GRM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1151 OF 2022
WITH
CRIMINAL APPLICATION NO. 1152 OF 2022
WITH
CRIMINAL APPLICATION NO. 1153 OF 2022
WITH
CRIMINAL APPLICATION NO. 1170 OF 2022

Sheetal Gupta wife of Surender Gupta … Applicant
V/s.
National Spot Exchange Limited & Anr. … Respondents

Mr. Kevic Setalvad, Sr. Adv., Mr. Vijay Singh, Mr. Vinay J. Bhanushali a/w Himanshu a/w Mr. Abhiraj Rao a/w Shreya Arur i/b Bhagyashree Ganwani, Adv. for the Applicant.

Mr. Yashpal Thakur a/w Nimeet Sharma a/w Asim Shaikh i/b MZM Legal LLP, Adv. for respondent No. 1/NSEL.

Mr. A. R. Patil a/w Ms. Anamika Malhotra, APP for the State/Respondent No. 2.

CORAM : R. G. AVACHAT, J.

DATED : JANUARY 10, 2023

P.C. :

Heard.

2. These applications are being decided by this common order since common questions of fact and law arise therein. Moreover, the proceedings are between the same parties.

3. The challenge in these applications, under Section 482 of the

Code of Criminal Procedure, 1973 (for short "**Cr.P.C.**"), is to the order/s refusing to stay the proceedings under Section 138 of the Negotiable Instruments Act, 1881 (for short "**NI Act**") initiated by respondent no. 1, National Spot Exchange Limited (for short "**NSEL**"). Stay of the proceedings was sought relying on the provisions of Section 96 of the Insolvency and Bankruptcy Code, 2016 (for short "**IBC**").

4. The applicant in all these applications, is an accused no. 5 in the proceedings under Section 138 of NI Act. She had, in a capacity as the Director (Ex), signed the cheques issued in favour of the respondent-NSEL towards discharge of liability incurred by M/s. P. D. Agro Processors Private Limited (for short "**PDAPPL**") (accused no. 1 in the proceedings under Section 138 of NI Act).

5. It is the case of respondent-NSEL that it is a company incorporated under the provisions of Companies Act, 1956. It carries on business as a spot exchange providing for an electronic trading platform for spot contracts in commodities on a compulsory delivery basis. PDAPPL was a trading-cum-clearing member of NSEL. Accused nos. 2 to 4 in the proceedings, were its Directors. The applicant herein i.e. accused no. 5, was its Ex-director. All of them were In-charge of the day to day business of PDAPPL. They signed at the relevant time, the documents pertaining to the membership, including undertaking, as was required in accordance with Rules and Bye-laws of NSEL. The applicant herein in addition thereto, is a signatory to the post-dated cheques issued along with the agreement and PDC

declaration.

6. There were defaults of pay-ins on NSEL by its members, including PDAPPL. On working out liability in respect of outstanding trades, it was found that Rs. 687.30 crores were due from PDAPPL. The cheques bearing nos. 734357, 734358 & 734359, dated 05/05/2014 of Rs. 50 crores each issued for payment of Rs. 150 crores, were therefore presented for encashment. The cheques returned unpaid for the reasons "Stop Payment" instructions. A statutory Demand Notice/s was therefore issued. Since the notice/s was not complied with, the prosecutions under Section 138 of NI Act came to be initiated.

7. Learned Senior Counsel for the applicant would submit that in view of the commencement of interim moratorium in terms of Section 96 of IBC, the proceedings under Section 138 of NI Act shall be deemed to have been stayed. According to him, learned Magistrate erred in rejecting the applications preferred by the applicant for stay of those proceedings.

8. Learned Senior Counsel for the applicant relied on the following judgments of Hon'ble Apex Court and Punjab & Haryana High Court :-

- **P. Mohanraj and Others v/s. Shah Brothers Ispat Private Limited, (2021)6 Supreme Court Cases 258**;

- **State Bank of India v/s. V. Ramakrishnan and Another,**

(2018)17 Supreme Court Cases 394;

- **Vijay Kumar Ghai v/s. Pritpal Singh Babbar, 2022 SCC OnLine P&H 1672**.

