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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL REVISION APPLICATION NO. 386 OF 2022**

Asmita Sarang ... Applicant
**V/s.**
Yogesh Badoni & Anr. ... Respondents

**WITH**
**CRIMINAL REVISION APPLICATION NO. 387 OF 2022**

Asmita Sarang ... Applicant
**V/s.**
Senthil Kumar Karmegam & Anr. ... Respondents

**WITH**
**CRIMINAL REVISION APPLICATION NO. 388 OF 2022**

Asmita Sarang ... Applicant
**V/s.**
Yogesh Badoni & Anr. ... Respondents

**WITH**
**CRIMINAL REVISION APPLICATION NO. 389 OF 2022**

Asmita Sarang ... Applicant
**V/s.**
Senthil Kumar Karmegam & Anr. ... Respondents

Mr. Karma Vivan a/w Sumit Krishna Kumar Tiwari, Adv. for the Applicant.

Mr. Darshit K. Jain i/b Mrs. Divya D. Jain and Mr. Dileep Satale, Adv. for Respondent No. 1.

Mr. A. R. Patil, APP for the State/Respondent.

**CORAM : R. G. AVACHAT, J.**

**DATED : FEBRUARY 28, 2023**

**P.C. :**

This group of four revision applications is being decided by this common order, since common questions of facts and law arise therein.

2. For the sake of convenience, pleadings in Criminal Revision Application No. 387/2022 are referred to.

3. The applicant in all these revision applications is the original complainant in C.C. No. 795/SS/2019 pending before the learned Metropolitan Magistrate, 14th Court, Girgaon, Mumbai for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (for short "**NI Act**"). It is her case in the complaint that she is a proprietor of M/s. Aquamarine Medical Solutions. Accused no. 1 therein viz. Great Unison Contractors India Private Limited, is a private limited company. Accused no. 2-Senthil Kumar Karmegam (respondent no. 1 in REVN/387/2022 & REVN/389/2022) & accused no. 3-Ambujam are its directors and accused no. 4-Yogesh Badoni (respondent no. 1 in REVN/386/2022 & REVN/388/2022) is an authorized signatory of four cheques bearing nos. 007559, 007564 & 007562 of Rs. 14,56,664/- each and 007563 of Rs. 12,00,000/-, totalling an amount of Rs. 55,69,992/-.

4. It is averred in the complaint that accused nos. 2 to 4 were in charge of affairs of the accused-company. They have active participation in management of the company. They were also responsible for day to day business and operation of the accused-company.

5. It is further averred in the complaint that the

applicant/complainant was in the business of providing medical services such as medical manning, medical consultancy solutions and topside medical assistance etc. The original accused nos. 2 to 4 approached the applicant/complainant for availing various services like providing qualified doctors, qualified paramedics, topside medical assistance, BLS/ACLS ambulance, medical/non-medical escort and hospital/OPD treatment etc. The applicant/complainant provided all the services in terms of Purchase Orders issued by the accused. Various invoices were therefore raised. The invoices have been duly acknowledged by the accused without any demur or protest. A sum of Rs. 43,69,900/- + Rs. 12,00,000/- = Rs. 55,69,992/- was due from the accused-company. Since the accused were unable to pay the same, the applicant/complainant filed Insolvency and Bankruptcy Application before the National Company Law Tribunal, Mumbai Bench (for short "**NCLT**"), against the accused-company. In the said proceedings, settlement was arrived at. The accused-company admitted its liability. It agreed to pay the principle sum due + Rs. 12,00,000/- towards interest on delay in payment. The accused no. 4 signed the consent terms for and on behalf of the accused-company.

6. Since the accused-company did not comply with the terms of settlement, the applicant/complainant presented four cheques for encashment. The cheques were dishonoured for the reason "Drawer's Signature Differ". A Statutory Demand Notice was therefore issued. The notice was replied with a false contentions.

The applicant/complainant therefore filed a complaint under Section 138 read with Section 141 of NI Act. Learned Magistrate issued the process against the accused.

7. The respondents/original accused approached the Sessions Court by preferring the revision applications and took exception to the order of issuance of process. Learned Sessions Judge allowed the revision applications and set aside the order of issuance of process. The applicant/original complainant is therefore before this Court.

8. Heard.

9. Learned Advocate for the applicant/complainant would submit that the law laid down by this Court in the case of **Tayal Cotton Private Limited, Aurangabad vs. State of Maharashtra and Others** reported in **2019(1) Mh.L.J. 312** held the field when the complaint was lodged. The judgment in the case of **Tayal Cotton Private Limited** (*supra*) was not brought to the notice of learned Judge of this Court, who passed the judgment in the case of **Rajeev Raj Kumar and Others vs. State of Maharashtra and Another** reported in **2019(2) Mh.L.J. 628**.

