

(2008) 05 DEL CK 0228
In the Delhi High Court
Case No : Co. Appeal 44 of 2005

Krishna Texport Industries Ltd.

APPELLANT

Vs

DCM Limited

RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

Companies Act, 1913 — Section 179
Companies Act, 1956 — Section 10, 179(457), 391, 391(1), 391(2)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 2
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 16, 17, 2(1), 22, 22(1)
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2008) 4 BC 627 : (2008) 114 CompCas 113 : (2008) 4 CompLJ 177 : (2008) 150 DLT 259 : (2008) 104 DRJ 101 : (2008) ILR Delhi 87 Supp : (2009) 89 SCL 151

Hon'ble Judges : Sanjay Kishan Kaul, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : A.S. Chandhiok, Suruchi Aggarwal, Vibha Dhawan and Navpreet Singh Ahluwalia, for the Appellant; Kirat Singh Nagra, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—A conflict of judicial view between the Bombay High Court and the Gujarat High Court in respect of the power of the company court u/s 391(6) of the Companies Act, 1956 (hereinafter referred to as the said Act) to stay criminal proceedings has given rise to the present appeal.

2. The commercial relationship between the appellant and the respondent started with an Inter Corporate Deposit (ICD) of Rs. 2.50 crores being placed by the appellant with the respondent under two separate agreements dated 26.9.1997 and 03.10.1997 by way of two separate cheques of Rs. 1.25 lac each which were duly encashed. The said ICDs were for a period of 120 days and the respondent company were liable to repay the same before the expiry of the said period along

with interest @25.5% per annum. In case of default, the rate of interest was to be enhanced by an additional interest of 11% per annum. It is the case of the appellant that the respondent failed to re-pay the ICD with interest and, thus, gave rise to two sets of separate proceedings. One proceeding arose out of the cheques issued by the respondent to clear the liabilities which were dishonoured on account of paucity of funds resulting in complaints being filed by the appellant u/s 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the NI Act) and the other arose by reason of the appellant filing proceedings for winding up under the said Act against the respondents after serving them with a legal notice. In respect of the complaint u/s 138 of the NI Act, the respondent filed proceedings for quashing of the same before this Court but they were ultimately withdrawn. In the winding up proceedings, it came to light that certain shares kept by the respondent with the appellant as security for the ICD had, in fact, been sold for an amount of about Rs. 37.00 lacs and since the sale was without the leave of the Court, the proceeds were directed to be deposited in Court and are still lying deposited. A third proceeding arose out of a suit filed by the respondent being Suit No. 1815/2003, on the Original Side of this Court seeking reliefs of declaration, injunction, recovery etc. as according to the respondent the liability towards the ICD had been cleared and part of the claim was settled by payment to a third party at the behest of the appellant, which was disputed by the appellant.

3. In the proceedings before the learned Company Judge, interim orders were granted whereby in view of the pending scheme for restructuring and arrangement, the proceedings against the respondent company were stayed. The order with which the appellant is aggrieved in the present case was passed on 25.4.2005. The order notes the contention of the counsel for the respondent that the scheme had been sanctioned and the same provided for payment to the creditors through the mechanism of an escrow account subject to the condition that the creditors withdraw all the cases against the company and its Executive Directors. It was pleaded that three persons, whose particulars were given, had not withdrawn the proceedings because of which payment could not be made to them although the respondent was ready and willing to make the payment in terms of the scheme subject to withdrawal of the criminal complaints. The learned Company Judge stayed the proceedings of the cases filed by the three parties. Not only that, it was noticed that some of the creditors had filed complaints before different consumer forums which claim also the respondent was willing to settle in accordance with the scheme.

4. The grievance of the appellant is that the criminal proceedings in the form of complaints filed u/s 138 of the NI Act by the appellant could not have been stayed by the learned Company Judge.