9. Learned Senior Counsel for the applicant has made many submissions, reference thereto is not made in extenso, since the submissions made by him are part of the reasons in support of this order.

10. Learned Advocate for respondent-NSEL would, on the other hand, submit that it was a proceeding under Section 95 of IBC initiated by the State Bank of India (for short "**SBI**") against M/s. Dunar Foods Limited. Similar proceedings have also been initiated by the SBI against the applicant herein. The respondent-NSEL is not a party to those proceedings. The transactions between PDAPPL and respondent-NSEL are independent one. The applicant is a signatory to the cheques, which have been bounced. According to learned Advocate for respondent-NSEL, the judgment of Hon'ble Apex Court in the case of **P. Mohanraj and Others v/s. Shah Brothers Ispat Private Limited** (*supra*) is quite distinguishable on facts. The issue involved therein pertained to a question of moratorium under Section 14 of IBC. He would further submit that the applicant herein had taken exception to the order of issuance of process. She has been unsuccessful in those proceedings before this Court and the Hon'ble Apex Court as well. This Court vide its order dated 06/04/2022 in Criminal Application No. 109/2020 and connected applications observed,

> "Since the cases are of 2013/2014, the trial of the said cases are expedited. The learned Judge to conclude the case expeditiously and in any event, within 12 months from the date of receipt of this order."

11. Learned Advocate for respondent-NSEL reiterated that since the respondent-NSEL was not a party to the proceeding under Section 95 of IBC, the effect of Section 96 of IBC has no application to the proceedings under Section 138 of NI Act pending before learned Metropolitan Magistrate. He therefore urged for rejection of the applications.

12. Before adverting to the issue involved in these applications, it needs to be stated that the applicant had taken exception to the order passed by learned Magistrate, by filing revision applications. The Revisional Court dismissed the revision applications on the ground of the orders, challenged therein, were interlocutory.

13. Considered the submissions advanced. Perused the authorities relied on.

14. Learned Trial Court rejected the prayer with the following observations :-

> "In order to attract Section 96 of the Insolvency and Bankruptcy Code, 2016 to the present case, there must have been insolvency resolution process pending against the present accused no. 1 of which the accused no. 5 is alleged to be partner or the director. Any other insolvency resolution process filed against the accused no. 5 for her alleged

> liability, which has no concern with the present accused no. 1 or the subject transaction would not, by itself, attract Section 96 to the present proceeding. I do not find substance in the application. Hence, I pass the following order :-
>
> **ORDER**
>
> The application is rejected."

15. In the case of **P. Mohanraj and Others v/s. Shah Brothers Ispat Private Limited** (*supra*), the Hon'ble Apex Court has observed thus -

> "*35 - When the language of Section 14 and Section 85 is contrasted, it becomes clear that though the language of Section 85 is only in respect of debts, the moratorium contained in Section 14 is not subject specific. The only light thrown on the subject is by the exception provision contained in Section 14(3)(a) which is that "transactions" are the subject-matter of Section 14(1). "Transaction" is, as we have seen, a much wider expression than "debt", and subsumes it. Also, the expression "proceedings" used by the legislature in Section 14(1)(a) is not trammelled by the word "legal" as a prefix that is contained in the moratorium provisions qua individuals and firms. Likewise, the provisions of Section 96 and Section 101 are moratorium provisions in Chapter III of Part III dealing with the insolvency resolution process of individuals and firms, the same expression, namely, "debts" is used as is used in Section 85.*
>
> *35.2 - A "legal action or proceeding in respect of any debt" as mentioned in Sections 81, 85, 96 and 101 IBC, would, on its plain language, include a Section 138 NI Act proceeding. This is for the reason that a Section 138 NI Act proceeding would*

be a legal proceeding "in respect of" a debt. "In respect of" is a phrase which is wide and includes anything done directly or indirectly. This, coupled with the fact that the section is not limited to "recovery" of any debt, would indicate that any legal proceeding even indirectly relatable to recovery of any debt would be covered.

36 - For all these reasons, therefore, given the object and context of Section 14, the expression "proceedings" cannot be cut down by any rule of construction and must be given a fair meaning consonant with the object and context. It is conceded before us that criminal proceedings which are not directly related to transactions evidencing debt or liability of the corporate debtor would be outside the scope of this expression.

