
(2021) 12 P&H CK 0080

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous Petition (M) No. 10624 Of 2020 (O& M)

Vishnoo Mittal

APPELLANT

Vs

M/S Shakti Trading Company

RESPONDENT

Date of Decision : 21-12-2021

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138, 141

Insolvency And Bankruptcy Code, 2016 — Section 2, 3, 14, 14(1), 31(1), 33

Citation : (2021) 12 P&H CK 0080

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

Advocate : Rakesh Malhotra, Ajay Kalra, A.D.S.Jattana

Final Decision : Dismissed

Judgement

Sureshwar Thakur, J

1. A complaint bearing No. 15580/18 titled as Ms/ Shakti Trading Company versus M/s Xalta Food and Beverages Pvt. Ltd., and others, became cast, under Section 138 of the Negotiable Instruments Act, 1881, before the learned Magistrate concerned. After the learned Magistrate recorded the preliminary evidence, comprised in affidavit Ex. CH, along wherewith became appended Ex. C1 to Ex. C5, he made a summoning order, on 07.9.2018, upon the accused (supra). One of the accused, who has been summoned through the summoning order, namely, one Vishnu Mittal, has challenged the summoning order (supra), through his casting the instant petition before this Court.

2. Cheque bearing No. 31859 of 05.7.2018, carrying therein a sum of Rs. One lac, became dishonoured on 07.7.2018. Subsequently, the complainant sent a statutory notice on 06.8.2018, upon, the accused (supra), demanding the afore sum from them. The factum of issuance, and, receipt of afore statutory notice, by the accused concerned, is not disputed before this Court. Since the demand as made, upon the accused concerned, through the afore statutory notice

remained unredressed, thereupon the complainant instituted the complaint (supra), on 07.9.2018. As afore stated, after the learned Judicial Magistrate concerned, recorded the preliminary evidence, he issued summons upon each of the accused. The summons issued upon the petitioner herein, become challenged by him.

3. The learned counsel appearing for the petitioner, has with much vigour, contended before this Court, that since the occurrence of sendings, and, receipt of the statutory notice, happened on 06.8.2018, and, when prior thereto, as apparent on a reading of Annexure P-2, the National Company Law Tribunal, New Delhi Bench, in the petition drawn by the complainant, against the respondent-accused M/s Xalta Food and Beverages Pvt. Ltd., hence claiming therein, the relief of imposition of moratorium, in terms of Section 14 of the Insolvency and Bankruptcy Code (for short 'IBC Code'), upon the complainant, and, besides when, through an order made by the National Company Law Tribunal on 25.7.2018, rather the afore relief became granted to the complainant. Therefore, he further submits that also when the amount carried in the Negotiable Instrument concerned, is, encompassed with the domain of the afore made order. Consequently, he further contends, that the clout of the moratorium, imposed through the order (supra) also extends to proceedings drawn under the Negotiable Instruments Act, and, thereupon the summoning order, is made with the completest lack of profound legal wisdom, and, is liable to be quashed, and, set aside. He further submits, that since Section 14 of the IBC, provisions whereof stand extracted hereinafter, make it abundantly clear, that subject to exceptions contained in sub-Section 2 and 3, on the insolvency commencement date, the moratorium declared by the competent authority rather casting a prohibition against the institution of suits, or continuation of pending proceedings against the corporate debtor, including execution of any judgment, decree, and, order passed by the tribunal, or arbitration panel, or other authority. Therefore, since the order (supra), as made by the Company Law Tribunal, occurred on 25.7.2018, or hence was made prior to the issuance of the demand notice (supra), thereupons with statutory forbiddance(s) becoming encumbered upon the accused, qua the redemption of the afore amount. Consequently, the issuance of demand notice becomes vitiated, and, also the proceedings as became thereafter constituted before the Magistrate concerned, become vitiated.