10. According to the learned Advocate, the judgment of Hon'ble Apex Court in the case of **P. Mohanraj and Others vs. Shah Brothers Ispat Private Limited** reported in **(2021)6 Supreme Court Cases 258** seals the fate of these revision applications. Learned Advocate would submit that in view of moratorium clamped under Section

14 of the Insolvency and Bankruptcy Code, 2016 (for short "**IBC**"), the prosecution against Directors and those others responsible to the day to day affairs of the company/firm would continue or be initiated under Section 138 read with Section 141 of NI Act. The observations of Hon'ble Apex Court in paragraphs 101 & 102 of the judgment in the case of **P. Mohanraj** (*supra*) have been specifically relied on.

11. Learned Advocate further relied on the judgments of Hon'ble Apex Court in the cases of **Nag Leathers Private Limited vs. Dynamic Marketing Partnership represented by its partners and Another** reported in **(2022)2 Supreme Court Cases 271** and **Narinder Garg and Others vs. Kotak Mahindra Bank Limited and Others** reported in **2022 SCC OnLine SC 517**, to ultimately submit that there is no bar to prosecute natural persons, who could be brought under the dragnet of offence in view of Section 141 of NI Act. He would further submit that what has been submitted by learned Advocate for the respondents if accepted, it would be easy for the company/firm to apply on its own under Section 9 of IBC and get itself and all other natural persons responsible for commission of the offence, absolved of the criminal liability.

12. Since submissions advanced by learned Advocate for the applicant/complainant were based on the observations in the case of **P. Mohanraj** (*supra*), this Court do not propose to detain itself with the submissions made by learned Advocate, since those would be adverted to later on.

13. Learned advocate for the respondents/accused would on the other hand submit that the ratio in judgment in the case of **P. Mohanraj** (*supra*) has to be taken to have been made in the facts and circumstances of that case. The offence in the case of **P. Mohanraj** (*supra*) had taken place before proceedings under IBC were initiated.

14. According to learned Advocate, post issuance of the cheques, proceeding under Section 9 of IBC came to be initiated at the instance of another creditor of the accused company. By virtue of effect of Section 14 of IBC, the management of company was taken over by Insolvency Resolution Professional. The operations of bank accounts were freezed. The authority to operate the bank accounts did vest in Insolvency Resolution Professional, as a result of Section 14 of IBC. According to learned Advocate, the respondents were no longer in control and management of the day to day affairs of the company. The cheques have not been bounced for the reason "funds insuffcient or the like". According to him, the cheques in question could not be honoured due to the bank accounts to have been freezed.

15. Learned Advocate has relied on the judgment of this Court in the case of **Prem Chand Gupta vs. State and Another** reported in **2010 SCC OnLine Del 230**, wherein it has been observed that -

> "In a case in which the Board of Industrial and Financial Reconstruction (for short "**BIFR**") has submitted its report declaring a company as 'sick' and has also issued a direction under Section 22A of Sick Industrial Companies

> (Special Provision) Act, 1985, restraining the company or its directors not to dispose of any of its assets except with consent of the Board, then the contention raised on behalf of the appellants that a criminal case or the alleged offence under Section 138 of NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright."

16. He also relied on the judgment of Delhi High Court in the case of **M. L. Gupta and Another vs. Ceat Financial Services Limited** reported in **2006 SCC OnLince Del 1448**, to submit that the complaint would not be maintainable when the cheque was presented after the company has already been wound up.

17. He further relied on the judgment of Punjab and Haryana High Court in the case of **Rajesh Meena vs. State of Haryana and Others** reported in **2019 SCC OnLine P&H 6256**, wherein it has been observed that -

> "20. A careful analysis of Section 138 of NI Act reveals that the first and foremost requirement to maintain the complaint under Section 138 of NI Act is that the cheque issued by the account holder must be from the account maintained by account holder with the drawer-Bank for discharge in whole or in part of any debt or other liability.
>
> 21. The expression "account maintained by him" as appearing in Section 138 of NI Act carries great significance and meaning. The dictionary meaning of "Maintain" (as contained in Oxford Dictionary) is defined as :- the act of making the state or situation continue. Therefore, the said expression "account maintained by him" cannot be construed narrowly to mean that if the account belongs to the accused, the necessary ingredient would be complete. This expression "account maintained by him" must necessarily include that the said account is

not only alive and operative, but the account holder is capable of executing command to govern the financial transactions which include the clearance of cheques etc. The authority and control of the account holder upon the account must exist on the effective date i.e. when the cheque becomes valid for presentation in the bank. It is settled law that mere issuance of a cheque is not an offence, but it becomes punishable when the said cheque is dishonoured. Mere fact that the record of the drawer bank shows a particular name as account holder would not be sufficient to establish that account is being maintained by the account holder, unless the said account holder holds the authority and control over the said account. In other words, if an account holder is deprived off his authority, control and dominion over the bank account, it cannot be said that the account is being maintained by the said account holder.