5. It is the submission of the appellant that under the garb of the escrow mechanism, really nothing is being paid to the appellant as it is the stand of the respondent that whatever amount was liable to be paid under the scheme to the

appellant, in fact, already stands paid prior to the scheme. This payment is in the form of part payment to the respondent and part payment to a third party. The scheme naturally did not envisage the payment of interest as per the terms of the ICD and it is in view thereof that the respondent was, in fact, claiming certain amounts as due and owing from the appellant under the transaction making part payment to a third party. In the alternative, the respondent was pleading that the matter in issue was in any case being tried in the Civil Court filed by the respondent. The appellant's case further was that there was nothing even in the scheme or in the list of the liability whereby payment had to be made to the appellant nor was the aspect of criminal liability forming part of the scheme. This was, of course, without prejudice to the plea that even if it was so included, the learned Company Judge would have no jurisdiction to stay the criminal proceedings.

6. It is not necessary to go into a further detailed scrutiny of the facts, but the aforesaid averments have been set out to show that under the scheme there is really nothing to be paid to the appellant on account of the claim of the appellant. The only question, thus, to be considered is whether the learned Company Judge was entitled to stay the proceedings in the criminal complaint filed by the appellant against the respondent company and its Directors. It has already been noticed above that the endeavor of the respondent to get the proceedings quashed in the hierarchy of the criminal courts had not succeeded and the quashing proceedings had been withdrawn.

7. There is an apparent conflict of opinion on this issue between the two High Courts. The Bombay High Court has taken a view that it is not within the domain of the Company Judge to stay the proceedings before the criminal court while exercising jurisdiction u/s 391 of the said Act while the view of the Gujarat High Court is to the contrary. We also have the benefit of the judgment of the learned single Judge of this Court, though not directly on Section 391 of the said Act, holding that criminal proceedings under the said Act cannot be stayed by the learned Company Judge unless there is specific empowerment in a particular section. In order to appreciate the aforesaid rival views, it is necessary to give a conspectus of the judicial pronouncements in this behalf. Section 391(6) of the said Act reads as under:

391. Power to compromise or make arrangements with creditors and members.

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the company on such terms as the Tribunal thinks fit, until the application is finally disposed of.

8. A learned single Judge of the Bombay High Court in *State of Tamil Nadu v. Uma Investments Pvt. Ltd.* 47 CompCas 242 observed that it was not possible to take the view that Section 391 of the said Act is meant for freezing criminal proceedings which may be instituted either by a creditor or a member of a

company or by the State either against the company or its officers for a thing which is an offence or an infringement or violation of any law, rule or regulation punishable by imprisonment or fine or both and that criminal proceedings can be commenced or continued notwithstanding the fact that the scheme for compromise or arrangement has been initiated u/s 391 of the said Act. The relevant observations are as under:

The language of this sub-section is clear and unambiguous. The main controversy is focused on the word "proceedings". According to Mr. Khambatta, the word "proceedings" cannot cover criminal proceedings against the company and its officers. It could not have been the intention of the legislature to stay the commencement or continuation of criminal proceedings. The company and its officers must face the consequences of their illegal acts. There seems to be considerable force in these arguments. If the intention of the legislature had been to stay the commencement or continuation of criminal proceedings, it would have specifically said so. It is difficult to accept Mr. Mehta's line of interpretation indicated above that the word "proceedings" embraces criminal proceedings.

There is another angle from which the provisions of Section 391 can be looked at in order to find out whether it is within the scope and object of the section to cover criminal proceedings. In the present application u/s 391, there are three classes of creditors, namely, (1) creditors who were the subscribers of terminated chit group, (2) creditors who are the subscribers of existing group, and (3) other creditors of the company. A reference to these classes shows that all of them are creditors. The question then arises as to what meaning is to be given to the word "creditor". "Creditor" would be a person having a pecuniary claim against the company, whether actual or contingent. If the claims of the creditors are of a pecuniary character or founded on money considerations, can it then be said that Sub-section (6) of Section 391 is extended to cover proceedings other than proceedings which involve pecuniary claims or claims based on money considerations ? It is in respect of these classes of creditors that proposal is put forward by the company for a compromise or arrangement. Nothing has been pointed out to me that the company's proposal refers to or covers any criminal proceedings against the company and its officers. The provisions of Sub-sections (1) and (2) of Section 391 lay down that if any proposal is put forth by a company or a creditor or class of creditors or a member or class of members, the same is required to be considered under the directions of the court by calling, holding and conducting a meeting or meetings, and if approved by a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, and agreed to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all concerned. The compromises or arrangements are about civil liabilities where a creditor will accept a lesser payment or receive less on distribution or grant time or waive interest and work out other kindred things. It is impossible to take the view that Section 391 is

