 10.11.2017 to 17.11.2017. The particulars of attached property are shown in the final report (Charge Sheet) submitted before Designated Court on 31.01.2018. (Please See Pg. 90 to 108 of Appeal Paper Book) Thereafter, on 16.04.2018 the registered office of the Corporate Debtor was sealed and on 26.04.2018 from the registered office of the Corporate Debtor, 29 articles were seized (Please See Pg. 240 to 242 of Affidavits and Documents filed Diary No. 25314) and on 25.02.2019, the Government of West Bengal published an order in the official gazette under Section 5 of the WBPIDFE Act and attached the movable and immovable properties of Corporate Debtor, M/s Pincon Spirits Ltd. and other group Companies,

specified in the schedule (Please See Pg. 243 to 247 of Affidavits and Documents Diary No. 25314).

25. Ld. Adjudicating Authority by the impugned order has only directed to de-attach the property attached vide notice dated 16.04.2018. We have mentioned above that on 16.04.2018, the registered office of the Corporate Debtor was sealed. It means, the impugned order is not in regard to the assets which were attached on different dates mentioned above in Para 24.

26. Now, we have to consider whether the property of a person who is not financial establishment as per the definition of Section 2(e) of the WBPIDFE Act can be attached. For this purpose, it is useful to refer Section 5 of the WBPIDFE Act, which reads as under:-

“5. (1) Notwithstanding anything contained in any other law for the time being in force,

(a) -----

(b) -----

(c) -----

(d) where the State Government is satisfied that any financial establishment committing a default in repayment of deposit fraudulently, has transferred (whether after the commencement of the Act or not) any of the property otherwise than in good faith and for consideration,

it may, in order to protect the interest of the depositors of such financial establishment, by an order to be published in the Official Gazette and after recording reasons in writing, attach the money or other property acquired either in the name of such financial establishment or in the name of any other person on behalf of such financial establishment:

Provided that if it is found that such money or other property as referred to above is not available for attachment or is not sufficient for repayment of the deposits, the State Government may attach—

(a) firstly, such other property believed to have been acquired with the money collected by way of deposits by such financial establishment; and

(b) secondly, the personal assets of the promoter, partner, director, manager, member, employee or any other person responsible for the management of the said financial establishment; and

(c) thirdly, the personal property of a person who has borrowed money from such financial establishment to the extent of his default.

(2) -----

(3) -----

(4) The Competent Authority shall, within thirty days from the date of the publication of an order under sub-section (I), make an application, supported by an affidavit stating the grounds on which the State Government has issued the said order under that sub-section and the amount of money or other property believed to have been acquired out of the deposits and the details, if any, of persons in whose name such property is believed to have been invested or acquired and any other property attached under this section, to the Designated Court of making the ad interim order of attachment absolute and for a direction to sell the property so attached by public auction and realized the sale proceeds and may also apply for such further order or orders as the Competent Authority may find necessary.

(5) The Competent Authority may also make an application to any Special Court or Designated Court or any other judicial forum established or constituted or entrusted with the powers by any other Government under any similar enactment for adjudicating any issue or subject-matter pertaining to money or property or assets belonging to or ostensibly belonging to a financial establishment or any person mentioned in the order under sub-section (1), situated within the territorial jurisdiction of that Special Court or Designated Court or any judicial forum, as the case may be, for passing appropriate orders to give effect to the provisions of this.

27. Section 5 (1)(d) of the WBPIDFE Act provides that where the State Government is satisfied that any financial establishment committing a default in repayment of deposit fraudulently, has transferred any of the property otherwise then in good faith and for consideration, it may in order to protect the interest of the depositors of such financial establishment by an order to be published in official gazette and recording reasons in writing attach the money or other property acquired either in the name of such financial establishment or in the name of any other person on behalf of such financial establishment.

28. Sub-section 5 of Section 5 of the WPIDFE Act provides that the Competent Authority may make an Application to Special Court or Designated Court for adjudicating any issue or subject matter pertaining to money or property or assets belonging to or ostensibly belonging to a financial establishment or any person mentioned in the order under Sub-Section (1) situated within the territorial jurisdiction of the Designated Court may be, for passing appropriate orders to give effect to the provisions.