22. Now while adverting to the facts of this case, it is evident that the proceedings against the company were initiated under the provisions of IB Code 2016 and the order in terms of Section 14 of IB Code was passed on 21/07/2017. The provisions of IB Code 2016 makes it absolutely clear that whenever a corporate debtor is facing the proceedings before the adjudicating authority (NCLT), then the control and management of the said corporate debtor can be vested with the Interim Resolution Professional.

23. It is also not disputed by learned counsel for the parties that Sh. Virender Singh already stands appointed as Interim Resolution Professional who is seized of the management and operation of the corporate debtor (accused No. 1). Admittedly, the post-dated cheques were given containing the dates as 27/06/2017 and 27/07/2017, but prior to the effective dates the said account was blocked, which cannot at all be attributed to the account holder, as it was a result of the order passed by NCLT, New Delhi and therefore, by virtue of the said order, the authority and control of the account holder

over the account ceased to exist."

18. Considered the submissions advanced. Perused the complaint, documents and the authorities relied on.

19. It is not in dispute that at the instance of applicant herein, the proceedings under Section 9 of IBC were initiated against the respondent company. It was an Insolvency And Bankruptcy Application No. 1944/2018. A settlement was arrived at between the parties to the said application. A copy of Consent Terms is on record.

20. The respondent/accused company acknowledged/accepted its liability. It had issued four post-dated cheques (subject matter of the complaint) towards repayment of principle sum due + interest on delay in payment.

21. Since the terms of settlement could not be materialized, the cheques were presented for encashment. The cheques returned unpaid for the reason "Drawer's Signature Differ". A short question therefore falls for consideration in these applications is as to whether the prosecution under Section 138 read with 141 of NI Act against the respondents shall continue in the peculiar facts and circumstances of the case.

22. For better appreciation, Section 14 of IBC is reproduced hereinafter :-

"**14. Moratorium**
(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 judgement, 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 (54 of 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.
[Explanation : For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a Similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.]

(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.
[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage

the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to -
[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
(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:

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."

23. Admittedly, another operational creditor initiated/filed proceeding against accused company under Section 9 of IBC vide Application No. 1414/2018. The said application was allowed on 08/01/2019. NCLT, Mumbai Bench vide order dated 08/01/2019 admitted the said application with the following prohibitory orders :-

"(I) (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(SARFAESI Act);

(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.

(II) That supply of essential goods' or services to the corporate debtor, If continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(IV) That the order of moratorium shall have effect from 08/01/2019 till completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code."

24. True, in the case of **P. Mohanraj** (*supra*), it has been observed by the Hon'ble Apex Court that -

"**101.** As far as the Directors/persons in management or control of the corporate debtor are concerned, a Sections 138/141 proceeding against them cannot be initiated or continued without the corporate debtor—see *Aneeta Hada*. This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the Company for the conduct of the business of the Company, as well as the Company. The Court, therefore, in *Aneeta Hada* held as under: (SCC pp. 686-88, paras 51, 56 & 58-59)

"51. We have already opined that the decision in *Sheoratan Agarwal* runs counter to the ratio laid down in *C.V. Parekh* which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the Company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the Company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the section is of immense significance and, in its tentacle, it brings in the Company as well as the Director and/or other officers who are responsible for the acts of the Company and, therefore, a prosecution against the Directors or other officers is tenable even if the Company is not arraigned as an accused. The words "as well as" have to be understood in the context.

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the

Company is an a express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the Company" appearing in the section make it absolutely unmistakably clear that when the Company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the Company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V. Parekh* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *Modi Distillery* has to be treated to be restricted to its own facts as has been explained by us hereinabove."