meant for freezing criminal proceedings which may be instituted either by a creditor or a member of a company or by the State either against the company or its officers. If, the officers of the company are involved in offences like cheating, criminal breach of trust, misappropriation, forgery, using a forged document and falsification of accounts, in connection with the business of the company, can it be said that prosecutions can be stayed by the aid of Sub-section (6) of Section 391 ? Again, if the officers of the company were to be held responsible for contravention and infringement of the Income Tax Act or Foreign Exchange Control Act, can a company by putting a proposal before the court u/s 391 seek the protection of the court under Sub-section (6) of Section 391 and stay the pending prosecutions or prevent the authorities under the Income Tax Act or the Enforcement Directorate from launching prosecutions? Again, Section 5 of the Companies Act, 1956, provides that for the purpose of any provision of this Act, an "officer who is in default" shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise. Can Sub-section (6) of Section 391 be made use of by a company (who is liable to be wound up) by coming forward with some sort of proposal? In my opinion, criminal proceedings cannot be held over or avoided or criminal process evaded by resorting to a scheme of compromise or arrangement u/s 391. Section 391 does not provide an umbrella to a company and its directors and officers for a thing which is an offence or an infringement and violation of any law, rule and regulation punishable by imprisonment or fine or both. Offenders cannot be given refuge in this section, nor can it be a shield for delinquent directors for their misdeeds. This is not the scheme of Section 391 or the policy of law in the manner urged by Mr. Mehta.

9. In the matter of winding up of Firth (India) Steel Co. Ltd. (In Liquidation) 1999 (1) M. L.J. 274, once again F.I. Rebello, J. had the occasion to examine the question whether the expression "suit or other legal proceedings" in Section 446(1) and the expression "suit or proceedings" in Section 442 of the said Act include criminal complaints filed u/s 138 of the NI Act. The company canvassed the plea that the expression "legal proceedings" or "other legal proceedings" should be given its widest amplitude and must, Therefore, also include criminal proceedings as a contrary view would result in the company in the winding up being subjected to criminal prosecution and would, thus, defeat the object of Sections 442 and 446 of the said Act. On the other hand, the petitioners contended that the said expressions must be read ejusdem generis with the expression "suit" and, thus, only refer to civil proceedings which have direct bearing on the proceedings for winding up of the company and, thus, "other legal proceedings" must exclude criminal proceedings. The learned Judge thereafter proceeded to discuss the different provisions in the Act where such expressions have been used. A distinction was made in respect of the provisions like Sections 442 and 446 as compared to Section 454(5) of the said Act where a default is made in complying with any of the requirements of the section without reasonable excuse and a person is liable to be punished with imprisonment. In

such a case the winding up court can take cognizance of an offence under Sub-section (5A) of Section 454 and, thus, a specific power to entertain a criminal complaint has been conferred. A similar position exists in Section 542 of the said Act where there is a provision for imprisonment. In Section 633 of the said Act, an Officer of a company in respect of certain types of misfeasance or breach of trust may move the High Court to relieve him. It was, thus, concluded that wherever the Parliament chose not to confer power on the company court to try criminal offences, it has so done. In this context, it was observed as under:

The Legislature therein has used the expression "suit, "prosecution" or "other legal proceedings". The rule of interpretation in such a case is not to make the language redundant or otiose or hold it to be surplus-age. If the literal interpretation is accepted then the expression "prosecution" has a different meaning than the expression "legal proceedings". The expression also appears in the same part and chapter. The main purpose or object behind sections 446 and 442 is that in respect of a Company in winding up or where proceedings in winding up have been filed, the Company Court is to see that the assets of the company are not recklessly given away or frittered. In this context, one has to remember the main duty of the Company Court is to oversee the affairs of the Company to meet the debts of its secured or its unsecured creditors as also of its shareholders and powers have been accordingly conferred on it. It may also be noted that for the purpose of the Act, Court means u/s 2(ii) the Court having jurisdiction under the Act with respect to the matters relating to the Company u/s 10 of the Act and in respect of any offence under the Act Judicial Magistrate, First Class, or Presidency Magistrate having jurisdiction. In this context would the expression "other legal proceedings" or "legal proceedings" include "criminal proceedings".