Section 14 of the WPIDFE Act reads as under:-

14.(1) Upon receipt of an application under sub-section (4) of section 5, the Designated Court shall issue to the financial establishment or to the person, whose property has been attached and vested in the Competent Authority under section 5, a notice accompanied by a copy of the application and affidavit together with an extract of evidence recorded, if any, calling upon such financial establishment and person to show cause as to why the order of attachment should not be made absolute and the property so attached be sold in public auction and such notice shall also be published in two daily newspapers having wide circulation, one in English language and another in vernacular language].

(2) The Designated Court, while issuing a notice under sub-section (1), shall also issue notice to all other persons having or being likely to claim any interest or title in the property of the financial establishment, or the property of the person, to whom the notice is issued under sub-section (1), directing them to appear before it and to raise objection, if any, in respect of the attachment of the property or any portion thereof.

(3) Any person claiming an interest in the property attached or any portion thereof, may, notwithstanding that no notice has been served upon him, under this sub-section, raise an objection as aforesaid before the Designated Court at any time before an order is passed under sub-section (5) or sub-section (6), as the case may be.

(4) Any person raising an objection under this section shall be required to show prima facie that he has some interest in the property attached on the date of the attachment.

(5) If no cause is shown or no objection is raised by the financial establishment, or by the person whose property has been attached and vested in the Competent Authority or by other persons to whom the notice has been issued under sub-section (2), on or before the date specified in the notice, the Designated Court shall, after considering the objection, if any, raised under

sub-section (3), pass an order making the ad interim order of attachment absolute and issue such direction as may be necessary for realization of the assets attached and direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds and for the equitable distribution of the money so realized among the depositors.

(6) If cause is shown or any objection is raised as aforesaid, the Designated Court shall proceed to investigate the matter.

(7) After investigation under sub-section (6), the Designated Court shall pass an order within a period of 180 days from the date of receipt of an application under sub-section (4) of section 5 either by making the ad interim order of attachment passed under sub-section (5) absolute or by varying it by releasing a portion of the property from attachment or cancelling the ad interim order of attachment and direct the Competent Authority to sell the property so attached by public auction and realize the sale proceeds:

Provided that the Designated Court shall not release from attachment any interest in property, which it is satisfied that the financial establishment or the person referred to in sub-section (1) has in the property unless it is also satisfied that there will remain under attachment an amount or property of value not less than the value that is required for repayment to the depositors of such financial establishment.

(8) Subject to the provisions of this Act, the Designated Court shall follow the summary procedure as contemplated under the Code of Civil Procedure, 1908 and exercise all the powers of a court in hearing a suit under the said Code.

(9) Where an application is made by any person duly authorised or constituted or specified by any other State Government under similar enactment empowering him to exercise control over 1 [any money or the property or the property or assets attached] by that Government, the Designated Court shall exercise all its powers as if application is made under this Act and pass appropriate orders 2 [or direction on such application, so as to give effect to the provision of such enactment].

29. Section 14 of the WBPIDFE Act provides the powers of Designated Court regarding attachment. Section 14 (1) provides that upon receipt of an application under sub-section 4 of Section 5, the Designated Court shall issue to the Financial establishment or to the person, whose property has been attached and vested in the competent authority under Section 5, a notice accompanied by a copy of the Application and affidavit together with an extract of evidence calling upon such financial establishment and person to show cause as to why the order of attachment should not be made absolute and property so attached sold in public auction. Section 14(3) provides

that any person claiming an interest in the property attached or any portion thereof, may notwithstanding that no notice has been served upon him under this sub section, raise an objection as aforesaid before the designated court at any time before an order is passed under sub section (5) or sub section (6).

30. With the aforesaid provisions, it is clear that under the WBPIDFE Act, the property acquired either in the name of a financial establishment or in the name of any other person on behalf of such financial establishment can also be attached. In the present case, the property of the Corporate Debtor is attached on the allegation that Corporate Debtor is one of the Companies of Pincon Group Companies and the Pincon Group Companies had fraudulently accepted the deposits and all the money went to Corporate Debtor and the Corporate Debtor had purchased the attached properties with the money of the depositors. In this regard, the appellant placed reliance on the findings of the designated court.

