

(2015) 08 CAL CK 0003

In the Calcutta High Court

Case No : CRR 3349 of 2014, CRAN 651 of 2015, CRR 1309 of 2013, CRAN 4261 of 2014, CRR 1310 of 2013 and CRAN 4260 of 2014

Satish Kumar Modi

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 26-08-2015

Acts Referred:

Constitution of India, 1950 — Article 136, 142
Criminal Procedure Code, 1973 (CrPC) — Section 252, 259, 320, 320(9), 397
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 147
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22(a)

Citation : (2015) 08 CAL CK 0003

Hon'ble Judges : Subrata Talukdar, J

Bench : Single Bench

Advocate : Ajit Sukla, U.S. Menon, Abhirup Chakraborty and Soumen Mohant, for the Appellant

Final Decision : Disposed off

Judgement

Subrata Talukdar, J—In all the three CRRs common questions of law and facts arise. Therefore, with consent of the parties the three CRRs were taken up for hearing analogously and are being disposed of by this common judgment.

2. The genesis of the three CRRs arise from a financial accommodation extended by the opposite party No. 2 (for short OP2) in favour of Modiluft Ltd. (now known as Spicejet Ltd.) and represented in the three CRRs by one of its stakeholders, Satish Kumar Modi. According to the complaint a total amount of five crores was advanced by the OP2-complainant in favour of Modiluft Ltd. and the said advance was sought to be repaid by way of post-dated cheques towards interest, TDS on interest and repayment of the principal sum. The post-dated cheques were presented on behalf of the OP2-complainant to its banker for encashment and the same being dishonoured three complaint cases were filed against Modiluft Ltd. (hereinafter referred to as the Company) by the OP2-complainant under Section 138 of the Negotiable Instruments Act, 1881 (for short the NI Act) before

the Ld. Magistrate at Calcutta.

3. The present petitioner applied before the Ld. Magistrate for discharge and such discharge having been refused, a revisional application was filed before the Ld. Sessions Court under Section 397 CrPC. In the light of the refusal also by the Ld. Revisionist Court to entertain the revision and thereby affirming the order of the Ld. Magistrate, the present applications in the form of the CRRs have been filed before this Hon"ble Court under Section 482 CrPC for quashing of the proceedings by setting aside both the orders of the Ld. Trial Court and the Ld. Revisionist Court.

4. Sri Ajit Sukla, Ld. Counsel appearing for the petitioner with Sri U.S. Menon, Ld. Counsel submits that the reliefs of quashing and of discharge from the proceedings is primarily based on the fact that there is a Scheme of Compromise (for short the said Scheme) between the Company and its creditors under Sections 391(1) and 393 of the Companies Act, 1956. Under the terms of the said Scheme the intercorporate depositors (for short ICD), including the OP2-complainant, will be returned 70% of the amounts advanced by them respectively in two instalments. The first instalment of 30% was made conditional upon withdrawal of suits and other proceedings including the criminal complaints under Section 138 of the NI Act pending against the Company.

5. Submitting that the said Scheme was duly approved by an Hon"ble Single Bench of the High Court at Delhi on 15th July, 2005 upon compliance of due process, Sri Sukla takes this Court to the order of the Hon"ble Single Bench which, inter alia, held as follows:--

"63. To sum up, the scheme can be sanctioned subject to the following conditions:

(I) It is subject to decision in CA No. 265/2003 and, therefore, clause relating to forfeiture of shares will not be given effect to for time being. In case if it is ultimately held that the RAL has no power to forfeit the shares, it shall bring the necessary finance for payment of the creditors.

(II) The disputes between the two sets of creditors, namely, S.K. Modi group and RHSL which are pending in different suits shall be adjudicated on their own merits without being influenced by the outcome of this petition.

(III) Payment of first instalment to the creditors would not be subject to the withdrawal of the proceedings under Section 138 of the Negotiable Instrument Act. Instead the parties may apply to the courts where such proceedings are pending, for adjourning the matters till the payment as per the scheme to these creditors is made.

(IV) In so far as different approvals from the Government, including Ministry of Civil Aviation are concerned which may still be required for relaunching of the airline, or any other foreign exchange approvals are yet to be given by the regulatory authorities, the said authorities shall consider the case in accordance

with law.

(V) Subject to aforesaid observations and aforesaid circumstances and having regard to the averments made in this petition and the materials placed on record and the affidavits filed by the Regional Director, Department of Company Affairs, Kanpur, and the Official Liquidator, I am satisfied that the prayers made in the petition deserve to be allowed. I also do not find any legal impediment to the grant of sanction to the Scheme of compromise. Hence, sanction is hereby granted to the above-mentioned Scheme of compromise under Section 391(1) read with Section 394 of the Companies Act, 1956."

6. On the strength of the above observations of the Hon"ble Single Bench sanctioning the said Scheme Sri Sukla argues that it has been made obvious that on payment of the first instalment by the Company to the creditors, such creditors, including the OP2-complainant, shall apply before the different courts where criminal proceedings are pending against the Company including the proceedings under Section 138 of the NI Act seeking adjournments. Thereafter, on payment of the second and final instalment such criminal proceedings will be treated to be withdrawn.

