IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

923 CRIMINAL WRIT PETITION NO.1060 OF 2018
WITH APPLN/455/2019 IN WP/1060/2018

ASHOKA MULTIYARNS MILL PVT. LTD., KOLKATA AND OTHERS
VERSUS
SATNAM TRADING COMPANY THROUGH PROP. GURDEEP SINGH A.RAJPAL AND ANR

Mr. S. U. Chaudhari, Advocate for the petitioner
Mr. Rahul R. Totala, Advocate h/f Mr. R. A. Karwa, Advocate for the respondent No.1
Mrs. R. P. Gaur, APP for the respondent/State

CORAM : N. R. BORKAR, J.
DATE : 24-11-2021

P. C.

. This writ petition takes an exception to the order dated 17-03-2017 passed by the learned Magistrate, Aurangabad in SCC No. 1252 of 2017. By the order impugned the learned Magistrate has issued the process against the present petitioners and the respondent No.2 for the offence punishable under Section 138 of the Negotiable Instrument Act.

2. The respondent No. 1 herein had filed the complaint case on 27-07-2013 against the present

petitioners and the respondent No. 2 for the offence punishable under Section 138 of the N. I. Act.

3. According to the respondent No.1 the petitioner No.1 is company incorporated under the Companies Act. The petitioner Nos. 2 to 4 and the respondent No. 2 are its Directors. According to the respondent No.1, the petitioner No. 1 company issued cheque for the sum of Rs. 46,55,159/- towards the payment of the amount due and outstanding in respect of goods supplied. According to the respondent No.1 said cheque was presented for encashment, however it was dishonored and returned unpaid by the banker of the accused. The statutory demand notice was issued and as the petitioners failed to make the payment the complaint case came to be filed for the aforementioned offence. It appears that simultaneously, the respondent No.1 herein had filed the company petition No. 11 of 2014 for winding-up the petitioner No.1/ company before the Rajasthan High Court on the ground that the it failed to pay sum of Rs. 52,29,365/- together with interest @ 18% p.a. Consent terms were filed in the said company petition.

4. It appears that thereafter in the year 2017, the Union Bank of India initiated insolvency proceeding against the present petitioners No.1/company under Section 7 of the Insolvency and Bankruptcy Code.

5. Learned counsel for the petitioners submits that in view of the consent terms the proceedings under Section 138 of the N. I. Act needs to be quashed. It is further submitted that in view of initiation of insolvency proceedings, the complaint case cannot be allowed to proceed. It is further submitted that the trial court has issued the process against the petitioners and the respondent No. 2 only under Section 138 of the N. I. Act and no process is issued under Section 141 of the said Act. In the alternative, it is submitted that the petitioner No. 2 was the Managing Director of the petitioner No. 1 company and the petitioner Nos. 3 and 4 were merely Directors and they were not in-charge of day-to-day affairs of the petitioner No.1 company nor they were responsible for conduct of the business. It is submitted that in view of this, issuance of process as against the petitioner Nos. 3 and 4 needs to be quashed and set aside. It is

further submitted that even otherwise in view of the Judgment of the Hon'ble Supreme Court in the case of *Aparna A. Shah Vs Sheth Developers Pvt. Ltd*. only the drawer of the cheque can be prosecuted under Section 138 of the N. I. Act.

6. On the other hand learned counsel for the respondent No. 1 submits that there is specific clause in consent terms that respondent No.1 shall not proceed with the complaint case, if amount of Rs. 46,62,643/- is paid. It is submitted that the said amount is not paid. As regards other contentions the learned counsel for the respondent No.1 submitred that there are specific averments in the complaint that the petitioner Nos. 2 to 4 and the respondent No. 2 were in-charge of the day-to-day affairs of the company and were responsible for conduct of business of the company. It is submitted that the order impugned, in absence of any material to contrary cannot be quashed against the petitioner Nos. 3 and 4. In support of the submission the learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of *Ashutosh Ashok Parasrampuriya and another Vs Gharrkul Industries Pvt. Ltd. And others reported in 2021 SCC Online SC*

915.

7. As regards the submission that due to initiation of insolvency proceeding, the proceedings under Section 138 cannot be allowed to proceed, the learned counsel for the respondent No.1 submits that the said position is no more res-integra in view of the judgment of the Hon'ble Supreme Court in the case of *P. Mohanraj and others Vs Shah Brothers Ispat Pvt. Ltd. Reported in (2021)6 SCC 258.*

8. It is not the case of the petitioners that pursuant to consent terms, they have paid amount of Rs.46,62,643/- to the respondent No.1. In view of clause 7 of the consent terms the contention that complaint case filed by the respondent No.1 needs to be quashed in view of consent terms is rejected.

9. In the complaint, the respondent No. 1 has made following averments in para Nos. 2 and 7 which read thus:

> 2. That accused No. 1 is a company incorporated under the companies act and accused No.2 is the authorised signatory to the impugned cheque, whereas accused Nos. 3

to 5 are Directors of the company. Accused No.2 to 5 were/are in charge of day to day affairs of the company and are also jointly and severally responsible to the accused No.1 company for conduct of the business of the company at all material times and more particularly when the offence is committed.

7. That the impugned A/c cheque is signed by Accused No. 2 as authorised signatory on the behalf of accused No. 1 company. As per the record available with the register of company accused No. 2 to 5 where in charge of the day to day affair of the accused Ni. 1 company and were/are responsible to the accused No. 1 company for the conduct of its business at all material time and particularly at the time when the above cheque was issue and when the cheque in question is dishonoured and when the offence is committed.

10. The Hon'ble Supreme Court in the case of Ashutosh Parasrampuriya (supra) has held:

19. (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and

responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of an responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

. There are specific averments in the complaint that petitioner Nos. 3 and 4 were incharge of day-to-day affairs of the company and were responsible for the conduct of the business of the company. No material is placed on record on behalf of the petitioner Nos. 3 and 4 to show that they were not incharge of day-to-day affairs of the company. In absence of such material the petitioner Nos. 3 and 4 who were admittedly Directors of the company cannot be exonerated at this stage.

11. As regards the contention that the trial court has issued the process only for the offence under Section 138 and not under Section 141, suffice it to say that Section 141 is not distinct offence. The order of issuance of process against the petitioner therefore, cannot be quashed on that ground.

12. As regards the contention that the proceeding under Section 138 cannot be allowed to continue in view of initiation of insolvency proceedings. The Hon'ble Supreme Court in the case of P. *Mohanraj and others* (supra) has held :

> 102. 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 Anneta Hada 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 Instrument Act.

104. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Sections 138/141 proceedings in this case will continue both against the company as well as the appellants for the reason given by us in paras 101 and 102 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case.

13. During the pendency of the present petition an application came to be moved seeking transposition of petitioner No.1 company as respondent No.3 on the ground that as the National Company Law Tribunal has ordered that petitioner No.1 company be liquidated and appointed the Liquidator. If this is so then, in view of the para 102 of P. Mohanraj’s case as moratorium period is over, no interference is called for in the order impugned even to the extent of petitioner No.1. The petition is dismissed.

14. The application for amendment is also rejected.

[N. R. BORKAR, J.]

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