10. In support of the aforesaid view, learned Counsel for the respondent also referred to the observations of the Supreme Court in BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., . The question arose whether Section 2(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short SICA) declaring out a sick company could bar the institution of criminal complaint against the company and its Directors u/s 138 of the NI Act. It was observed in Paras 20 and 21 as under:

20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence u/s 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in Maharashtra Tubes Ltd. (supra) is whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the SICA. Hence the legal principal adumbrated in the said decision is of no avail to the appellants.

21. In the above context it is pertinent to point out that Section 138 of NI Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of the word "company" mentioned in Section 141 of the NI Act was widened through the Explanation added to the section, Parliament did not think it necessary to exclude companies falling u/s 22 of SICA from the operation thereof. If Parliament intended to exempt sick companies from prosecution proceeding, necessary provision would have been included in Section 141 of the NI Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words ["and no suit for the recovery of money or for enforcement of any security against industrial company or of any guarantee in respect of any loans or advance granted to industrial company"] Parliament did not specifically include prosecution proceedings within the ambit of the said ban.

11. The plea, thus, was that the aforesaid observations apply on all fours in the context of even the provisions of the said Act.

12. In the same context, the Supreme Court in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, observed as under:

15. The next question for consideration is whether under the provisions of the SICA there was any legal impediment for payment of the amount for which the cheques were drawn and for that reason the appellants cannot be taken to have committed an offence u/s 138 NI Act. A bare reading of the Section 22 of the SICA makes the position clear that during pendency of an inquiry u/s 16 or during the preparation of a scheme referred to u/s 17 or during implementation of a sanctioned scheme or pendency of an appeal u/s 25, no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie or be proceeded with further, except with the consent of the Board or, the Appellate Authority, as the case may be. The section only deals with proceedings for recovery of money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company. The section does not refer to any criminal proceeding. In B.S.I. Ltd. and Anr. v. Gift Holdings Pvt. Ltd. Criminal Appeal No. 847 of (1999) we held that pendency of proceeding u/s 22(1) of SICA alone is not sufficient to get absolved from the liability u/s 138 of the NI Act.

13. In Rajneesh Aggarwal Vs. Amit J. Bhalla, , it was observed that even if the amount in question was deposited after the complaint had been instituted u/s 138 of the NI Act, by no stretch of imagination the criminal proceedings can be quashed on account of the said deposit of money in Court nor could it be held that the criminal proceedings were unsustainable in law because of deposit of money.

14. The aforesaid view has again been followed in *Ion Exchange Finance Ltd. v. Bombay Leasing Co. Ltd.* (1999) 101 Bom. LR 180 which was affirmed by Vazifdar S., J. in *In Re: Scheme of Compromise/Arrangement between Sharp Industries Limited and its Secured, Unsecured Creditors and Equity shareholders*, . The said case also dealt with the prayer for stay of proceedings u/s 138 of the NI Act. It was observed as under:

12. In any event, the question whether proceedings u/s 138 of the Negotiable Instruments Act are covered within the provisions of Section 391(6) is also not *rest Integra*. In Criminal Appln. No. 2517 of 1998, (1999(1) Learned judgment 288), it was contended that complaints u/s 138 of the Negotiable Instruments Act are filed by parties with the principal object that the payee must get his money. In that case took, the complaint was filed by the respondents against the applicant for dishonour of the cheque. The applicants in the judgments had prayed that the proceedings u/s 138 ought to be stayed till the disposal of the application filed by the applicants before the Calcutta High Court u/s 391 of the Companies Act. The learned Judge first held that in proceedings u/s 482 of the Criminal Procedure Code the question of invocation of inherent jurisdiction u/s 391(6) did not arise at all. With this part of the judgment we are not concerned presently. However the learned Judge in paragraph 4 considered the alternative case as well and held as under ;