**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 *Aneeta 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 Instruments Act.**"

25. In the case of **Nag Leathers Private Limited** (*supra*), it has been observed by the Hon'ble Apex Court that since no natural person was arrayed as accused, exception carved out in aforementioned case of **P. Mohanraj** (*supra*), does not arise in the instant case. While in the case of **Narinder Garg** (*supra*), it has been observed by the Hon'ble Apex Court that -

> "A subsidiary issue was also about the liability of natural persons like a Director of the Company. In paragraph 77 of its judgment, this Court observed that the moratorium provisions contained in Section 14 of the Insolvency and Bankruptcy Code, 2016 would apply only to the corporate debtor and that the natural persons mentioned in Section 141 of the Act would continue to be statutorily liable under the provisions of the Act."

26. The dates of happenings are crucial one to decide the issue involved in these applications. Before that the facts in the case of **P. Mohanraj** (*supra*), need to be adverted to. Those are as under :-

> "Steal products were supplied by the respondent therein to one M/s. Diamond Engineering Private Limited (the "company") from 21/09/2015 to 11/11/2016, as a result of which INR 24,20,91,054 was due and payable by the

company. As many as 51 cheques were issued by the company in favour of the respondent towards the amounts payable for supplies, all 51 cheques were returned dishonoured for the reason "Funds Insufficient" on 03/03/2017. As a result, the respondent issued a Statutory Demand Notice on 31/03/2017. Again on 28/04/2017, two cheques presented by the respondent for encashment, were returned dishonoured for the reason "Funds Insufficient". Second Demand Notice was issued on 05/05/2017. Since the payment was not made pursuant to two Statutory Demand Notices, two criminal complaints were filed. Meanwhile, a Statutory Notice under Section 8 of IBC had been issued on 21/03/2017 by the respondent to the company. The adjudicating authority admitted the application vide its order dated 06/06/2017. Moratorium in terms of Section 14 of IBC was ordered."

27. The aforesaid events would undoubtedly suggest that the moratorium in terms of Section 14 of IBC was ordered on 06/06/2017 i.e. after presentation of the cheques for encashment, dishonour thereof for the reason "Funds Insufficient", issuance of Statutory Demand Notice and even non-compliance of the Demand Notice within 15 days of the receipt thereof. As such, the ingredients for constituting the offence punishable under Section 138 of NI Act had already occurred.

"(2) Precedent – Decision is precedent for what has been decided therein and cannot become precedent what can be inferred from it.

(4) When neither the question had not arisen before the supreme court, nor was the court required to decide the same, then it could not be taken to have been decided by the Court.

(10) Ratio of a decision is to be understood by considering facts of the case, the points raised for decision and the ruling thereon and no decision can be read as a statute.

(24) Precedent – Reliance on decision – Can not be placed without discussing whether it was rendered in same factual and legal background – Judgments of Court – Cannot be construed as statutes – Since judges interpret words of statutes. **AIR 2003 SC 2661 (2664) : 2003 AIR SCW 3387 : 2003 ALL LJ 1874**."

28. For better appreciation, Sections 138 & 142 of NI Act are reproduced hereinbelow :-

"**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 provision of this Act, be punished with imprisonment for [a term which may be extended to two years], or with 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, make 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 off 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.

Explanation.—For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

**142. Cognizance of offences**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no Court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;]

(c) no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.]

[(2) The offence under section 138 shall be inquired into and tried only by a Court within whose local jurisdiction, —

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

*Explanation.*- For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account.]."

29. In the judgment in the case of **S. P. Mani and Mohan Dairy vs. Dr. Snehalatha Elangovan** reported in **2022 SCC OnLine SC 1238**, it has been observed by the Hon'ble Apex Court that -

> "**24.** Evidently, the gist of Section 138 is that the drawer of the cheque shall be deemed to have committed an offence when the cheque drawn by him is returned unpaid on the prescribed grounds. The conditions precedent and the conditions subsequent to constitute the offence are drawing of a cheque on the account maintained by the drawer with a banker, presentation of the cheque within the prescribed period, making of a demand by the payee by giving a notice in writing within the prescribed period and failure of the drawer to pay within the prescribed period. Upon fulfilment of these requirements, the commission of the offence which may be called the offence of 'dishonour of cheque' is complete. If the drawer is a company, the offence is primarily committed by the company. By virtue of the provisions of sub-section (1) of Section 141, the guilt for the offence and the liability to be prosecuted and punished shall be extended to every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of its business; irrespective of whether such person is a director, manager, secretary or other officer of the company. It would be for such responsible person, in order to be exonerated in terms of the first proviso, to prove that the offence was committed without his knowledge or despite his due diligence.
>
> **26.** While the essential element for implicating a person under sub-section (1) is his or her being in charge of and responsible to the company in the conduct of its business at the time of commission of the offence, the emphasis in sub-section (2) is upon the holding of an office and consent, connivance or negligence of such officer

irrespective of his or her being or not being actually in charge of and responsible to the company in the conduct of its business. Thus, the important and distinguishing feature in sub-section (1) is the control of a responsible person over the affairs of the company rather than his holding of an office or his designation, while the liability under sub-section (2) arises out of holding an office and consent, connivance or neglect. While all the persons covered by sub-section (1) and sub-section (2) are liable to be proceeded against and also punished upon the proof of their being either in charge of and responsible to the company in the conduct of its business or of their holding of the office and having been guilty of consent, connivance or neglect in the matter of commission of the offence by the company, the person covered by sub-section (1) may, by virtue of the first proviso, escape only punishment if he proves that the offence was committed without his knowledge or despite his due diligence.