7. Pointing out that the OP2-complainant was one of the objectors to the said Scheme, Sri Sukla takes this Court to the discussion made by the Hon"ble Single Bench of the High Court at Delhi considering each of the objections to be untenable. Out of two objections raised by the OP2-complainant first, claiming to be treated as a decree holder instead of an ICD creditor and, second, that the proceedings pending under Section 138 of NI Act should not be prematurely terminated to the prejudice of the OP2-complainant, only the second objection is relevant for the purpose of discussion in this judgment.

8. The second objection was dealt with by the Hon"ble Single Bench as follows:--

"56. In so far as objection of Malanpur to the two conditions attached to making payment of first instalment are concerned, there may not be of any cause of worry inasmuch as it can be directed that the suits or other proceedings under Section 138 of the Negotiable Instruments shall be withdrawn only after the complete payment is made as per the scheme. Till that time, the complainant as well as the company may apply for adjourning of the pending matters. On the final payment being made a joint compromise application can be filed for disposing of the said pending proceedings. It has been pointed out by the petitioner that in the creditors' meetings, this term had been changed and it was decided that the withdrawal of such complaints would be simultaneously with the payment of second instalment amount. Therefore, this objection is rendered nugatory.

57. Objection regarding discriminatory treatment is untenable. If some of the creditors were settled earlier in a particular manner that does not mean that the scheme propounded afterwards has to be on the same pattern. In the scheme now filed, the creditors who are to be paid are treated alike and there is no

discrimination."

9. Being aggrieved by the order dated 15th July, 2005 sanctioning the said Scheme, the OP2-complainant applied for review. The second objection of the OP2-complainant qua the fate of the proceedings launched by it under Section 138 of the NI Act was again discussed in review by the Hon"ble Single Bench as follows:--

"26. Another plea taken in this review petition relates to the proceedings initiated by Malanpur under Section 138 of Negotiable Instruments Act. It was submitted by Mr. Jayant Bhushan, learned Senior Counsel appearing for the Malanpur that even when the Company Court is considering scheme under Section 391/392 of the Companies Act, it has no jurisdiction to stay such proceedings. In support, the learned Senior Counsel referred to a Division Bench Judgment of this Court in Krishna Texport Industries Ltd. Vs. DCM Limited, (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 .

27. This contention is again misconceived. In para 56 of the judgment, same very objection was dealt with in the following manner:--

"56. In so far as objection of Malanpur to the two conditions attached to making payment of first instalment are concerned, there may not be of any cause of worry inasmuch as it can be directed that the suits or other proceedings under Section 138 of the Negotiable Instruments shall be withdrawn only after the complete payment is made as per the scheme. Till that time, the complainant as well as the company may apply for adjourning of the pending matters. On the final payment being made a joint compromise application can be filed for disposing of the said pending proceedings. It has been pointed out by the petitioner that in the creditors' meetings, this term had been changed and it was decided that the withdrawal of such complaints would be simultaneously with the payment of second instalment amount. Therefore, this objection is rendered nugatory."

28. There is no order directing Malanpur to withdraw the proceedings. Only arrangement which is made is that Malanpur and/or the Company may apply for adjourning the pending matters which could be withdrawn only after payment as per the scheme is made. Malanpur has to accept the position that the scheme has since been sanctioned. The amount due to Malanpur is now payable as per the sanctioned scheme. Because of nonpayment of this very amount due to Malanpur in respect of which Spice Jet has given the cheques and they are dishonoured, Malanpur has taken due proceedings under Section 138 of the NI Act. Naturally, once the amounts as per the scheme are paid, the Spice Jet shall be absolved of any liability in respect of the aforesaid ICDs given by the Malanpur to Spice jet. In such an eventuality, it would always be permissible to Spice Jet to contend before the Court, where these proceedings are pending that amount in question stands paid. The consequence flowing there from can always

be taken into account by the Court where these proceedings are pending. In this backdrop once the scheme has already been sanctioned, this ground seeking review of the order is not even available to Malanpur.

29. In Krishna Texport (supra), this Court was of the opinion that Company Court was not empowered to stay criminal proceedings against officers of the company involved in cheating, criminal breach of trust, misappropriation, forgery and dishonour of cheques. Likewise, provision of Section 391(6) of the Companies Act, could not be used to bring an end the prosecution arising from Income Tax Act or Foreign Exchange Control Act. Because of this reason, the court also opined that proceedings under Section 138 of the N.I. Act instituted against the company could not be stayed. That stage is long over. It is stated at the cost of repetition that scheme was sanctioned way back in the year 2005. But for the present review petition, said scheme has attained finality. That has even substantially acted upon as well, inasmuch as, payment to most other creditors have already been given as per the scheme.

35. In this order, C.A. 634/2009 in C.P. 385/2003 also stands decided inasmuch as it is clear that payment would be made to Malanpur Steels Ltd. as per the sanctioned Scheme and once the entire payment is made, Malanpur shall withdraw the proceedings under Section 138 of the NI Act which were filed by it alleging non-payment of dues in the form of dishonour of the cheques."

10. Drawing inspiration from the above noted observations of the Hon''ble Single Bench, Sri Sukla points out that in no uncertain terms the Hon''ble Single Bench was pleased to express its mind on the maintainability of the proceedings under Section 138 of the NI Act which were treated to be withdrawn once the second and final instalment was paid by the Company under the said Scheme.