31. Respondent Nos. 1 & 3 raised the objection that the findings of the designated court are not binding on the Corporate Debtor because the Corporate Debtor was not a party before the designated court. We have considered this objection. Admittedly, accused Monoranjan Roy is a director of Pincon Spirits Ltd. (Corporate Debtor) and designated court found him guilty for the offence under Sections 406, 409, 420 and 120-B of I.P.C and Section 3 of the WBPIDFE Act. In this case, the properties of the Corporate Debtor attached and produced before the court and on conclusion of the trial, such properties have been confiscated. It cannot be said that the Corporate Debtor was unaware of the proceedings before designated court. There is nothing on record that Corporate Debtor had raised any objection under Section 14(3) of the WBPIDFE Act that the properties were wrongfully attached and produced before the court. In such

circumstances, we are unable to convince with the argument of Ld. counsel for the respondent that the findings of the designated court are not binding on the Corporate Debtor.

32. In this regard it is useful to refer to the findings of the Designated Court of Economic Offences.

Conclusion with reason by this court: -

(There is no paragraph Numbers in the judgment therefore we are mentioning the page numbers of the appeal paperbook.)

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“Monoranjan Roy is one educated, economist industrialist wants to do for the society, provider of service of 4000+ employees, ambitious”. -----

He is the chairman and managing director of Pincon Spirits Ltd(PSL).Having 48000 shareholders throughout the world in this business he has 7.6% foreign direct investment. At the time of arrest, he had 1800 crores turnover in this company”.

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“He has purchased the Police Stations and DEO. He has challenged the courts because he knew that the investigating authority will never help the public prosecutors and they will not help to the courts rather they will mislead the courts to reach in the decision that PSL is a clean and clear company of Monoranjan Roy.”

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“Monoranjan Roy took loan from banks by mortgaging the property, All the properties are from West Bengal. He purchased these properties with the money of the public. All the money ultimately went to PSL through other companies. Bank did not see regarding the activities of the companies and gave loan.”

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“The activities of Monoranjan Roy is full of irregularities and he had intention to cheat the public and banks from the very beginning. And his submissions and activities are full of contradictions. Firstly, he stated he knows nothing regarding the money circulation and the investors, now he is stating that he will sell all the properties and will give money to the depositors.

The liabilities to the investors are admitted throughout the case of this court and also of Hon'ble High Court, in Writs. So it can be said admitted facts need not be proved and the Monoranjan Roy is full connected with this offence."

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"Monoranjan Roy has given open challenge to the judiciary with pride that he as the owner of Pincon Spirit Ltd hold the economy of india and gives four crores of excise duty per day and expanded this business upto foreign. He told -The Hon'ble High Court appreciated that and released this company to the accused from the hands of DEO. The accused filed the documents which was filed in that Writ many times before this court and looked with red eyes."

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"So Monoranjan Roy has challenged the judiciary regarding PSL.

It will reveal from the bank statements that the companies which were acquired by Monoranjan in the name of his persons and directors, some of which has only paper existence or fake, which does not do any profitable business according to Companies Act, used to make monitory transactions with each other illegally without any justification. Those did not follow the legal procedure and the money was syphoned through these ultimately to PINCON SPIRIT Ltd. which is the heart of accused Monoranjan Roy. The DEO had indicated that in the annexures with the charge sheet."

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"PSL is the heart of Monoranjan Roy. In examination u/s 313 he admitted that he is the owner of this company. This is the actual culprit company. All money was syphoned to this company which has connection with foreign countries. Monorajan Roy is successful to protect his heart by suppressing the actual fact."

33. With the aforesaid findings of designated court we hold that the properties of the corporate debtor can be attached.

Issue No. (ii)

34. Para 17 of the impugned order reads as under: -

"Hon'ble High Court of Calcutta issued direction to DEO, WB to cooperate with the RP and to assist him to discharge his statutory duty and function in term of IBC. The Assets of the Corporate Debtor have been excluded by the Hon'ble high Court vide order dated 23.04.2019 holding that assets and properties of Pincon Spirits Ltd, the Corporate Debtor herein, should be kept outside purview of such sale"

35. Hon'ble High Court of Calcutta vide order dated 23.04.2019 directed as under: -

“Director of Economic Offences shall submit affidavit disclosing particulars of all assets attached by them except those of M/s Pincon Spirits Ltd. and M/s Greenage Food Products Ltd. and valuation thereof on the next date of hearing.”