**29.** The seminal issue raised and requires to be settled in the present case is one relating to a person liable to be proceeded against under the provisions of sub-section (1) of Section 141 for being in-charge of and responsible to the company "at the time the offence was committed." It would, therefore, be important to find out the "time when the offence under Section 138 can be said to have been committed by the company. It is common place that an offence means an aggregate of facts or omissions which are punishable by law and, therefore, can consist of several parts, each part being committed at different time and place involving different persons. The provisions of Section 138 would require a series of acts of commission and omission to happen before the offence of, what may be loosely called "dishonour of cheque" can be constituted for the purpose of prosecution and punishment. It is held by the Supreme Court in *K. Bhaskaran v. Sankaran Vaidhyan Balan*, (1999) 7 SCC 510, that :-

"14. The offence under Section 138 of the Act can

> be completed only with the concatenation of a number of acts. The following are the acts which are components of the said offence : (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice."

30. The facts of the case in hand are that the four post-dated cheques were issued in pursuance of the Consent Terms dated 26/02/2018. The details of cheques are as under :-

| Sr. No. | Cheque Date | Cheque Number | Cheque Amount |
|---|---|---|---|
| 1. | 28/02/2019 | 007559 | 14,56,664/- |
| 2. | 30/03/2019 | 007564 | 14,56,664/- |
| 3. | 30/04/2019 | 007562 | 14,56,664/- |
| 4. | 31/05/2019 | 007563 | 12,00,000/- |

31. Admittedly, NCLT, Bench at Mumbai vide its order dated 08/01/2019, passed the prohibitory order (referred hereinabove). As a consequence thereof, the company was prohibited from transferring or alienating or disposing of any of its assets. Meaning thereby, the amount in the bank account of the Corporate Debtor/company came to be freezed. Insolvency Resolution Professional was appointed. He took over the charge of management of the Corporate Debtor/company. There is communication on record indicating the Corporate Debtor to have expressed its inability to pay the amount of dishonoured cheques on account of moratorium imposed vide order dated 08/01/2019. The concern bank of Corporate Debtor/company was also informed the operation of bank account was taken over by

Insolvency Resolution Professional. As a consequence, the Insolvency Resolution Professional became the authority to operate the bank account. As a further consequence, signature of earlier person, who was authorized to operate the bank account, came to be replaced with that of the Insolvency Resolution Professional. The cheques came to be presented on 11/04/2019 and 02/05/2019 i.e. long after moratorium was imposed. When the cheques were presented for encashment, the respondents were no longer in control and management of day to day affairs of the Corporate Debtor. It is not known as to whether there were sufficient funds in the bank account of Corporate Debtor to honour the cheques.

32. It is reiterated that the cheques were bounced for the reason "Drawer's Signature Differ". In view of this Court, the ingredients for constituting the offence punishable under Section 138 of NI Act occurred post imposition of moratorium. The respondents herein therefore could not be blamed. True, *mens-rea* is not an essential ingredient of the offence punishable under Section 138 of NI Act. As such, ingredients of the offence punishable under Section 138 read with Section 141 of NI Act do not get attracted against any of the respondents herein. The Revisional Court was therefore justified in setting aside the order of issuance of process. This Court is in respectful agreement with what has been observed in the case of **Rajesh Meena** (*supra*) (referred hereinabove). Reliance on the judgment in the case of **Narinder Garg** (*supra*), would be of no consequence, since no natural person was arraigned as accused.

Had they been there, what would have been their defence and consequential judgment thereon, is nothing but hypothesis. In the case of **Narinder Garg** (*supra*), it is an order and not the judgment. Full facts of said case are not before this Court.

33. For the reasons stated hereinabove, this Court is of the view that the Revisional Court did not commit any mistake in passing the orders impugned herein and therefore no interference is warranted therewith. The revision applications therefore fail. The same are thus dismissed and disposed of accordingly.

**(R. G. AVACHAT, J.)**