4...Secondly, even assuming that u/s 482 this Court could have considered that proceedings are pending before the Company Court in Calcutta when Scheme is under consideration could this Court stay the proceedings. The expression used is "suit" or "other proceedings". A learned Single Judge of this Court in the State of Tamil Nadu v. Uma Industries Ltd., (supra) has held the provisions of Section 391(6) will not apply in so far as the criminal proceedings are concerned. The said judgment came up for consideration before me in Company Application No. 446 of 1997 in Company Application No. 457 of 1997 in (In the matter of winding up order dated 23-10-1997 of Firth (India) Steel Co. Ltd. (In Liqn.) Ion Exchange Finance Ltd.), decided on 4th September, 1998 reported in 1999 (1) Mh 274 and some other matters. I had occasion to consider expression "suit" or "other legal proceedings", In the context of Section 442 and 446 of the Companies Act, I have considered Chapter wherein expression "suit" or "other legal proceedings" have been included including the expression "legal proceedings" in Section 391(6). I have therein considered a judgment of the learned Single Judge of the Gujarat High Court which has taken by different view than the view taken by this Court in the State of Tamil Nadu v. Uma Industries Ltd. (supra). After considering the various Judgments. I have reiterated that the view taken by this Court in Uma Industries Ltd. (supra) requires no reconsideration and is in confirmity with the provision of Chapter V of the Companies Act. The only limitation is that in a case where a fine is imposed on the Company, at the stage of the recovery of the fine, the Company Court can invoke its jurisdiction. The said matter had came up before me at the instance of applicants against whom complaints had been filed u/s 138 of the Negotiable Instruments Act. I am Therefore clearly of the opinion

that the expression "suit" and/or "other legal proceedings" does not include criminal proceedings.

15. A contrary view, however, has been taken in *Harish C. Raskapoor and Ors. v. Jaferbhai Mohmedbhai Chhatpar* 1989 65 CompCas 163 by a learned single Judge of the Gujarat High Court. The view expressed by the Bombay High Court in *State of Tamil Nadu v. Uma Investments Pvt. Ltd.* (supra) has been specifically differed with on the ground that the meaning to be assigned to other proceedings should be of the widest amplitude and, thus, Sub-section (6) of Section 391 of the said Act should include criminal proceedings. In fact, the view is predicated on the reasoning that Sub-section (3) of Section 446 of the said Act would also include criminal proceedings apart from civil proceedings. In fact, each of the reasoning of Uma's case (supra) is sought to be countered in the said judgment. It has, thus, been observed that the word "proceedings" does not indicate that it is confined only to civil proceedings or that it excludes criminal proceedings. In other words, the word "proceedings" is used in a comprehensive sense.

16. The Delhi High Court had the occasion to earlier deal with this aspect where a Division Bench of this Court in *D.K. Kapur Vs. Reserve Bank of India and Others*, has followed the line of reasoning of the Bombay High Court in the context of Sections 433 and 446 of the said Act and applying the rule of ejusdem generis to the expression "legal proceedings" or "other legal proceedings" to the expression "suit" held that criminal prosecution was not included in the aforesaid two provisions. Unfortunately, neither side referred to this judgment.

17. The intent and object of Section 446(2) of the said Act as enunciated in *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, was taken note of. Section 442(6) has been included to save the company which is ordered to be wound up from frivolous and expensive litigation and to accelerate the disposal of winding up of proceedings and, thus, the Parliament devised a cheap remedy by conferring jurisdiction on the Court winding up the company to entertain petitions in respect of claims for and against the company. Thus, the object is to safeguard the assets of the company in winding up against wasteful and expensive litigation. It was observed as under:

12. Mere look at the aforesaid provisions would show that on the one hand, in Section 457 of the Act, the legislature has empowered the liquidator to institute or defend any "suit" or "prosecution" or "other legal proceedings" civil or criminal in the name and on behalf of company after permission from the court; and by Section 454(5A) of the Act the legislature has empowered the Company Court itself to take cognizance of the offence under Sub section (5) of Section 454 of the Act and to try such offenders as per the procedure provided for trial of summons cases under the Code of Criminal Procedure , 1974; but on the other hand in Sections 442 and 446 of the Act the legislature has used only the expression "suit or other legal proceedings". The words "prosecution" or "criminal case" are conspicuously missing in these sections. It appears quite logical as

purpose and object of Sections 442 and 446 of the Act is to enable the Company Court to oversee the affairs of the company and to avoid wasteful expenditure. Therefore the intention of the legislature under these sections does not appear to provide jurisdiction to the Company Court over criminal proceedings either against the company or against its directors. Wherever legislature thought it necessary to provide such jurisdiction it has used the appropriate expressions.