36. A bare reading of this order makes it apparent that Hon’ble High Court while passing aforesaid order has not directed for de-attaching the Assets of the Corporate Debtor so also has not directed that such Assets should be kept outside the purview of such sale. Therefore, we can say that High Court’s order has wrongly been quoted, as if, Hon’ble High Court has directed to de-attach the Assets of the Corporate Debtor.

37. On the contrary, Hon’ble High Court of Calcutta in WP 24110 (W) of 2016 vide order dated 13.12.2018 directed the Excise Commissioner to take necessary steps for sale of the bottled liquors and to make re-allotment of the consignment of strong Spirit in tanks which were seized by the Directorate of Economic Offences from the various factories of the added Respondents, namely Pincon Spirits Ltd. and the value thereof be remitted to the one Man committee who shall keep the said sum in an interest bearing short term fixed deposit account in a nationalized bank until further orders.

38. Aforesaid orders are passed by the High Court in the presence of Pincon Spirits Ltd. Pincon Spirit Ltd. However, they have not placed on record any objection which has been filed under section 14 (3) of WBPIDFE Act. In such a situation, it cannot be said that the Hon’ble High Court directed that the assets of the Corporate Debtor be kept outside the purview of sale.

Issue No. (iii)

39. Firstly we have considered whether the provisions of Section 14 of the IBC have an overriding effect on the provisions of Section 3 of the WBPIDFE Act.

40. Section 14 of the IBC relates to declaration of ‘Moratorium’ for prohibiting some of the actions as mentioned therein and it reads as under:

“14. Moratorium— (1) Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: —

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

41. From a plain reading of Section 14 of the IBC, it is clear that the provision relates to:

(i) institution of suits;

(ii) continuation of pending suits;

(iii) proceedings against the ‘Corporate Debtor’ including execution of any judgment;

(iv) decree of order in any court of law, tribunal, arbitration panel or other authority;

- (v) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (vi) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; (vii) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

42. Section 3 of WBPIDFE Act reads as under:-

3. (1) Where any financial establishment—

(a) fails to make any re-payment of deposit along with any benefit in the form of interest, bonus, profit or in any other form, after a specified period, that is, on maturity or otherwise; or

(b) fails to render service, product or asset promised against the deposit; or

(c) fails to render any specified service agreed against such deposit with intention of causing wrongful gain to one person or wrongful loss to another person; or

(d) commits such default due to its inability arising out of impracticable or commercially not viable promises made while accepting such deposit; or (e) commits such default due to deployment of money or assets acquired out of the deposits in such a manner as it involves inherent risk in recovering the same when needed, such financial establishment and every person including the promoter, partner, director, manager, member, employee or any other person responsible for the management of, or for conducting the business or affairs of such financial establishment, shall be deemed to have committed a default in repayment of deposit fraudulently.

(2) Every person including the promoter, partner, director, manager, member, employee or any other person responsible for the management, or for conducting the business or affairs, of a financial establishment who has committed a default in repayment of deposit fraudulently within the meaning of sub-section (1), shall, on conviction, be punishable with imprisonment for life or imprisonment for either description for a term which may extend to ten years and such financial establishment shall also be liable to a fine which may extend to an amount equivalent to five lakh rupees, or where such deposit is quantifiable in terms of money, twice the money involved in such default, whichever is higher;

Provided that in the absence of special and adequate reasons recorded in the judgement of the Court, the imprisonment shall not be less than for three years and the fine shall not be less than twenty thousand rupees as against each individual and not less than one lakh rupees against such financial establishment.