11. Being aggrieved by the rejection of its review application (supra), the OP2-complainant filed an appeal before an Hon''ble Division Bench of the High Court at Delhi. The Hon''ble Division Bench was pleased to consider the arguments advanced by the OP2-complainant that criminal proceedings under Section 138 of the NI Act cannot be made the subject matter of the order sanctioning the said Scheme under Section 391 of the Companies Act. The Hon''ble Division Bench was pleased to consider the thrust of the points raised by the OP2-complainant in this regard that neither the said Scheme ipso facto nor the Company Court can direct compulsory compounding of proceedings under Section 138 of the NI Act in the light of two judgments - one of an Hon''ble Single Bench of the High Court at Delhi in Krishna Texport Industries Ltd. Vs. DCM Limited, (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 and the subsequent judgment of the Hon''ble Apex Court in JIK Industries Limited and Others Vs. Amarlal V. Jumanji and Another, AIR 2012 SC 1079 : (2012) 1 BC 646 : (2012) 107 CLA 192 : (2012) 2 CompLJ 46 : (2012) CriLJ 1649 : (2012) 1 Crimes 204 : (2012) 3 CTC 428 : (2012) 2 JT 1 : (2012) 1 RCR(Civil) 913 : (2012) 1 RCR(Criminal) 822 : (2012) 2 SCALE 97 :

(2012) 3 SCC 255 : (2012) 112 SCL 51 : (2012) AIRSCW 1501 : (2012) 1 Supreme 668 .

12. The Hon"ble Division Bench of the High Court at Delhi was therefore pleased to conclude as follows:--

"18. This brings us to the second issue regarding proceedings under Section 138 of the NI Act. Malanpur has filed proceedings under the aforesaid section as cheques given by Modi Luft for encashment had bounced and had not been honoured. In the order dated 15th July, 2005, learned single Judge has observed as under:--

"56. In so far as objection of Malanpur to the two conditions attached to making payment of first instalment are concerned, there may not be of any cause of worry inasmuch as it can be directed that the suits or other proceedings under Section 138 of the Negotiable Instruments shall be withdrawn only after the complete payment is made as per the scheme. Till that time, the complainant as well as the company may apply for adjourning of the pending matters. On the final payment being made a joint compromise application can be filed for disposing of the said pending proceedings. It has been pointed out by the petitioner that in the creditors' meetings, this term had been changed and it was decided that the withdrawal of such complaints would be simultaneously with the payment of second instalment amount. Therefore, this objection is rendered nugatory."

19. In the order dated 14th July, 2010, the single Judge has held as under:--

"28. There is no order directing Malanpur to withdraw the proceedings. Only arrangement which is made is that Malanpur and/or the Company may apply for adjourning the pending matters which could be withdrawn only after payment as per the scheme is made. Malanpur has to accept the position that the scheme has since been sanctioned. The amount due to Malanpur is now payable as per the sanctioned scheme. Because of non-payment of this very amount due to Malanpur in respect of which Spice Jet has given the cheques and they are dishonoured, Malanpur has taken due proceedings under Section 138 of the NI Act. Naturally, once the amounts as per the scheme are paid, the Spice Jet shall be absolved of any liability in respect of the aforesaid ICDs given by the Malanpur to Spice jet. In such an eventuality, it would always be permissible to Spice Jet to contend before the Court, where these proceedings are pending that amount in question stands paid. The consequence flowing there from can always be taken into account by the Court where these proceedings are pending. In this backdrop once the scheme has already been sanctioned, this ground seeking review of the order is not even available to Malanpur.

29. In Krishna Texport (supra), this Court was of the opinion that Company Court was not empowered to stay criminal proceedings against officers of the company involved in cheating, criminal breach of trust, misappropriation, forgery and dishonour of cheques. Likewise, provision of Section 391(6) of the Companies

Act, could not be used to bring an end the prosecution arising from Income Tax Act or Foreign Exchange Control Act. Because of this reason, the court also opined that proceedings under Section 138 of the N.I. Act instituted against the company could not be stayed. That stage is long over. It is stated at the cost of repetition that scheme was sanctioned way back in the year 2005. But for the present review petition, said scheme has attained finality. That has even substantially acted upon as well, inasmuch as, payment to most other creditors have already been given as per the scheme."