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

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

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

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

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

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

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

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

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

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

4. Moreover, and, reiteratedly he argues that when the demand, as made through the statutory notice upon the juristic entity/accused, named in the complaint(supra), could not be hence redeemed by it, during the moratorium period, as the statutory disablements entailed upon the assets, and, accounts of the corporate entity concerned, rather forbade it, and, also forbade him to redeem the debt. Therefore, he contends that when the relevant underlined hereinafter mandate, as occurring in the proviso, to Section 138 of the Negotiable Instruments Act, forbids the institution of a complaint against the accused concerned, unless all, the clauses carried therein, become completely, and, conjunctively satisfied. Consequently, he argues, that hence the afore statutory disablements, as encumbered, upon the assets and accounts of the corporate entity concerned, and, as arose, from the moratorium order, as became imposed prior to the issuance of the statutory notice, rather concomitantly incapacitated the accused corporate entity concerned, and, also all other non-juristic persons, hence to comply with the demand notice within 15 days since its issuance, and, receipt by the accused concerned. Therefore, he argues that the factum of the afore evident disablements, can not assign the relevant mens rea to all the accused concerned, and, that the complaint was not maintainable.

"138-Dishonour of cheque for insufficiency, etc., of funds in the account. -Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank,

such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

5. Before appreciating the aforemade arguments, by the learned counsel for the petitioner, it is imperative to extract hereinafter, the relevant portion of the order as made on 25.7.2018, by the National Company Law Tribunal, New Delhi Bench, relevant portion whereof stands extracted hereafter:-

"6. In the absence of any dispute, or rather in the face of a clear and categorical admission of the Corporate Debtor, the prayer of the operational Creditor has to be admitted. Accordingly, the petition is admitted. A moratorium in terms of Section 14 of Code comes into effect forthwith staying :

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

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

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

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

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

(3) the provisions of sub-section (1) shall not apply to transactions as may be

notified by the Central Government in consultation with any financial regulator.

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

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

6. Bearing in mind the afore, initial argument, as addressed before this Court, by the learned counsel for the petitioner, that in the wake of the moratorium order (supra), as made by the Company Law Tribunal, New Delhi Bench, the relevant portion whereof stands extracted hereinabove, hence the mandate occurring in Section 14 of the IBC, becoming animated, and, it also enabling the drawing of a further legal sequel, that when Clause-A of Sub Section 14(1) of the IBC, hence prohibits the institution of suits, or continuation of pending suits or continuation of pending proceedings against the corporate debtor. Therefore, the above statutory coinage carried therein, also covering proceedings drawn under Section 138 of the Negotiable Instruments Act. The afore made argument is well rested, as it is covered by the judgment of the Hon'ble Apex Court, pronounced in case titled as P.Mohan Raj and others versus Shah Brothers Ispat Private Limited reported in (2021) 6 Supreme Court Cases 258. In the judgment (supra), the Hon'ble Apex Court, has in paragraph 102 thereof, as becomes extracted hereinafter, taken a view that the moratorium provisions contained in Section 14 of the IBC Code, prohibit the continuation of proceedings drawn even under Section 138/141 of the Negotiable Instruments Act, against the corporate debtor, rather during the subjudice corporate insolvency resolution process.

"Since the corporate debtor would be covered by the moratorium provision contained in Section 14 of the IBC, by which continuation of Section 138/141 proceedings against the corporate debtor and initiation of Section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paragraphs 51 and 59 in Aneeta Hada would then become applicable. The legal impediment contained in Section 14 of the 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 Section 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 Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the 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."

