IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.4041 OF 2022

1. Fortune Pharma Private Limited
B-6, Shendra MIDC, Aurangabad
Regd. Office at : Tapadiya Terrace, 1st Floor,
Adalat Road, Aurangabad.

2. Sudhakar Haribhau Mulay
Age : Major, Occu : Business &
Managing Director, Fortune Pharma Private Ltd.,
Tapadiya Terrace, 1st Floor, Adalat Road,
Aurangabad.

3. Vikram Sudhakar Mulay
Age : Major, Occu : Business &
Director, Fortune Pharma Private Ltd.,
Tapadiya Terrace, 1st Floor, Adalat Road,
Aurangabad.

4. Vishram Indarrao Jagtap
Age : Major, Occu : Business &
Director, Fortune Pharma Private Ltd.,
Tapadiya Terrace, 1st Floor, Adalat Road,
Aurangabad. .. Applicants

Versus

1. M/s. Pooja Enterprises,
M-47, MIDC Waluj, Aurangabad
Through its Proprietor
Vikas R. Joshi
R/o. N-6, CIDCO, Aurangabad .. (Orig. complainant)

2. Anurag Kumar Sinha
(Liquidator of applicant no.1 company)
C/o. Mayank Ghoshal,

Flat No.1106, Tower -1,
Oakwood, Runwal Greens,
Mulund – Goregaon Link Road,
Near Fortis Hospital, Mulund West,
Mumbai .. Respondents

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Mr. V.D. Hon, Senior Advocate i/by. Mr. S.B. Kakade, advocate for the applicant
Mr. A.S. Barlota, Advocate for Respondent No.1
Mr. S.M. Gunjal h/f. Mr. S.R. Deshpande, Advocate for Respondent No.2

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CORAM : R. M. JOSHI, J.

Reserved on : 28-07-2023
Pronounced on : 08-08-2023

ORDER :

. Applicants have filed this Application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'CrPC') for quashing of proceeding in S.C.C. No.476 of 2020 for the offence punishable under Section 138 of the Negotiable Instruments Act pending before the Judicial Magistrate First Class, Aurangabad and the order of issuance of process dated 13.03.2020 passed therein. The applicant no.1 is a Private Limited Company engaged in manufacturing of various APIS and intermediate of usage in human and veterinary health. The applicant no. 2 was the Managing Director and authorised signatory of applicant no. 1 – Company, whereas the applicants no.3 and 4 were also Directors of the company. There is allegation against applicants that for purchase of material from respondent no.1, three cheques for a total sum of Rs.14,91,139/- were issued by the applicant no.1 - Company. On presentation the said cheques were dishonoured on 18.11.2019 for the reason 'funds insufficient'. A complaint came to be filed under Section 138 of the Negotiable Instruments Act (for short, 'N.I. Act') and it was registered as S.C.C. No. 476 of 2020. After recording of verification of the complainant, the learned Judicial Magistrate First Class passed order dated 13.03.2020 issuing process against applicants.

2. It is further contention of the applicants that on 25.11.2019 National Company Law Tribunal passed order appointing Mr. A.K. Sinha as new I.R.P. and liquidator. It is the contention of the applicants that after the appointment of liquidator, the applicants no.2 to 4 have not remained in-charge of the administrations / affairs of the applicant no. 1 Company. Hence, the proceedings initiated under the N.I. Act deserves to be quashed and order for issuance of process needs recalled.

3. Learned counsel for the applicants by referring to the aforestated facts submitted that admittedly applicants no.2 to 4 are

not in the control of the administration of the applicant no.1 Company. It is submitted that in view of the appointment of liquidator by the National Company Law Tribunal under the provisions of the Insolvency and Bankruptcy Code, there is statutory bar and hence the proceeding is not maintainable against them. To support his submissions, he placed reliance on judgment of the Single Judge of this Court in **M/s. NRC Limited & Ors vs. M/s. Fuel Corporation of India & Ors, 2020 ALL MR (Cri) 3328**.

4. Learned counsel for respondent no.1 opposed the said submissions essentially on facts by stating that the cheque in question was dishonoured on 18.11.2019 i.e. prior to the appointment of the liquidator by National Company Law Tribunal, question of attraction of any bar does not arise. He submitted that the judgment relied upon by the applicants does not apply to the present case as the same is passed on different set of facts so also under the provisions and bar created by Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). To buttress his submissions about the maintainability of the proceeding under the N.I. Act, he placed reliance on the judgment of the Full Bench of the Hon'ble Apex Court in the case of **P. Mohanraj vs M/S. Shah Brothers Ispat Pvt. Ltd**, **Civil Appeal No.10355 of 2018**

decided on 01.03.2021. On the basis of the judgment, it is submitted that the proceeding under Section 138 of the N.I. Act are maintainable against both company as well as its directors.

5. There are certain facts which are not in dispute such as applicant no.2 is the Managing Director and authorised signatory of applicant no.1 - Company and the cheques in question were issued under his signatures. There is avernment in the complaint that applicants no.3 and 4 are also Directors and they are responsible for day to day conduct of the business of applicant no.1 – Company. Further, admittedly the cheques were issued to respondent no.1 were presented for realization and on 18.11.2019 the cheques were dishonoured for the reason “funds insufficient”. There is further no denial of the fact that the appointment of liquidor under the Insolvency and Bankruptcy Code came to be passed on 25.11.2019 i.e. after the dishonour of the cheques. Section 141 of the N.I. Act states that every person responsible for the conduct of the business is said to have been committed offene of dishnour of the cheque. There is specific pleading to that effect against applicants no.3 and 4 in paragraph no.1 of the complaint. Further, there is avernment that

applicant no.2 is the Managing Director and authorised signatory of the Company. Undisputedly he has signed the cheques in question. Thus dishonour of the cheques was complete on 18.11.2019 when the applicants no. 2 to 4 were in-charge of the conduct of the business of applicant no.1 Company. In the case of **M/s. NRC Limited** (*supra*) the said proceeding was under SICA and restraining order under the said Act was in force prior to issuance of cheque. Apart from the fact that the present proceeding is not under SICA but under Insolvency and Bankruptcy Code, the difference in the factual matrix of both cases is that in the instant case there was no order passed by the National Company Law Tribunal of appointment of liquidator prior to issuance of cheque and dishonour thereof.

6. *Prima facie* considering all material on record indicates that the applicants herein were in-charge of the day-to-day affairs of the company and were responsible for the issuance of the cheque in favour of the respondent which was dishonoured. In order to maintain a valid complaint under Section 138 of the N.I. Act, it is mandatory for the complainant to plead that the cheque is issued by the accused and in the case of company the other accused are responsible for its day-to-day affairs. Furthermore, the complainant is

required to show that the cheque was presented within its validity period and after dishonour of the same, notice is issued within prescribed time as stipulated in Section 138 of the N.I. Act. Complaint needs to be filed within a period of limitation as specified therein. All these mandatory aspects are complied with in the present case. The defence of the applicants cannot be considered at this stage. Suffice it to say that *prima facie* material placed on record indicates that the cognizance of the complaint has been taken properly by the concerned Magistrate, so also order of issuance of the process cannot be faulted with. Hence, this is not a fit case for quashment of the complaint as sought in the present application.

7. No issue is raised before this Court about the validity of the continuation of the proceedings before the learned Magistrate in view of the appointment of liquidator. Hence, this Court refrains itself from making any observations in this regard.

8. In view of above, there is no merit in the application and the same stands dismissed.

[R. M. JOSHI]
JUDGE

GGP