
(2023) 05 DEL CK 0096

In the Delhi High Court

Case No : Criminal Miscellaneous Case No. 381 Of 2022, Criminal Miscellaneous Application No. 1727 Of 2022

Sandeep Gupta

APPELLANT

Vs

Shri Ram Steel Traders & Anr.

RESPONDENT

Date of Decision : 15-05-2023

Acts Referred:

Negotiable Instrument Act, 1881 — Section 138, 141, 141(1), 141(1)(a), 141(2), 142
Insolvency and Bankruptcy Code, 2016 — Section 14, 94, 96

Citation : (2023) 05 DEL CK 0096

Hon'ble Judges : Jasmeet Singh, J

Bench : Single Bench

Advocate : Shashank Khurana, Shailendra Babbar, Avinash Das, Aayush Agarwala, Siddham Nahata

Final Decision : Dismissed

Judgement

Jasmeet Singh, J

1. The present petition is filed seeking quashing of impugned order dated 03.12.2021 passed by the Ld. Metropolitan Magistrate (New Delhi - 01), Patiala House Court, New Delhi in CT No.12161/2018 titled 'Shri Ram Steel Traders vs. Richa Industries Limited and Ors.'

2. The facts of the present case are that the complaint, being CT No 12161/2018, was filed by Respondent No.1-Shri Ram Steel Traders, against the Petitioner and Respondent Nos. 2-Richa Industries Limited, under Section 138 read with Section 141 and 142 of the Negotiable Instrument Act, 1881 (hereinafter called NI act) before the Metropolitan Magistrate, NewDelhi-01, Patiala House Court, New Delhi.

3. The petitioner was the Managing Director of Respondent no. 2. The respondent no.1 alleged that the Petitioner and Respondent no 2 approached Respondent no.1 for purchase of steel. On placing of purchase orders, materials

have been alleged to have been supplied to Respondent no.2 on credit. In discharge of debt, respondent no.2 issued cheque no. 424055 dated 24th march 2018 drawn on Corporation Bank, Faridabad for a sum of Rs. 6 crores. The cheque was signed by the petitioner for and on behalf of respondent no.2. The cheque on presentation was dishonored and hence the complaint.

4. During the pendency of complaint, the petitioner started facing mounting liabilities and two of his creditors, HDB Financial Services and Indian Overseas Bank invoked their respective guarantees in 2019 that had been given by the Petitioner for credit facilities that had been availed from them. In view of such liabilities, and his incapacity to pay his liabilities, the Petitioner was constrained to approach the National Company Law Tribunal, Chandigarh Bench for devising an effective resolution plan in respect of his debts.

5. During the pendency of the National Company Law Tribunal (herein after called NCLT) proceedings, an application under Section 94 of the Insolvency and Bankruptcy Code (hereinafter called IBC) was filed by the Petitioner for personal insolvency resolution process in respect of all his debt before the NCLT, Chandigarh Bench. The application upon being filed on 24.08.2020 was initially given Diary No.0404115/00887 /2020.

6. Subsequently, this petition has been duly numbered as C.P.(IB) No.88/Chd/Hry/2021 and is at present pending before the NCLT, Chandigarh Bench.

7. It is stated by the Id counsel for the petitioner that in view of the above petition having been moved under Section 94 of the IBC, an interim moratorium immediately came into effect under Section 96 of the IBC. Consequently, the subject proceedings were liable to be stayed. The Petitioner moved an application for stay of the subject proceedings pending before the Ld. MM, New Delhi - 01, Patiala House Courts, New Delhi on 21.10.2021.

8. The Respondent No.1, who was the complainant in the subject proceedings, did not prefer any reply to the subject application. The Ld. Metropolitan Magistrate heard arguments from both the parties and passed the impugned order dated 03.12.2021 vide which the Ld. MM refused to stay of the criminal complaint filed by Respondent No.1 and dismissed the application moved by the Petitioner.

9. It is submitted by Ld counsel for petitioner that the provisions of the IBC make it clear that immediately upon filing of an application under Section 94 of the IBC, an interim moratorium comes into existence in respect of all the debts of the concerned petitioner and any legal action or proceedings pending in respect of any debt shall be deemed to have been stayed. Section 96, of the IBC reads as under:-

"96. Interim-moratorium - (1) When an application is filed under section 94 or section 95-

(a) an interim-moratorium shall commence on the date of the application in

relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period-

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section(1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions -as may be notified by the Central Government in consultation with any financial sector regulator.”