20. We are in agreement with the counsel for Malanpur that under Section 391(6) of C. Act, proceedings under Section 138 of the NI Act cannot be stayed. We are also in agreement with the counsel for the Malanpur that even if the scheme has been sanctioned and payment to the creditors is to be made under the scheme, criminal proceedings under Section 138 of the NI Act cannot be stayed or quashed by the Company Court. In the Krishna Texport Industries (supra), the scheme was sanctioned and a question arose whether in exercise of power under Section 391(6) of C. Act, criminal prosecution under Section 138 of the NI Act could be stayed or quashed. The Division Bench in Krishna Texport Industries (supra), after referring to several decisions of the Supreme Court and High Courts, observed that the word "proceedings" used in the said section would not include "criminal proceedings". The Division Bench referred to the observations of the Supreme Court in Deepak Kumar Vs. Ravi Virmani and Another, AIR 2002 SC 1320 : (2002) CriLJ 1781 : (2002) 1 JT 555 : (2002) 1 SCALE 570 : (2002) 2 SCC 737 : (2002) 1 SCR 786 : (2002) AIRSCW 1138 : (2002) 1 Supreme 458 , Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, AIR 2000 SC 955 : AIR 2000 SC 954 : (2000) CriLJ 1464 : (2000) 85 FLR 122 : (2000) 2 JT 390 : (2000) 1 LLJ 1649 : (2000) 2 SCALE 80 : (2000) 2 SCC 745 : (2000) AIRSCW 609 : (2000) 2 Supreme 218 , Rajneesh Aggarwal Vs. Amit J. Bhalla, AIR 2001 SC 518 : (2001) 104 CompCas 332 : (2001) CriLJ 708 : (2001) 1 JT 325 : (2001) 1 SCALE 36 : (2001) 1 SCR 54 : (2001) AIRSCW 124 : (2001) 1 Supreme 24 and observed that the expression "proceedings" can be interpreted differently depending upon the context in which it has been used by the legislature. In the context of Section 391 and 392 of the C. Act, it will exclude the criminal proceedings. If further observed as under:--

"31. The matter may also be looked into from another perspective. The company court cannot call before itself the proceedings Under Section 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 Under Section 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 Under Section 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."

The aforesaid view finds resonance and acceptance in the judgment of the Supreme Court in JIK Industries Limited (supra). During the course of arguments before us, a copy of the decision of Bombay High Court, which was made subject matter of challenge before the Supreme Court in the said case, was produced. The factual position in the said case was that the scheme was approved in the meeting held on 25th June, 2005 and was sanctioned by the Court vide order dated 16th September, 2005. The appointed date as stipulated was 28th February, 2005. In the said case, prosecution under Section 138 of the NI Act had been filed in some cases after the appointed date. In fact, in some cases, cheques were dishonoured after the said date. The scheme envisaged issue of shares to the creditors. Identical or similar arguments were raised but were rejected by the Bombay High Court observing that the scheme did not have the effect of creating a new debt but it simply makes the original debt payable in the manner and to the extent proved in the scheme. This sanction of the scheme did not result in extinguishing the debt but only curtailed the right to recover the debt in the sense that the debt would become payable only in accordance with the sanctioned scheme. Distinction was drawn between power of the Company Court and exercise of power under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short). The effect and the consequence once the payment was made under the Scheme and whether in such circumstances the proceedings under Section 138 of the NI Act should be quashed under Section 482 Cr.P.C. was left open. It was, however, observed that the company court cannot quash, stay or compound the criminal proceedings under Section 138 of the NI Ac. The Supreme Court in its detailed judgment held that the power of compounding requires consent or agreement of two parties. It is bilateral and must have an element of mutuality. It is not unilateral. There cannot be any deeded compounding or implicit consent on the basis that the scheme under

Section 391 of the Act has been sanctioned.

22. In view of the aforesaid pronouncements, we do not think that the observations in the impugned orders for stay or proceedings of quashing of proceedings under Section 138 of NI Act can be sustained. The aforesaid observations will be treated as deleted. We clarify that we have not examined or stated what will be the effect in case payment is made under the sanctioned scheme. We have also not examined whether in the said situation the accused would be entitled to ask for quashing of the criminal proceedings. The said aspect will be examined in the criminal proceedings by the court(s) concerned and we express no opinion in that regard.

23. The aforesaid findings, dispose of the company appeal NO. 28/2010 filed by Malanpur.

24. This brings us to the appeal filed by Spice Jet Limited and the others i.e. Company Appeal Nos. 1 and 2/2011. The issue raised pertains to 55,60,000 pledged shares which were given as collateral securities for the ICDs. The issue arises for consideration in view of the directions given by the Supreme Court in its order dated 6th July, 2009, passed in SLP(C) No. 17474/2005. The order reads as under:--

"By order dated 16th January, 2009 the Delhi High Court in C.M. Nos. 1469-1470 of 2008 in Co. P. No. 385 of 2003 observed that the question regarding forfeiture of shares is pending in the Supreme Court and it would be open to M/s. Malanpur Steel Limited to make its submission before the Supreme Court.

Today when the Special Leave Petition came before this Court the above order was shown to us. We are of the opinion that the High Court should decide the said question in accordance with law. In the meanwhile, status quo as regards the transfer of shares shall continue till the High Court decides the matter expeditiously.

Accordingly, the Special Leave Petition stands disposed of."

13. Still relying upon the judgment of the Hon"ble Division Bench (supra), Sri Sukla argues that the Hon"ble Division Bench has clarified, although deleting the observations of the Hon"ble Single Bench made in its orders dated 15th July, 2005 and 14th July, 2010 sanctioning and reviewing the said Scheme respectively - in respect of those portions pertaining to stay or quashing of proceedings under Section 138 of the NI Act the view was expressed by the Hon"ble Division Bench that the effect of payments being completed under the said Scheme have neither been examined nor stated in its order. Therefore, Sri Sukla points out, the Hon"ble Division Bench refrained from examining whether in a situation where payments have been completed under the said Scheme the accused, meaning thereby the present petitioner, will be entitled to seek quashing of the criminal proceedings under Section 482 CrPC.

14. The Hon"ble Division Bench therefore, in its wisdom, left it to the appropriate

courts exercising criminal jurisdiction to look into such aspect of the matter.

