Form J(1) **IN THE HIGH COURT AT CALCUTTA**

Criminal Revisional Jurisdiction

Appellate Side

Present :

The Hon'ble Justice Bibek Chaudhuri

CRR 357 of 2022

Manish N. Tardeja & Anr.

Vs.

State of West Bengal & Ors.

For the petitioners	**:**	**Mr. Rachit Lakhmani,** **Mr Mohammad Amin,** **Mr. Ghulam Muztaba,** **Mr. Arfat Bin Mustafa.**
For the O.P.No. 2	**:**	**Mr. Koushik Kundu**
Judgement on	**:**	**20.02.2023.**

Bibek Chaudhuri, J.

In view of the ratio decided in ***P. Mohanraj & Ors. –Vs.- M/s. Shah Brothers Ispat Private Limited*** reported in ***(2021) 6 SCC 258***, it is now settled that a complaint under Section 138 of the Negotiable Instruments Act being filed pursuant to the order passed under Section 14 of the Insolvency and Bankruptcy Code, the proceeding against the corporate debtor that is the company would be stayed but criminal proceeding under Section 138 of the Negotiable Instruments Act would proceed against the private individuals/erstwhile Directors.

However, in the instant revision the petitioners have raised an important question as to whether the individual persons would also be liable under Section 138 of the Negotiable Instruments Act when the negotiable instrument was admittedly issued after the commencement of Corporate Insolvency Redressal Process (CIRP).

In order to substantiate his argument, the learned Advocate for the petitioners refers to the following dates:-

CIRP commenced under Insolvency and Bankruptcy Code against the company on 20th December, 2019. The cheque in question was issued on 23rd February, 2021. It was dishonoured on 5th March, 2021. The complainant/opposite party issued statutory notice under Section 138 of the Negotiable Instruments Act on 12th March, 2021 which was received by the accused/petitioners on 18th March, 2021. 15 days' time to pay the amount involved in the said cheque had expired on 2nd April, 2021 and the complainant filed the complaint before the learned Magistrate on 3rd April, 2021. Referring to the said dates, the learned Advocate for the petitioner tries to draw a line of distinction to the effect that in ***P. Mohanraj*** cheque in question was issued before commencement of CIRP. Here the cheque was issued after commencement of CIRP. Practically, it is the assumption of the learned Advocate for the petitioner that post dated cheques were issued to bind the individual creditors against the liability and one of such cheques was used for initiation of the proceeding.

It is further submitted by the learned Advocate for the petitioner that -

(i) on commencement of CIRP moratorium was issued under Section 14 of the Insolvency and Bankruptcy Code in respect of 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;

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

(iii) 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;

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

With commencement of corporate insolvency resolution process, interim resolution professional is appointed and all liabilities of the company was shifted to the IRP or RP under the IBC, as the case may be.

Thus, it is contended by the learned Advocate for the petitioners that even if the cheque issued by one of the Director/Directors of the company in the name of the company after adoption of CIRP is dishonoured, the payee shall not be held liable in view of the specific provisions of the Insolvency and Bankruptcy Code. Section 17 clearly lays down that from the date of appointment of the interim resolution professional, management of affairs of corporate debtor shall be exclusively controlled by the RIP. Thus, when the individual debtors had no authority to issue any negotiable instrument on behalf of the company, they cannot be held to be liable on dishonour of cheque.

Learned Advocate for the petitioner next refers to another decision of the Hon'ble Supreme Court in ***BSI Ltd & Anr. –Vs.- Gift Holdings Pvt. Ltd. & Anr***. reported in ***(2000) 2 SCC 737***. This judgment deals with applicability of Sick Industrial Companies (Special Provisions) Act (SICA) in relation to 138 of the Negotiable Instruments Act. Paragraphs 20 and 21 of the aforesaid report is relevant and quoted below:-

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

21. In the above context it is pertinent to point out that Section 138 of the N.I. Act was introduced in 1988 when SICA was already in vogue. Even when the amplitude of the word "company" mentioned in Section 141 of the N.I. Act was widened through the explanation added to the section, Parliament did not think it necessary to exclude

companies falling under Section 22 of SICA from the operation thereof. If Parliament intended to exempt sick companies from prosecution proceedings, necessary provision would have been included in Section 141 of the N.I. Act. More significantly, when Section 22(1) of SICA was amended in 1994 by inserting the words

"and no suits for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company"

Parliament did not specifically include prosecution proceedings within the ambit of the said ban."