13. Further Section 621 makes the offences against the Act to be cognizable only on the complaint by Registrar, shareholder or the Government. No permission of the Company Court is required. However, u/s 446(1) of the Act, suit or other legal proceedings cannot be instituted without permission of the company court. Therefore, Section 621(1) itself indicates that the company court has no jurisdiction over other offences except the offence u/s 545 of the Act?

14. The scope and meaning of expressions "other legal proceedings" or "proceedings" u/s 446(1) came up for consideration before the Supreme Court in the context of Income tax proceedings in *S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. Vs. V.M. Deshpande, Income Tax Officer, Companies Circle I(8), Bombay and Another*, . It was observed that the expression "other legal proceedings" in this section cannot be extended to Income Tax proceedings as these cannot appropriately be dealt with by the company court. It was held:

While holding these assessment proceedings the Income Tax Officer does not, in our view, perform the functions of a Court as contemplated by Section 446(2) of the Act. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446 read as a whole, it appears to us that the expression "other legal proceeding" in Sub-section (1) and the expression "legal proceeding" in Sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court.

15. It was further held: The liquidation Court, in our opinion, cannot perform the functions of Income Tax Officers while assessing the amount of tax payable by the assessee even if the assessed be the company which is being wound up by the Court. The orders made by the Income Tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income Tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income Tax. It would lead to anomalous consequences if the winding up Court were to be held empowered to transfer the assessment proceedings to itself and assess the company to Income Tax.

16. The reasoning adopted by the Supreme Court in the above case would be fully applicable to the facts at hand. Complaints under the penal provisions of other statutes against the company or its directors, (except those provided under

the Companies Act) cannot be appropriately dealt with by the company court. Orders passed by the criminal court are subject to the appeal and revision etc. under the Code of Criminal Procedure. If the (sic) court is held to be empowered to transfer these criminal proceedings to itself it would lead to anomalous consequences.

17. While considering the prosecution of directors for violations of the provisions of Provident Fund Act, the Supreme court in *Rabindra Chamria and others Vs. The Registrar of Companies, West Bengal and others*, considered the scope of the expression "Any proceedings" in Section 633 of the Act and held that it cannot save directors of the company from liability or prosecution for violating these provisions. It was observed that such a relief can be granted only in case of proceedings arising under the Companies Act and not under other acts. It was held:

Under Section 633 of the Companies Act relief cannot be extended in respect of any liability under any Act other than the Companies Act. The expression "any proceeding" in Section 633 cannot be read out of context and treated in isolation. It must be construed in the light of the penal provisions. Otherwise the penal clauses under the various other Acts would be rendered ineffective by application of Section 633. Again, if Parliament intended 633 to have a coverage wider than the Act, it would have specifically provided for it as, otherwise, it is a sound rule of construction to confine the provisions of a statute to itself. The powers under Sub-section (2) of Section 633 must be restricted in respect of proceedings arising out of the violation of the Companies Act. Sub-section (2) cannot apply to proceeding instituted against the officer of the company to enforce the liability arising out of violation of provisions of other statutes.

18. While dealing with the provisions of Section 179 of the Companies Act, 1913 (corresponding to Section 457 of the Companies Act, 1956) the Supreme Court in *Jeswantrao Manilal Akhaney v. The State of Bombay* 1956 S.C. 575 observed that in Section 179(457) of the Act cannot be construed to restrict powers of the criminal court to take cognizance of an offence or powers of the police or even of a private citizen to move the machinery of the criminal courts. It was held:

There is nothing in Section 179 of the Companies Act, 1913 which can be construed as restricting the powers of the Court to take cognizance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the criminal Courts to bring an offender like the managing director of a company to justice. For a prosecution for breach of trust even by a director of a company no such condition precedent as the previous sanction of any authority is contemplated by law, unless it is a prosecution in the name and on behalf of the company by the official liquidator who has to incur expenses out of the Funds of the company. Section 179 is an enabling provision to enable the liquidator to do certain things with the sanction of the Court. It does not control the general law of the land.

19. When the powers of criminal court to take cognizance and power of an aggrieved person to institute any criminal proceedings against the company under liquidation are fully protected, can it said that power of a citizen would be subject to the sanction u/s 446 of the Companies Act? The answer has to be in the negative".