37 - V. Ramakrishnan Looked at and contrasted Section 14 with Sections 96 and 101 from the point of view of a guarantor to a debt, and in this context, held : We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason."

16. As such, the proceedings under Section 138 read with 141 of

NI Act get covered by the term "any legal action or proceeding pending in respect of any debt" appearing in Section 96(1) of IBC.

17. The contention of learned Advocate for the respondent-NSEL that NSEL is not a party to the proceedings, will be of no consequence. Admittedly, the SBI has filed a petition before National Company Law Board against the applicant herein to initiate Insolvency Resolution Process. It is necessary to have a glance at the relevant provisions of IBC. Chapter III of IBC speaks of Insolvency Resolution Process. Section 94 thereof pertains to the application by debtor to initiate the Insolvency Resolution Process. Under Section 95 of IBC, a creditor may move an application to initiate the Insolvency Resolution Process. For ready reference, Section 95(1) of IBC is reproduced, which reads thus :-

> "**95 – Application by creditor to initiate insolvency resolution process**. - (1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an Insolvency Resolution Process under this section by submitting an application."

18. Section 96 of IBC speaks of "Interim-moratorium", which reads thus :-

> "**96 - Interim-moratorium**. - (1) When an application is filed under Section 94 or Section 95 -
>
> (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and
>
> (b) during the interim-moratorium period -

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2)……

(3)……"

19. The adjudicating authority is expected to pass an order either allowing or rejecting the application under Section 94 or under Section 95, as the case may be. If the application is admitted under section 100 of IBC, moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of 180 days beginning with the date of admission of the application or on the date, the Adjudication Authority passes an order on the repayment plan under Section 114 of IBC, whichever is earlier.

20. In view of Sub-section (2) of Section 101 of IBC, during the moratorium period any pending legal action or proceeding in respect of **any debt** shall be deemed to have been stayed. Then Section 102 of IBC speaks of issuance of public notice and claims from creditors. For better appreciation, Section 102(1) is reproduced, which reads thus :-

"**102 – Public notice and claims from creditors -** (1) - The Adjudicating Authority shall issue a public notice within seven days of passing the order under Section 100 inviting claims from all creditors within twenty-one days of such issue."

21. It is true that respondent-NSEL is not a party to the application moved under Section 95 of IBC. The terminology of clause (b) of Section 101(2) of IBC unequivocally suggests that any pending legal action or proceeding pending in respect of **any debt** shall be deemed to have been stayed. The debt incurred or likely to be incurred by the applicant herein by virtue of a final order, that may be passed in a proceedings under Section 138 of NI Act initiated by respondent-NSEL, is covered by the term "any debt" appearing under Section 96 of Sub-section (1) of IBC. As per provisions under Section 103 of IBC, all the creditors are expected to register their claims with the resolution professional by sending details of the claims by way of electronic communications or through courier, speed post or registered letter.

22. Section 41 of the Indian Evidence Act speaks of a final judgment, order or decree of a Competent Court, in the exercise of insolvency jurisdiction, operates as a judgment "***in rem***".

23. On going through the scheme of Insolvency Resolution Process contained in Chapter III of IBC, the contention of learned Advocate for respondent-NSEL that proceeding under Section 95 of IBC and outcome thereof is a party specific (parties to the said proceeding only), can not be accepted.

24. Learned Magistrate ought to have allowed the application/s for stay of the proceedings pending before it. Since the same has not been done, interference with the order/s impugned herein is warranted. In the result, the applications succeed. Hence, the

following order is passed :-

ORDER

1. Criminal Application Nos. 1151 to 1153 of 2022 and 1170 of 2022 are allowed.

2. The proceedings (C.C. Nos. 4185/SS/2017, 2218/SS/2017, 4186/SS/2017 & 2217/SS/2017) under Section 138 of NI Act pending before learned Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai to stand stayed, *qua* the applicant, during the interim moratorium period.

3. Criminal Application Nos. 1151 to 1153 of 2022 and 1170 of 2022 stand disposed of.

(R. G. AVACHAT, J.)