15. In the meantime the matter was carried in contempt before the Hon''ble Single Bench of the High Court at Delhi by the present petitioner. In the contempt it was, inter alia, alleged that pendency of the criminal proceedings is itself an act of contempt being in breach of the orders of the Hon''ble Company Court.

16. The contempt proceedings were disposed of by the Hon''ble Single Bench by holding, inter alia, that the court of contempt is not the correct remedy for the petitioner to invoke. The petitioner was therefore granted the liberty to approach the competent criminal court for appropriate reliefs.

17. In the meantime the petitioner proceeded to file applications before the Ld. Magistrate at Kolkata for discharge in the light of the order of the Hon''ble Company Court at Delhi. The petitioner also applied for treating the complaint of the OP2-complainant as a warrant triable case under Section 259 CrPC.

18. The Ld. Magistrate was pleased to hold the view that in the absence of a specific order of the Hon''ble Court at Delhi on the issue of discharge, such prayer must be considered on evidence. Therefore, at this stage, such prayer stood rejected. The order of the Ld. Magistrate being carried in revision before the Ld. City Sessions Court under Section 397 CrPC by the petitioner, the Revisionist Court found that plea was recorded on 22nd May, 1997 and the application for discharge is being filed after a lapse of 15 years. Relying upon a judgment of the Hon''ble Apex Court reported in Subramaniam Sethuraman Vs. State of Maharashtra and Another, (2004) 4 BC 598 : (2004) CriLJ 4609 : (2004) 4 CTC 613 : (2004) 8 JT 220 : (2004) 7 SCALE 733 : (2004) 13 SCC 324 : (2005) 1 UJ 55 : (2004) AIRSCW 5326 : (2004) 6 Supreme 662 , the Revisionist Court held that once plea is recorded under Section 252 CrPC it is not open to the accused to seek recall of the summons or to seek discharge.

19. However, the Revisionist Court expressed the view that the only remedy of the accused is by way of a petition under Section 482 CrPC before the Hon''ble High Court. The revision accordingly stood dismissed.

20. In the meantime the OP2-complainant approached the Hon''ble Division Bench of the High Court at Delhi seeking clarification of its orders in connection with the following points:--

"(iii) Whether criminal prosecution under Section 138 of the Negotiable Instruments Act, 1881 can be made a subject matter of the order under Section 391(6) of the Companies Act, 1956 as neither the scheme nor the Company Court can sanction/direct, compulsory compounding of proceedings under Section 138 of the Negotiable Instruments Act, 1881?

The appellant/Applicant are constrained to file the present application seeking clarification of the Common Judgment in relation to point 2 (iii) above, as underlined."

21. Clarifying its order in the appeal (supra) the Hon''ble Division Bench as follows:--

"This application has been filed for clarification of our decision dated 9th November, 2012, on the issue of proceedings under Section 138 of the Negotiable Instruments Act, 1882. Having gone through paragraphs 18 to 22 of the said order, we feel that the position has been brought out clearly and the aforesaid paragraphs do not require and clarification or modification, except correction of typographical errors in the first sentence of paragraph 22. The first sentence of paragraph 22 will read "In view of the aforesaid pronouncements, we do not think that the observations in the impugned order for stay of proceedings or quashing of proceedings under Section 138 of the NI Act can be sustained." Paragraph 22 after correction of the typographical errors would read:--

"22. In view of the aforesaid pronouncements, we do not think that the observations in the impugned orders for stay of proceedings or quashing of proceedings under Section 138 of the NI Act can be sustained. The aforesaid observations will be treated as deleted. We clarify that we have not examined or stated what will be the effect in case payment is made under the sanctioned scheme. We have also not examined whether in the said situation the accused would be entitled to ask for quashing of the criminal proceedings. The said aspect will be examined in the criminal proceedings by the court(s) concerned and we express no opinion in that regard.""

22. Having regard to the gamut of the facts recorded above Sri Sukla submits that the option of seeking the relief of quashing under Section 482 CrPC has been clearly left open by the Hon''ble Court at Delhi. Even the Revisionist Court at Kolkata was pleased to hold that the only remedy of the accused is by way of a petition under Section 482 CrPC. Relying upon a judgment of the Hon''ble High Court of Karnataka in the matter of BPL Ltd. v. Infrastructure Leasing & Financial Services Ltd. being Criminal Petition No. 1467 of 2006, Sri Sukla argues that in a similar situation criminal proceedings taking cognizance have been quashed considering the terms of a Scheme of Compromise.

23. Sri Sukla also makes the point relying on the judgment of the Hon''ble Apex Court in Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., (2008) ACJ 581 : AIR 2008 SC 767 : (2008) 1 CLT 162 : (2008) 149 PLR 775 : (2007) 14 SCALE 257 : (2008) 2 SCC 595 , that the tender of a cheque has been treated to be as equivalent to payment. In the facts of the present case admittedly the sum of money directed to be tendered on behalf of the Company has been tendered and is lying with the Registry of the High Court at Delhi. The fact that the OP2-complainant has not come forward to withdraw the tendered amount does not mean that the terms of the said Scheme have not been complied with in substance by the Company. Therefore, according to Sri Sukla, the Ld. Revisionist Court was wrong in coming to the conclusion that the withdrawal of the proceedings under Section 138 of the NI Act is unequivocally conditional upon actual payment meaning thereby, acceptance and withdrawal by

the OP2-complainant.