18. The view taken by the learned single Judge of the Gujarat High Court in Harish C. Raskapoor (supra) has been specifically disagreed with.

19. Learned Counsel for the appellant sought to rely upon the judgment of the single Judge of this Court in CRB Capital Markets Limited Vs. Reserve Bank of India, where references have been made to certain orders passed by the Bombay High Court staying the proceedings both in the civil and criminal court. In a passing reference it has been observed that the company court has ample powers u/s 391(6) of the said Act so as to stay all civil and criminal proceedings against the company and its Directors during implementation of scheme of arrangement. It appears that the judgment in D.K. Kapur's case (supra) was not brought to the notice of the learned single Judge. An appeal, being Co.APP.63/2005, was preferred against this judgment which was decided on 29.2.2008. The Division Bench set aside the order of the learned single Judge and remanded the matter back for consideration specifically in view of the fact that certain aspects germane to the matter in controversy had not been discussed. One of the questions raised was about the authority of the criminal court to stay the criminal and Income Tax proceedings under the scheme u/s 391 of the said Act.

20. In Company Applications 35-36/2006 in the matter of Escorts Limited v. Escorts Finance Ltd., Sanjiv Khanna, J. of this Court passed an order on 17.3.2006 and noticed the conflict of view between the two Courts, as referred to aforesaid, as also the judgment in D.K. Kapur's case (supra). At that stage the order had not been passed by the Division Bench in the matter of CRB Capital (supra). The learned Judge declined to stay the criminal proceedings.

21. We have given deep thought to the legal views expressed by the different Courts and we are inclined to follow the view expressed by the Division Bench of this Court in D.K. Kapur's case (supra) and see no reason to differ from the same. The result is that the view of the Bombay High Court insofar as the interpretation of Section 391(6) of the said Act is concerned would prevail.

22. The legal principles enunciated aforesaid make it clear that the expression "proceedings" has been used in different provisions of the said Act. It is not necessary that the same word used in the Act must necessarily be given the same meaning in all situations. The word in the context in which it is used may be different in different sections. It is in view thereof that it is observed in Maxwell on the Interpretation of Statutes that just as the presumption that the same meaning is intended for the same expression in every part of an Act is not of much weight, so the presumption of a change of intention from the change of

language - which is of no great weight in the construction of documents - seems entitled to less weight in the construction of a statute than in any other case.

23. The legislature in its wisdom wherever it wanted to confer powers on the company court under the said Act to deal with matters of criminal offences has specifically so conferred the power. The discussion in this behalf is found in D.K. Kapur's case (supra) as well as the other cases of the Bombay High Court, which have been extracted aforesaid. Thus in Section 454(5) of the said Act or in Section 633 of the said Act the object is clear. A distinction has to be made in respect of the provisions like Section 442, 446 or 391 of the said Act. The object of these provisions is to prevent vexatious litigation and cost on the company during the period of time when a scheme is being propounded. This object is not sub-served by stay of the criminal proceedings. In *Pennar Paterson Limited Vs. Hon'ble Court of Judicial Magistrate 1st Class, Court No. 1, Nagpur and Another*, , the Division Bench of the Andhra Pradesh High Court comprising of S.B. Sinha, C.J. (as he then was) and V.V.S. Rao, J., while dealing with the question of whether the expression "other legal proceedings" occurring in Section 446(1) of the Companies Act does include the criminal proceedings, held that an interpretation ought to be given which makes the textual interpretation match the contextual. If the intention of the legislature was to include criminal prosecution, the legislature would have specifically said so and hence, the legal proceedings would not embrace within its fold a criminal prosecution. It was observed in para 20 as under:

In *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others*, it was held:

That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.

24. It cannot be lost sight of that the aforesaid provisions take colour from the same intent and in a similar situation. The proceedings arose on account of the failure of the company to meet its financial commitments. Thus if winding proceedings are pending, the civil proceedings can be put in abeyance for the time being to give some time to the company to come up with a scheme or otherwise to clear its liability. In fact, in view of the D.K. Kapur's case (supra), the matter is not even rest integra insofar as this Court is concerned that in such a situation criminal proceedings cannot be kept in abeyance.