10. It is further stated that legal proceeding in respect of any debt of the Petitioner is required to be stayed in terms of the mandate of the above provisions. The subject proceedings under Section 138 of the Negotiable Instrument Act, 1881 which concern the dishonour of the cheque issued under the signatures of the Petitioner would fall within the prohibition contained in Section 96 of the IBC reproduced above.

11. It is also stated that the cheque issued by the Respondent No.2 under the signatures of the Petitioner herein becomes the Petitioner's debt under Section 141 of the NI Act.

12. Hence the subject proceedings under Section 138 read with Section 141 of the NI Act which is concerned with the dishonour of an alleged cheque under the signatures of the Petitioner would fall within the prohibition contained in Section 96 of the IBC.

13. He states that the Interim Moratorium comes into effect on the date of the filing of the application under Section 94 of the IBC itself. Section 94 read with Section 96 of the IBC is applicable to Personal Guarantors and the petitioner being the personal guarantor to the loan of Respondent no. 2, the complaint filed by Respondent No.1 is liable to be stayed.

14. The respondent on the other hand states that the present Petitioner in the subject proceedings pending before the Ld. MM, Patiala House Court is facing trial as a 'Natural Person' under Section 141 of the NI Act i.e., for liability of the Company of which the Petitioner was the director/ person in charge.

Analysis

15. In the present case the primary question which arises for the consideration is whether the section 96 of the IBC is applicable to the petitioner “141. Offences by companies.

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section, --

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

Petitioner arrayed as natural personal and not as personal guarantor.

16. The Petitioner has filed an application under Section 94 of the IBC before the NCLT, Chandigarh Bench, seeking initiation of the insolvency resolution process against himself as a Personal Guarantor towards Respondent no.2

17. In the present case, the petitioner's application for insolvency before NCLT related to the personal liability of the Petitioner in his capacity as a surety in contracts of guarantee to Respondent no.2. However, the Petitioner in the proceedings pending before the Ld. MM, Patiala House Court was facing trial as a 'Natural Person' under Section 141 of the NI Act i.e., for liability of the Company of which the Petitioner was the Managing Director/ person in charge.

18. The case would have been different if the personal liability of the petitioner was in question. In that case, the moratorium will apply to the petitioner. But in the present case, the proceedings pending before the MM were for bouncing of cheques issued by company where petitioner was the Managing Director. The debt of the Respondent No.2 company is not the personal debt of the petitioner.

The petitioner is arrayed as an accused in his capacity as a Managing Director.

19. The petitioner has been summoned for offence u/s 138 NI Act being the Managing Director of Respondent No.2 on whose account the cheque in question had been drawn.

20. Thus, there is an inherent fallacy in the argument of the petitioner.

21. The case of P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd. 2021: INSC:133 has held that natural persons, as defined under Section 141 of the Negotiable Instruments Act (NI Act), who are also accused as being in charge of and responsible for the affairs of the corporate debtor, can continue to be tried under Section 138/141 of the Act despite the commencement of insolvency proceedings against the corporate debtor and the imposition of a moratorium under Section 14. The provisions of the NI Act, 1881 and the Insolvency and Bankruptcy Code (IBC) do not equate the independent statutory liability of a director/person in charge of and responsible for the business of a company, i.e., the liability of a 'Natural Person' under Section 141 of the 1881 Act, with the coextensive liability of the company under insolvency.

22. In P. Mohanraj v. Shah Bros. Ispat (P) Ltd., 2021: INSC:133, the Hon'ble Supreme Court has observed

"77....Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of Sections 138/141 proceedings against the corporate debtor and initiation of Sections 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paras 51 and 59 in Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] would then become applicable. The legal impediment contained in Section 14 IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. Thus, for the period of moratorium, since no Sections 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Sections 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.

Conclusion

78. In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court judgments in Tayal Cotton (P) Ltd. v. State of Maharashtra [Tayal Cotton (P) Ltd. v. State of Maharashtra, 2018 SCC OnLine Bom 2069 : (2019) 1 Mah LJ 312] and MBL Infrastructions Ltd. v. Manik Chand Somani [MBL Infrastructions Ltd. v. Manik Chand Somani, 2019 SCC OnLine Cal 9097] , respectively, we hold

that a Sections 138/141 proceeding against a corporate debtor is covered by Section 14(1)(a) IBC.”