24. Sri Sukla argues that it is now a fact that the said Scheme has been sanctioned and debts of each of the creditors have been rearranged and/or reprioritised in terms of the said Scheme. Therefore, the debt liability complained of in the proceedings under Section 138 of the NI Act does not survive. Such proceedings should therefore be quashed by treating the same as withdrawn with effect from the date the said Scheme has seen the light of day.

25. Per contra, Sri Debasish Roy, Ld. Counsel appearing on behalf of the OP2-complainant makes the following points:--

"First, that the dictum of the Hon'ble Apex Court In Re: Subramaniam Sethuraman v. State of Maharashtra (supra) as noticed by the Ld. Revisionist Court cannot be ignored. Neither such point can be diluted or bypassed.

Second, Sri Roy argues that the effect of both the appeal and the clarification decided by the Hon'ble Division Bench of the High Court at Delhi leaves no room for doubt that all observations of the Hon'ble Single Bench sanctioning the said Scheme qua the future course of the proceedings under Section 138 of the NI Act have been struck down. Such observations of the Hon'ble Single Bench both in its original order and, in its order in the review, are no longer valid.

Third, Sri Roy points out that the OP2-complainant has not withdrawn the amount paid under the said Scheme in its favour by the Company deposited with the Registry of the High Court at Delhi. Arguing that the proceedings under the NI Act were instituted in the year 1996 and plea was recorded in the year 1997 whereas the said Scheme which was filed before the Hon'ble High Court at Delhi in the year 2000 was approved only in the year 2005, it must be construed that the offence was already complete under Section 138 of the NI Act and therefore must be taken to its logical conclusion.

Fourth, Sri Roy relies on several judgments of the Hon'ble Apex Court, namely:--

? Rajneesh Aggarwal Vs. Amit J. Bhalla, AIR 2001 SC 518 : (2001) 104 CompCas 332 : (2001) CriLJ 708 : (2001) 1 JT 325 : (2001) 1 SCALE 36 : (2001) 1 SCR 54 : (2001) AIRSCW 124 : (2001) 1 Supreme 24 ;

? Sri Krishna Agencies Vs. State of A.P. and Another, AIR 2009 SC 1011 : (2009) CLT 166 : (2009) CriLJ 787 : (2009) 1 SCC 69 : (2009) AIRSCW 106 : (2008) 8 Supreme 333 ;

? BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., AIR 2000 SC 926 : (2006) 2 BC 359 : (2000) 100 CompCas 436 : (2000) 2 CompLJ 13 : (2000) CriLJ 1424 : (2000) 2 CTC 548 : (2000) 2 JT 127 : (2000) 124 PLR 57 : (2000) 1 SCALE 540 : (2000) 2 SCC 737 : (2000) 1 SCR 815 : (2000) 2 UJ 818 : (2000) AIRSCW 521 : (2000) 2 Supreme 41 .;

? Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, AIR 2000 SC 955 : AIR 2000 SC 954 : (2000) CriLJ 1464 : (2000) 85

FLR 122 : (2000) 2 JT 390 : (2000) 1 LLJ 1649 : (2000) 2 SCALE 80 : (2000) 2 SCC 745 : (2000) AIRSCW 609 : (2000) 2 Supreme 218 ;

? Krishna Texport Industries Ltd. Vs. DCM Limited, (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 ; and

? JIK Industries Limited and Others Vs. Amarlal V. Jumanani and Another, AIR 2012 SC 1079 : (2012) 1 BC 646 : (2012) 107 CLA 192 : (2012) 2 CompLJ 46 : (2012) CriLJ 1649 : (2012) 1 Crimes 204 : (2012) 3 CTC 428 : (2012) 2 JT 1 : (2012) 1 RCR(Civil) 913 : (2012) 1 RCR(Criminal) 822 : (2012) 2 SCALE 97 : (2012) 3 SCC 255 : (2012) 112 SCL 51 : (2012) AIRSCW 1501 : (2012) 1 Supreme 668 "

26. On the strength of the several authorities as noted above Sri Roy argues that it has been, inter alia held In Re: BSI Ltd. (supra) that merely because the Board for Industrial and Financial Reconstruction (for short BIFR) was considering the rehabilitation package of a sick company under Section 22(a) of the Sick Industrial Companies Act, it would not ipso facto mean that criminal proceedings under Section 138 of the NI Act automatically ended.

27. Relying heavily on In Re: Krishna Export and In Re: JIK Industries (supra), Sri Roy argues that an identical conclusion has been arrived at by the two courts on the point that the findings of the Company Court cannot be used as a light house to guide the further passage of criminal proceedings, including the proceedings under Section 138 of the NI Act. Sri Roy argues that the prayer for quashing must be accordingly rejected.

28. Having heard the parties and considering the materials on record this Court finds that admittedly the findings of the Hon"ble Single Bench of the High court at Delhi qua the pendency of the criminal proceedings under Section 138 of the NI Act have been modified by the Hon"ble Division Bench in the appeal against the review. Therefore, to the mind of this Court little sustenance can be found in the argument that upon deposit of the second and final instalment by the Company under the said Scheme, the proceedings under Section 138 of the NI Act instituted by the OP2-complainant shall be deemed to have been withdrawn.