7. On the other hand, the learned counsel for the respondent has contended,

with vigour before this Court, that the moratorium, as became imposed upon the operational creditor therein, and, who is the complainant in the apposite proceedings, drawn before the National Company Law Tribunal, and, also when the insolvency proceedings, become initiated by the operational creditor, who is also the complainant in the extant complaint, yet cannot result in any succor emanating to the accused, from the provisions of Section 14 of the IBC Code. He rests the afore argument on the ground that a reading of the afore made order, does not detail, that the insolvency process as invoked by the complainant, before the NCLT, New Delhi, also covered, and, encompassed therein rather the extantly dishonoured instrument. However, the afore made submission, cannot become accepted by this Court, as a reading of the relevant portion, of the order extracted hereinabove, when becomes combined with the credit claimed, by the operational creditor, against the respondent therein, who is the accused corporate debtor, in the instant petition, rather along with other accused/natural persons named therein, does unfold, that the relevant portion of the order (supra), appertains to all the operational credits, as become carried in paragraph 2 of the order (supra). Even if there is no mention therein of the instantly dishonoured negotiable instrument, yet omissions (supra) would make the least difference, to the clout thereof also extending to the extantly dishonoured negotiable instrument, as thereins, specific references are made to the invoice numbers, both with respect to the corresponding dates of issuance thereof, and, also qua the specific amounts carried therein. The afore detailings do, prima facie bring the cause of action, as carried in the instant complaint, to concur therewith, as all the transactions, mentioned therein, and, as occurring inter se the litigants concerned, in respect whereof, the dishonoured negotiable instrument concerned became issued, do rather appertain to the calender year 2016, 2017, and, in the calender year 2018, calender years whereof, are the ones mentioned in paragraph 2 of the order (supra), made by NCLT, New Delhi. Therefore, prima facie hence there is inter se concurrence inter se the cause of action embodied the instant complaint, vis-a-vis the details borne in paragraph 2 of the order (supra), and the above inference would become withered, only upon prima facie material existing on record, and, its making a display, that the details made in paragraph above of the order (supra), appertain(s) not to the cause of action, carried in the instant complaint. Since the above rebutting material to erode the afore drawn prima facie inference, is not on record. Therefore, the afore made argument is rejected.

8. Now considering the further argument addressed, before this Court by the learned counsel for the petitioner, that the underlined hereinabove condition precedent, for therethroughs valid cognizance, and, also valid assumption of jurisdiction, being taken by the learned trial Magistrate, upon, the complaint concerned, does enjoin, qua its along with all the clauses carried in the proviso, rather being conjunctively satisfied. Therefore, in the wake of the moratorium order (supra), thus, its mandate is to be conjunctively satisfied along with the mandate of all other clauses carried in the proviso concerned. Therefore, he

submits that with the taking of cognizance rather occurring during the spell, of operation of the moratorium order (supra), and, the clout of the moratorium order, covering also the statutory notice issued, upon, the accused concerned. Consequently, when during the above spell, the accused concerned, were obviously financially disabled, to hence operationalize the accounts, and, assets of the corporate entity concerned. In sequel, the apposite statutory mens rea, was not made out against the accused, mentioned in the complaint, nor obviously any valid cognizance, nor any valid assumption of jurisdiction could be taken by the learned Magistrate concerned, upon, the complaint concerned. The afore made argument is well rested, as the imposition of moratorium, at the instance of the operational creditor, qua the accused corporate entity, made the apposite demand notice to be unamenable for redress, by the corporate entity. In other words, the afore order (supra), has a cascading legal effect qua the accused corporate entity concerned, becoming hence financially disabled to deliver the apposite demand.

Therefore, the afore disabling effects, to redeem the debt after receipt of the statutory demand notice, as, rather visited on any accused corporate entity, would also result in the imperative statutory sequel qua the condition precedent, as occurring in the underlined portion of the provisio to Section 138 of the Negotiable Instruments Act, becoming not established, and, or it remaining unproven. As a sequel, when there was no deliberate, or intentional avoidance, on the part of the accused corporate debtor, to deliver the statutory demand notice or to cause redemption of the debt to the demander, nor obviously, hence the requisite mens rea, was made out against the corporate entity concerned, nor any valid cognizance, upon the apposite complaint against the corporate entity, could be taken, nor any valid assumption of jurisdiction could be taken, upon the complaint, against the corporate entity, by the learned Magistrate concerned. Therefore, the complaint against the corporate debtor, was not maintainable.