Referring to another decision in ***Sarav Investment & Financial Consultancy Private Limited & Anr. –Vs.- Llyods, Register of Shipping, Indian office, Staff Provident Fund & Anr.*** reported in ***(2007) 14 SCC 753***. It is submitted by the learned Advocate for the petitioner that Section 138 to Section 147 in Chapter XVII of the Negotiable Instruments Act deal with penalties in cases of dishonour of certain cheques for insufficiency of funds in the accounts. The said provisions being penal provisions are required to be interpreted strictly. It is submitted by the learned Advocate for the petitioners that after adoption of CIRP the petitioners had no liability to issue any cheque and dishonour of such cheques does not attract any penal provision under Section 138 of the Negotiable Instruments Act.

Learned Advocate for the opposite party, on the other hand, submits that in view of the decision of the Hon'ble Supreme Court in ***P. Mohanraj*** the corporate debtor may not be held liable but liability of the present petitioners cannot be held to be waived. It is further submitted by him that the learned Advocate for the petitioners has placed his arguments on factual issues. Those facts are required to be proved in course of trial by leading evidence and at this stage this Court cannot take into account such factual aspects relating to adoption of CIRP issuance of moratorium, handing over the management of the company to the IRP etc. Therefore, all such questions being questions of fact can only be decided by the Trial Court.

It is also submitted by the learned Advocate for the opposite party with reference to ***Rangappa –Vs.- Sri Mohan*** reported in ***(2020) 11 SCC 441*** that when the cheque in question was issued by one of the Directors of the company who were responsible to the company for day to day management of the company, he is held to be liable under Section 138 read with Section 141 of the Negotiable Instruments Act. It is submitted by him that in cheque bouncing cases, what the Courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that when cheque was issued by one of the petitioners in discharge of the liability on behalf of the company, the proceeding under Section 138 of the Negotiable Instruments Act is maintainable.

In support of his contention learned Advocate for the petitioner has also placed reliance on the unreported judgements of a Coordinate Bench of this Court passed in CRR 889/2021 dated 18th January, 2023, CRR 890/2021 dated 18th January, 2023 and CRR 891/2021 dated 18th January, 2023.

In fine, it is contended by the learned Advocate for the petitioner that the ratio of ***P. Mohanraj*** (Supra) is squarely applicable in the instant complaint and there is no ground to quash the complaint at this stage.

Having heard the learned Counsels for the parties and on perusal of the entire materials-on-record as well as the decisions submitted by the learned Counsels for the parties, I like to state at the outset that in ***P. Mohanraj***, the accused issued 51 cheques on behalf of the company in favour of the respondent towards the amount payable for supplies of materials. All the said cheques were returned dishonoured for the reasons funds insufficient on 3rd March, 2017. Statutory notice were accordingly issued on 31st March, 2017 requiring the accused persons to pay the amount within 15 days of the receipt of the notice. In the aforesaid case, CIRP was adopted on 6th June, 2017. Thus, CIRP was adopted after the issuance of cheque in question by the accused persons. In the instant case, indisputably cheques were issued after adoption of CIRP and handing over of entire management of the company to the IRP. As soon as IRP takes hold of the management of the company the Directors had lost their authority to issue any negotiable instrument on behalf of the company. If there is any debt the creditor is required to approach the IRP or RP, he cannot take advantage of issuance of cheque by one of the accused persons because with adoption of CIRP the accused persons had no liability to discharge any debt on behalf of the company.

In view of the aforesaid reason, this Court finds that case no. CS 27050/2021 pending before the learned Metropolitan Magistrate, 7th Court, Calcutta under Section 138 read with Section 141 of the

Negotiable Instruments Act is not maintainable and is accordingly quashed.

The revision is allowed on contest, however, without cost.

(Bibek Chaudhuri, J.)

Srimanta, A.R.(Ct.)
Item No. 08.