29. Although noticing the anxiety expressed by Sri Sukla, Ld. Counsel that the effect of the said Scheme is statutory and binding on all creditors and being a Scheme in rem must be taken in cognizance by all courts, at the same time this Court cannot be oblivious to the fact that for criminal proceedings to be quashed or compounded there is a due process both under the statute and settled through judicial authority.

30. The due process qua withdrawal of criminal proceedings, particularly arising out of a Scheme framed under the company law came up for detailed consideration before the Hon"ble Apex Court In Re: JIK Industries (supra). The Hon"ble Apex Court upon consideration of several authorities held as follows:--

"26. Therefore, the main argument of the learned counsel for the appellant(s) that once a scheme under Section 391 of the Companies Act is sanctioned by the court the same operates as compounding of offence under Section 138 read with Section 141 of the NI Act cannot be accepted. Rather the principle which has been reiterated by this Court repeatedly in the aforesaid judgments is that a scheme under Section 391 of the Companies Act cannot be contrary to any law. From this consistent view of this Court it clearly follows that a scheme under Section 391 of the Companies Act cannot have the effect of overriding the requirement of any law.

27. The compounding of an offence is always controlled by statutory provision. There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender that the offence has been compounded. This, compounding of an offence cannot be achieved indirectly by the sanctioning of scheme by the Company Court.

40. This Court in Damodar S. Prabhu, on the basis of the submissions of the learned Attorney General, framed certain guidelines for compounding of offence under Section 138 of the NI Act. Those guidelines are as follows:

"THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

BLOCKQUOTE> (a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

41. The Court held in para 26 of Damodar that those guidelines have been issued by this Court under Article 142 of the Constitution in order to fill up the legislative vacuum which exists in Section 147 of the NI Act. The Court held that Section 147 of the NI Act does not carry any guidance on how to proceed with

the compounding of the offence under the NI Act and the Court felt that Section 320 of the Code cannot be strictly followed in the compounding of the offence under Section 147 of the NI Act. Those guidelines were given to fill up a legislative vacuum.

42. Reliance was also placed by the learned counsel for the appellant(s) on the judgment of this Court in *CBI v. Duncans Agro Industries Ltd.* The decision of this Court in *Duncans Agro* was on the question of quashing the complaint under Section 482 of the Criminal Procedure Code. In the facts of that case the learned Judges held that the bank filed suits for recovery of the dues on account of grant of credit facility and the suits have been compromised on receiving the payments from the company concerned. The learned Court held if an offence of cheating is *prima facie* constituted, such offence is a compoundable offence and compromise decrees passed in the suits instituted by the banks, for all intents and purposes amount to compounding of the offence of cheating. In that case the Court came to the conclusion that since the claims of the banks have been satisfied and the suits instituted by the banks have been compromised on receiving payments, the Court felt that the complaint should not be pursued any further and, therefore, the Court felt "in the special facts of the case" that the decision of the High Court in quashing the complaint does not require any interference under Article 136 of the Constitution.

43. Quashing of a case is different from compounding. In quashing the court applies it but in compounding it is primarily based on consent of the injured party. Therefore, the two cannot be equated. It is clear from the discussion made hereinabove that *Duncans Agro Case* was not one relating to compounding of offence. Apart from that the Court found that the dues of the banks have been satisfied by receiving the money and the suits filed by the bank in the civil court have been compromised. The FIRs were filed in 1987-1988 and the investigation had not been completed till 1991. On those facts the Court, rendering the judgment in July 1996, felt that having regard to the lapse of time and also having regard to the fact that there is a compromise decree satisfying the banks' dues, there is no purpose in allowing the criminal prosecution to proceed. On those consideration, this Court, in the "special facts of the case", did not interfere with the order of the High Court dated 23-12-1992 whereby the criminal prosecution was quashed.

44. It is, therefore, clear that no legal proposition has been laid down on the compounding of offence in *Duncans Agro*. This Court proceeded on the peculiar facts of the case discussed above. Therefore, the said decision cannot be an authority to contend that by mere sanctioning of scheme, the offences committed by the appellant Company, prior to the scheme, stand automatically compounded.

68. It is clear from a perusal of the aforesaid Statement of Objects and Reasons that offence under the Ni Act, which was previously non-compoundable in view of Section 320 sub-section (9) of the Code has now become compoundable. That

does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override Section 320(9) of the Code insofar as offence under Section 147 of the NI Act is concerned. This is also the ratio in Damodar. Therefore, the submission of the learned counsel for the appellant to the contrary cannot be accepted.

69. In this connection, we may refer to the provisions of Section 4 of the Code. Section 4 of the Code, which is the governing statute in India for investigation, inquiry and trial of offences has two parts. Section 4 sub-section (1) deals with offences under the Penal Code. Section 4 sub-section (2) deals with offences under any other law which would obviously include offences under the NI Act.

70. In the instant case no special procedure has been prescribed under the NI Act relating to compounding of an offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under Section 320 shall automatically apply in view of clear mandate of sub-section (2) of Section 4 of the Code.

83. For the reasons aforesaid, this Court is unable to accept the contentions of the learned counsel for the appellant(s) that as a result of sanction of scheme under Section 391 of the Companies Act there is an automatic compounding of offences under Section 138 of the NI Act even without the consent of the complainant."