9. Be that as it may, the petition at hand, has been filed by one Vishnoo Mittal, who claims himself to be the suspended Director of the corporate entity, named as M/s Xalta Food and Beverates Pvt. Ltd. The learned counsel for the petitioner submits, that the clout of the moratorium, is omnibus, and, it also indemnifies, and, saves the liability, if any, of the petitioner herein. However, the afore made argument, cannot be accepted by this Court, as the Hon'ble Apex Court in judgment (supra), has in paragraphs 120 and 121 thereof, paras whereof, stand extracted hereinafter, made a candid expostulation of law, that proceedings drawn under Section 138 of the Negotiable Instruments Act, though are covered by Section 14 of the IBC Code, but the afore drawn proceedings cannot rather continue only against the corporate debtor accused, but can continue against the erstwhile director/person incharge, and, responsible for the conduct of the business of the corporate debtor. Since the petitioner is a natural person, and, a suspended Director, and, hence falls within the domain of erstwhile director. Thereupon the immunity, as granted to a corporate debtor, cannot be extended

to him.

"120. Leave granted.

121. The complaint in the present case was filed by the respondent on 28.7.2016. An application under Section 7, IBC was admitted by the Adjudicating Authority only on 20.2.2018 and moratorium imposed on the same date. The impugned judgment rejected a petition under Section 482 of the Cr.P.C. on the ground that Section 138 proceedings are not covered by Section 14 of the IBC.

10. Moreover, since the sweep of the afore verdict covers with immunity any corporate debtor hence a juristic person, against rearings of proceedings under Section 138 of the Negotiable Instruments Act, and, does not likewise cover any natural person, working as a Director in the corporate entity concerned nor covers erstwhile directors. Therefore, since the petitioner is not a juristic person, but is a natural person, and, though he is a suspended director, yet when he is an erstwhile director of the corporate entity concerned, and, hence within the ambit of paragraph 121 (supra), rather prima facie, at the relevant stage of issuance, was incharge of, and, responsible for the company, and, of the business of the corporate debtor. Therefore, the issuances of summons against him, through the making of the impugned order, does not suffer from any illegality.

11. The petition is dismissed.

12. In view of the afore made verdict, the learned Magistrate concerned is directed to draw orders, in consonance therewith.

13. It is also imperative to bear in mind the proviso, as carried in the hereinabove extracted portion of the order, as made by the Company Law Tribunal, New Delhi, especially the proviso, carried therein, wherein it has been stipulated, that if the resolution plan, is approved, or an order of liquidation of corporate debtor, is passed, thereupon the moratorium, as ordered therein, would cease to take effect, from the date of such approval or passing of liquidation order, as the case may be. De hors the above, as no intimation has been purveyed to this Court, with respect to the adjudicating authority rather approving the resolution plan, or its making an order for liquidation of the corporate debt, nor hence it can be concluded, that in sequel, to the afore respective approvals, and, passings, the moratorium has ceased, from the date of apposite approvals or passings of liquidation order. Consequently, even if the afore respective apposite approvals, and, passings, may make the relevant moratorium to cease to hold force, from the date of apposite makings, yet it would not reanimate, the cause of action appertaining, to the proceedings drawn under Section 138 of the Negotiable Instruments Act, as permitting revival of the proceedings (supra), would be reviving the mis-constituted cause of action, as it was, at the incipient stage, or would revive an invalid cause of action, as it was at the incipient stage, as has happened in the wake of existence, at the relevant spell or phase, of the order of moratorium, with all its consequential statutory

effects (supra).

Conspicuously, also when the cause of action appertaining to criminal proceedings when once becomes deadened, it cannot become reanimated.