43. From the aforesaid provisions, it is clear that the WPIDFE Act, 2013 relates to fraudulent deposits accepted by the Company and fails to make repayment of deposit along with interest, bonus, profit or in any other form after the specified period i.e. on maturity or otherwise. As per Section 3(2) of the WPIDFE Act, as a person including the promoter, partner, director, manager, member, employee or any other person responsible for the management or for conducting the business or affairs, of a financial establishment who committed a default in repayment of deposit fraudulently within the meaning of sub-section 3(1) of the WPIDFE Act shall on conviction be punished with imprisonment for life, however, after recording special and adequate reasons not less than three years and has nothing to do with the Corporate Debtor. It will be applicable to individual which may include the promoter, partner, director, manager, member, employee or any other person responsible for the management of the Corporate Debtor and they cannot be given protection from the WPIDFE Act, and such individual cannot take any advantage of Section 14 of the IBC. Section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceedings or any Act having essence of crime or crime proceeds. The WPIDFE Act and the IBC are legislated on two different fields with two different aims. The WPIDFE Act has been enacted to protect the interest of depositors and it provides penal action.

44. With the aforesaid proposition, we have considered the facts of this case. In this case, the properties of the Corporate Debtor were attached during 10.11.2017 to 17.11.2017 and after investigation DEO, WB filed charge sheet on 31.01.2018 under Sections 406, 409, 420 and 120B of IPC and under Section 3(1)(e) of the WPIDFE Act against 41 accused persons, including Manoranjan Roy Director of the M/s Pincon Spirits Ltd. On 16.04.2018, the registered office of M/s. Pincon Spirits Ltd. (Corporate

Debtor) was sealed. Thereafter, on 26.04.2018 and 25.02.2019, various properties of M/s Pincon Spirits Ltd. were attached by the DEO, WB. Meanwhile, on 19.07.2018 initiated CIRP against M/s Pincon Spirits Ltd. Thus, admittedly, the properties of M/s Pincon Spirits Ltd. were seized and the registered office was sealed much prior to the initiation of CIRP. We can say that the moratorium has been declared after the properties were attached by the DEO, WB and produced before the Designated Court of Economic Offences. Thus, we hold that Section 14 of the IBC has no overriding effect on Section 3 of the WBPIDFE Act.

45. Now, we have to consider whether Section 33 (5) of the IBC prevails over Section 3 of the WBPIDFE Act.

46. Hon'ble Supreme Court in the case of Manish Kr. (supra) upheld the validity of this provision inserted as Section 32-A of the IBC. Hon'ble Supreme Court in this case clarified the liability of a Corporate Debtor for an offence committed prior to commencement of CIRP. It is useful to refer to the relevant paragraphs of this judgment (para 252 to 255) as under: -

252. Section 32A has been divided into three parts consisting of sub-Sections (1) to (3). Under sub-Section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both, these immunities are subject to the following conditions:

- i. A Resolution Plan, in regard to the corporate debtor, must be approved by the Adjudicating Authority under Section 31 of the Code;
- ii. The Resolution Plan, so approved, must result in the change in the management or control of the corporate debtor;
- iii. The change in the management or control, under the approved Resolution Plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor;

iv. The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant Investigating Authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a Report before the relevant Authority or the Court. This last limb may require a little more demystification. The person, who comes to acquire the management and control of the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a Resolution Plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected;

253. The first proviso in sub-Section (1) declares that if there is approval of a Resolution Plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-Section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved Resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub-Section (1), however, the designated partner in respect of the liability partnership or the Officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, in-charge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-Section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the Report submitted and Report filed by the Investigating Authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. Thus, the combined reading of the various limbs of sub-Section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in in-charge of the assets of the corporate debtor, or who

were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

254. Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the Resolution Plan. The further requirement is that a Resolution Plan must be approved by the Adjudicating Authority and, finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in sub-Section (1). In other words, the requirements for invoking the bar against proceeding against the property of the corporate debtor in relation to an offence committed before the commencement of the CIRP, are as follows:

- (i) There must be Resolution Plan, which is approved by the Adjudication Authority under Section 31 of the Code;
- (ii) The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence.

The Explanation to sub-Section (2) has clarified that the words “an action against the property of the corporate debtor in relation to an offence”, would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word “include” is used under sub-clause (i) of the Explanation, the word “action” against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the Code. The other part of the clarification, under the Explanation, is found in the second sub-clause of the Explanation (ii). Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person. Thus, reading sub-Section (1) and sub-Section (2) together, two results emerge – (i) subject to the requirements embedded in sub-Section (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease; (ii) The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated. The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. The bar against action against the property of the corporate

debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in sub-Section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

255. The last segment of Section 32A makes it obligatory on the part of the corporate debtor or any person, to whom immunity is provided under Section 32A, to provide all assistance to the Investigating Officer qua any offence committed prior to the commencement of the CIRP.”