Emphasis supplied

23. Thus, I am of the view that the judgment of P. Mohanraj (supra) is clear in this regard. Admittedly, in the present case, the petitioner had signed the cheque as the Managing Director of Respondent No.2. The judgment of P. Mohanraj (supra) categorically states that the moratorium provisions u/s 14 IBC would apply only to the corporate debtor and the natural persons would continue to be liable. The petitioner is the natural person and merely because he has filed personal insolvency proceedings, the same would not bring him under the ambit of Section 96 IBC vis-a-vis the pending complaint under section 138 NI Act.

24. The Hon’ble Supreme Court in “AJAY KUMAR RADHEYSHYAM GOENKA vs TOURISM FINANCE CORPORATION OF INDIA LTD”2023:INSC:232 observed the scope of the IBC as well as NI act.

“16. We have no hesitation in coming to the conclusion that the scope of nature of proceedings under the two Acts and quite different and would not intercede each other. In fact, a bare reading of Section 14 of the IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings, which is the nature of proceedings under Section 138 of the N.I. Act. We are unable to appreciate the plea of the learned counsel for the Appellant that because Section 138 of the N.I. Act proceedings arise from a default in financial debt, the proceedings under Section 138 should be taken as akin to civil proceedings rather than criminal proceedings. We cannot lose sight of the fact that Section 138 of the N.I. Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of the N.I. Act. It is not a recovery of the amount with interest as a debt recovery proceedings would be. They are not akin to suit proceedings.

17. It cannot be said that the process under the IBC whether under Section 31 or Sections 38 to 41 which can extinguish the debt would ipso facto apply to the extinguishment of the criminal proceedings. No doubt in terms of the Scheme under the IBC there are sacrifices to be made by parties to settle the debts, the company being liquidated or revitalized. The Appellant before us has been roped in as a signatory of the cheque as well as the Promoter and Managing Director of the Accused company, which availed of the loan. The loan agreement was also signed by him on behalf of the company. What the Appellant seeks is escape out of criminal liability having defaulted in payment of the amount at a very early stage of the loan. In fact, the loan account itself was closed. So much for the bona fides of the Appellant.

18. We are unable to accept the plea that if proceedings against the company come to an end then the Appellant as the Managing Director cannot be proceeded against. We are unable to accept the plea that Section 138 of the N.I. Act proceedings are primarily compensatory in nature and that the punitive

element is incorporated only at enforcing the compensatory proceedings. The criminal liability and the fines are built on the principle of not honouring a negotiable instrument, which affects trade. This is apart from the principle of financial liability per se. To say that under a scheme which may be approved, a part amount will be recovered or if there is no scheme a person may stand in a queue to recover debt would absolve the consequences under Section 138 of the N.I. Act, is unacceptable.”

Emphasis supplied

25. In the present case as well, the petitioner is seemingly trying to escape his liability by trying to urge that his application u/s 94 of the IBC in his individual capacity would stay the complaint under section 138 NI Act against him. . It is clear that the petitioner is facing criminal proceedings for being signatory to the cheque which has been dishonoured. He is covered under natural person under section 141 NI Act.

26. The debt in the present case is not of the petitioner but that of Respondent No.2. Section 141 of the NI Act fastens liability on every officer of the company who was in management and control of the affairs of the company.

27. Hence, in my considered view, the provisions of Section 96 of the IBC would not be applicable in the facts of the present case as the petitioner is arrayed as an accused in the complaint u/s 138 NI Act in his capacity of the Managing Director of Respondent No.2.

28. It is also clear that Section 138 NI Act prescribes a punishment and compensation for the offence that is bouncing of cheque and is not recovery proceeding. Hence under section 138 NI Act the court cannot direct payment of the cheque amount to the complainant but can only award punishment and compensation by way of fine. Thus, what could be dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act i.e., only the corporate debtor (i.e., the company) is protected by the moratorium while the signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by filing personal insolvency proceedings.

29. In view of above, I find no illegality in the impugned order dated 03.12.2021 passed by the trial Court. Therefore, the present petition being devoid of any merit is hereby dismissed.

30. Misc. Application(s) pending, if any, shall stand disposed of accordingly.