25. Section 391 of the said Act only empowers the company court to compromise or make arrangements with creditors or its members. Thus, a power has to be exercised in a similar situation and, thus, there is reason to take a different view than what is taken in the context of Sections 442 and 446 of the said Act.

26. We are in agreement with the view that the words used in all the aforesaid provisions of "proceedings" or "other proceedings" must be construed ejusdem generis with the expression "suit" used aforesaid and clearly imply civil proceedings. It is only such construction which is in conformity with the intent of the legislature introducing these provisions in the said Act.

27. We are also fortified by the views expressed by the Supreme Court in BSI Limited's case (supra) while dealing with the same provision of Section 138 of the NI Act and the question whether these proceedings have to be stayed in view of the orders passed in 22(1) of SICA.

28. The SICA Act is again one more legislation to revitalize a company which has gone sick. It has, thus, been observed that the criminal prosecution is neither for recovery of money nor for enforcement of any security and Section 138 of the NI Act is a penal provision. It is in this context that the observations in Rajneesh Aggarwal's case(supra) become relevant that even on deposit of money, the criminal proceedings cannot be quashed.

29. The legislature in its wisdom introduced Section 138 of the NI Act conscious of the existence of the other provisions under the said Act. Thus, Section 138 of the NI Act, a later enactment, envisaged criminal prosecution for the offence of negotiable instruments being dishonoured, including cheques. The object was to reinforce sanctity of commercial transactions. Once the rigours of the provisions have been complied with, a person/company cannot, as a matter of right, come to the Court to deposit the amount and claim that the prosecution should be brought to an end. It can, thus, hardly be expected that the provisions of Sections 442 and 446, or for that matter Section 391 of the said Act, can be interpreted in a manner so as to bring the proceedings u/s 138 of the NI Act to a stand-still. Thus, even if in a scheme which is approved and it was envisaged that certain amounts have to be paid, the debtor company or its Directors cannot insist that the proceedings u/s 138 of the NI Act be quashed.

30. The observations made in para 11 in the case of Jose Antony Kakkad Vs. Official Liquidator, High Court of Kerala and Another, are of direct relevance wherein it was held that the provisions of the special statute namely, the NI Act would have an overriding effect over the general principles of the Companies Act and that criminal proceedings as in the case of Section 138 of the NI Act which are not in respect of the assets of the company would end in the conviction or acquittal of the accused, cannot be stayed under the Companies Act.

31. The matter may also be looked into from another perspective. The company court cannot call before itself the proceedings u/s 138 of the NI Act and quash the proceedings. The power to quash those proceedings rest only with the

hierarchy of the criminal courts. Thus, what would be the intent to put such proceedings in abeyance by an order of a company court when the company court itself has no power at any stage to bring to an end these proceedings?

32. The sanctity of the proceedings u/s 138 of the NI Act must, thus, be preserved and those proceedings must continue as they arise out of the failure of the company's Directors to honour the negotiable instrument duly signed by them like a cheque. The proceedings u/s 138 of the NI Act are not for recovery of claim of money by a creditor for which the remedy would be by filing a civil suit.

33. It can hardly be said that the object of Section 391(6) of the said Act is to prevent action against the officers of the company who may be involved in cheating, criminal breach of trust, mis-appropriation, forgery and for that matter dishonour of cheque. Again the provision cannot be used to bring to an end a prosecution arising from Income Tax Act or Foreign Exchange Control Act. The proceedings are clearly not of a pecuniary nature involving recovery of money. Interestingly, even the scheme stated to be approved at the behest of the respondent company does not envisage bar to any criminal proceedings or payment of any actual amount in the given facts of the case as discussed at the inception of this judgment, but only seeks to extinguish the liability of the appellant on the ground that the respondent is liable to pay a lesser amount, the interest not running, and the claim is alleged to have been extinguished by payment to a third party at the behest of the appellant for which there is no written document.

34. We are, thus, unequivocal of the view that Section 391(6) of the said Act does not envisage either quashing or stay of criminal cases against the company or its Directors and, thus, the proceedings against the respondents u/s 138 of the NI Act instituted by the appellant could not have been stayed.

35. The impugned order is set aside and the appeal is allowed. The appellant is also entitled to costs, which are quantified at Rs. 10,000/-.

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