31. Now to the point urged by Sri Sukla, Ld. Counsel that this Court in exercise of its inherent powers under Section 482 CrPC can quash the criminal proceedings by taking notice of all the relevant developments in terms of the said Scheme, the observations of the Hon'ble Apex Court in a leading authority on the point *Gian Singh Vs. State of Punjab and Another*, (2012) 9 JT 457 : (2012) 9 JT 426 : (2012) 9 SCALE 257 : (2012) 10 SCC 303 is required to be noticed:--

"57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

59. *B.S. Joshi and Others Vs. State of Haryana and Another*, AIR 2003 SC 1386 : (2003) CriLJ 2028 : (2003) 3 CTC 54 : (2003) 1 DMC 524 : (2003) 3 JT 277 :

(2003) 3 SCALE 214 : (2003) 4 SCC 675 : (2003) 2 SCR 1104 : (2003) 2 UJ 953 : (2003) AIRSCW 1824 : (2003) 3 Supreme 227 , Nikhil Merchant Vs. Central Bureau of Investigation and Another, AIR 2009 SC 428 : (2008) CLT 1226 : (2008) 9 JT 192 : (2008) 11 SCALE 379 : (2008) 9 SCC 677 , Manoj Sharma Vs. State and Others, (2008) 11 JT 674 and Shiji @ Pappu and Others Vs. Radhika and Another, AIR 2012 SC 499 : (2012) CriLJ 840 : (2012) 1 JCC 101 : (2011) 13 JT 180 : (2012) 167 PLR 108 : (2012) 1 RCR(Criminal) 9 : (2011) 12 SCALE 588 : (2012) AIRSCW 445 do illustrate the principle that the High Court may quash criminal proceedings or FIR or complaint in exercise of its inherent power under Section 482 of the Code and Section 320 does not limit or affect the powers of the High Court under Section 482. Can it be said that by quashing criminal proceedings in B.S. Joshi, Nikhil Merchant, Manoj Sharma and Shiji this Court has compounded the non-compoundable offences indirectly? We do not think so. There does exist the distinction between compounding of an offence under Section 320 and quashing of a criminal case by the High Court in exercise of inherent power under Section 482. The two powers are distinct and different although the ultimate consequence may be the same viz. acquittal of the accused or dismissal of indictment.

61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominating civil favour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because

of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings."

32. Therefore, having regard to In Re: Gian Singh (supra) this Court finds that where proceedings arise out of commercial, financial, mercantile, civil, matrimonial or like transactions which are essentially private or personal in nature and "the parties have resolved their entire dispute" (emphasis supplied), it is necessary prior to considering a prayer for quashing to examine whether the compromise between the alleged offender and victim is complete. The language expressed In Re: Gian Singh (supra) is as follows:--

"Full and complete settlement and compromise with the victim".

33. The Hon"ble Apex Court, in the considered view of this Court made it clear that the High Court shall be well within its jurisdiction to quash criminal proceedings in certain types of private and personal disputes where the court is convinced that in view of the complete (emphasis added) compromise arrived at between the parties it is necessary for the ends of justice to quash the proceedings.

34. To the mind of this Court no quashing can be granted on a unilateral basis, i.e. only on the prayer of the present petitioner in the absence of a complete compromise qua the parties. Similarly, the facts of the present case do not allow for compounding in view of the law laid down In Re: JIK Industries.

35. Before parting with this case this Court is required to notice that the prayer for quashing made in the application by the petitioner is founded on the pleadings of a compromise arising out of the said Scheme. Such compromise is pleaded to be binding on both the Company and on the OP2-complainant.

36. In this regard special mention may be made of the pleadings at paragraph XXVII of CRR 3349 of 2014:--

"XXVII. For that the Learned Sessions Judge and the Learned Magistrate failed to appreciate that the Scheme in this case is essentially a compromise between the company and its unsecured creditors and the Scheme when sanctioned does not merely operate as an agreement between the parties but has statutory force and is binding not only on the company but even dissenting creditors or member, as

the case may be."

37. However, from the discussion made above this Court, in the absence of a complete compromise agreed to by the OP2-complainant as well as the distinct nature of the law governing criminal proceedings is restrained from exercising its power under Section 482 CrPC for either quashing or compounding the offence.

38. The orders impugned are therefore not interfered with.

39. CRR 3349 of 2014 stands accordingly dismissed.

40. On a parity of reasoning the two connected CRR Nos. 1309 of 2013 and 1310 of 2013 also stand dismissed.

41. In view of the order of dismissal of the three CRRS, the liberty is granted to the applicants in CRAN Nos. 651 of 2015, 4261 of 2014 and 4260 of 2014 to approach the competent Court of the Ld. Magistrate with the prayers made in the applications which will be considered on their own merits.

42. CRAN Nos. 651 of 2015, 4261 of 2014 and 4260 of 2014 stand accordingly disposed of.

43. Interim orders, if any, stand discharged.

44. Urgent certified photocopies of this judgement, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

Later

At this stage Sri U.S. Menon, Ld. Counsel appearing for the petitioner in the three CRRs prays for stay of operation of this judgment and order dated 26th August, 2015.

Prayer for stay is considered and rejected.