47. Hon'ble Supreme Court in Para 254 of the judgment laid down that sub-section 2 of the Section 32-A declares a bar against taking any action against property of the Corporate Debtor. This bar also contemplates the connection between the offence committed by the Corporate Debtor before the commencement of the CIRP and the property of the Corporate Debtor.

48. With the proposition laid down by the Hon'ble Supreme Court, we have examined the facts of this case. The requirement for invoking the bar against proceeding against property of the Corporate Debtor in relation to an offence committed before the commencement of CIRP, are as follows: -

(i) there must be Resolution Plan which is approved by the Adjudicating Authority under Section 31 of the IBC.

49. Admittedly, in this case, pursuant to the advertisement published inviting the Expression of Interest (EoI), however, not even a single EoI was received. The statutory period of 180 days for completion of CIRP was extended and even after the expiry of 270 days of CIRP, no EoI or resolution plan was received. Thereafter, in the 7th meeting of CoC held on 05.04.2019, the CoC, by majority voting share of the committee members, has decided not to proceed with CIRP and recommended liquidation. However, the liquidation process is not commenced because the registered office of the Corporate Debtor was sealed by the DEO, WB on 16.04.2018 and the record kept in the registered

office was ultimately seized by the DEO, WB on 26.04.2018. As, in this case, no resolution plan was received, therefore, there is no question of approval of resolution plan.

50. No resolution plan was approved which resulted in the change in control of the Corporate Debtor, therefore, there is no bar to take action against the property of the Corporate Debtor in connection with the offence. The explanation to sub-section (2) has clarified that the words and actions against the Corporate Debtor in relation to an offence would include the attachment, seizure, retention or confiscation of such property under the law applicable to the Corporate Debtor. Since the word 'include' is used under sub-clause 1 of the explanation, the word 'action' against the property of the Corporate Debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the IBC. The other part of the clarification under the explanation is found in the second sub-clause of the explanation.

51. Reading sub-sections (1) and (2) together, two results emerge :- (i) subject to the requirements embedded in sub-section (1), the liability of the Corporate Debtor for the offence committed under CIRP will cease; and (ii) the property of the Corporate Debtor is protected from any legal action subject to the safeguards which indicated. The bar against action against the property is available, not only to the Corporate Debtor but also to any person who acquires property of the Corporate Debtor under the CIRP or liquidation process. The bar against action against the property of the Corporate Debtor is also available in the case of a person subject to the same limitation as prescribed in sub-section (1) and also in sub-section (2) if he has purchased the property of the Corporate Debtor in the proceedings for the liquidation of the Corporate Debtor.

52. In such a situation the Director of the Corporate Debtor and the property of the Corporate debtor cannot get immunity from the prosecution. Thus, the attached property, which is confiscated by the Designated Court of Economic Offences, cannot be de-attached.

53. Now the attached property is not in possession and control of the DEO, WB. Therefore, as per the impugned order DEO, WB cannot de-attach the property which is already confiscated by the Designated Court of Economic Offences.

54. In the earlier order dated 30.09.2019, Ld. Adjudicating Authority rightly held that WBPIDFE Act is a self-contained Act wherein Section 19 enables the liquidators to prefer an Appeal against the order of the Authorities before the Hon'ble High Court of Calcutta. Admittedly, when the Corporate Debtor's property was attached and produced before Designated Court, the Corporate Debtor has not taken any appropriate legal courses open under the WBPIDFE Act.

55. With the aforesaid, we are of the view that the impugned order is not sustainable in law therefore, the order is hereby set aside. However, the liquidator is at liberty to take legal action available

Accordingly, the Appeal is allowed, however, no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Mr. Kanthi Narahari]
Member (Technical)

New Delhi
04.05.2021.

The judgement is pronounced by Mr. Kanthi Narahari for and on behalf of the bench as per rule 92 of National Company Law Appellate Tribunal Rules 2016.

[Mr. Kanthi Narahari]
Member (Technical)