IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 436 OF 2022

APPLICANTS :

1. M/s Shrid Metals Technologies Pvt. Ltd. A Company incorporated under the Companies Act, 1956, through its erstwhile Managing Director, Shri Shriyash Shashikant Kulkarni, Aged about 46 years, Occ: Business,

   Having its Regd. Office at Plot No. 5 (Near Coca Cola Company), Ghat No. 349 & 357, Pirangut Tal – Mulshi, Pune – 412115, Maharashtra.

2. Shri Shriyash Shashikant Kulkarni, (Erstwhile Managing Director), Aged 46 years, Occ: Business.

3. Shri Ashish Chandrakant Patne, (Erstwhile Joint Managing Director), Aged 47 years, Occ: Business.

4. Smt. Shreya Shriyash Kulkarni (Erstwhile Director), Aged 44 years, Occ: Housewife,

   All 2 to 4 having its Office at Plot No. 5 (Near Coca Cola Company), Ghat No. 349 & 357, Pirangut, Tulshi, Pune-412115 (Maharashtra).

//VERSUS//

NON-APPLICANT : M/s Sanvijay Rolling and Engineering Limited, A Company incorporated

under the Companies Act, 1956,
through its Authorised Person, Shri
Yatin Babulal Mehta, Aged about 60
years, Occ: Business, Having its Regd.
Office at Plot No. 9, Imamwada Road,
Nagpur – 440018, Maharashtra.

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Mr. G.S. Gour, Advocate for the Applicants.
Ms. Sakshi P. Agrawal, Advocate for the Non-applicant.

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CORAM : G. A. SANAP, J.
DATED : 6th JANUARY, 2023.

ORAL JUDGMENT

01] **Rule.** Rule made returnable forthwith. The application is heard finally by consent of the learned advocates for the parties.

02] The challenge in this application is mainly to the order dated 18th December, 2020, passed by the learned Additional Sessions Judge-8, Nagpur, whereby the criminal revision application, challenging the order of issuance of process dated 31st July, 2018, came to be rejected.

03] The perusal of the order passed by the learned Additional Sessions Judge in the criminal revision application would show that the learned Judge was satisfied that the facts stated in the complaint disclosed the cause of action against the accused including the Company. It is the case of the applicants that *vide* order dated 16th April, 2018 as far as the accused No.1-Company is concerned, the National Company Law Tribunal, Mumbai Bench (for short "NCLT"), has imposed the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (for short "the IB Code"). It was further stated in the revision application that the cheque was issued as a security by the accused persons, but the said cheque was misused and, as such, there was no cause of action to file the complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short "the NI Act"). It was further stated that in view of the moratorium imposed *vide* order dated 16th April, 2018 by the NCLT, the complaint under Section 138 of the NI Act was not maintainable.

04] The learned Additional Sessions Judge considered the matter in detail and came to the conclusion that the facts stated in the complaint were sufficient to establish the basic ingredients of the offence alleged to have been committed for taking cognizance. The learned Additional Sessions Judge found that no illegality as such was committed while issuing the process.

05] Being aggrieved by this order, the present application has been filed. The challenge is mainly on two grounds namely (i) the complaint does not disclose the cause of action and (ii) that the complaint cannot be instituted or continued, in view of the imposition of a moratorium by the order of the NCLT dated 16th April, 2018 and consequent liability for prosecution.

06] The learned advocate for the applicants submitted that due to imposition of the moratorium, the management of the Company was suspended and in place of the old management, the new management i.e. Interim Resolution Professional has come on record of the Company. The learned advocate, relying upon a decision in the case of ***P. Mohanraj and Others Vs. Shah Brothers Ispat Private Limited*** reported in ***(2021) 6 SCC 258,*** submitted that after imposition of the moratorium, the proceeding under Section 138 of the NI Act cannot be instituted or continued against the corporate debtor and directors. Learned advocate further submitted that the facts pleaded in the complaint with regard to the responsibility of accused Nos.2 and 3 for the running of the day-to-day affairs of the Company would not be sufficient without details and particulars to take the cognizance of an offence under Section 138 of the NI Act against them. The learned advocate submitted that before instituting the complaint, the complainant ought to have verified the correct position and on verifying the same, ought to have arrayed only the necessary parties as an accused. The learned advocate submitted that in view of the imposition of a moratorium and submission of the insolvency resolution plan by the Interim Resolution Professional-Shri V. S. Nagulapati Rao, the complaint is not maintainable.

07] The learned advocate for the non-applicant (complainant) submitted that the stand taken by the accused No.1 - Company and the remaining accused, who are the Managing Directors and Director, is self-contradictory and, as such, not maintainable. The learned advocate submitted that if the stand with regard to the imposition of a moratorium and submission of the insolvency resolution plan by the Interim Resolution Professional is accepted, then this application at the behest of the accused Nos.2, 3 and 4 will not be maintainable. The learned advocate for the non-applicant (complainant), relying upon the decision in the case of ***P. Mohanraj and Others*** (supra), submitted that the right of initiation or continuation of the proceedings against the persons mentioned in sub-sections 1 and 2 of Section 141 of the NI Act remains intact even after imposition of moratorium and acceptance of the plan submitted by the Interim Resolution Professional.

08] The learned advocates for the parties relied upon the observations from para 102 of the judgment in the case of ***P. Mohanraj and Others*** (supra).

09] In my view, this application cannot be allowed for more than one reasons. The contention raised by the applicant Nos.2, 3 and 4 cannot be entertained and accepted despite imposition of the moratorium under Section 14 of the IB Act, in view of the law laid down in the case of ***P. Mohanraj and Others*** (supra). For the purpose of convenience, it would be profitable to reproduce paragraphs 101 and 102 of the judgment in the case of ***P. Mohanraj and Others*** (supra), which read thus:

> ***"Whether natural persons are covered by Section 14 IBC***
>
> ***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)*
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> > *"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 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."*

10] The perusal of the above quoted para would indicate that the proceedings can be initiated and continued against the persons mentioned in Sections 141(1) and (2) of the NI Act. It is held in this case that the moratorium provision contained in Section 14 of the IB Code would apply only to the corporate debtor and the natural persons mentioned in Section 141 would continue to be statutorily liable under Chapter XVII of the NI Act. In my view, on both the counts, this decision is against the applicants. On the basis of this decision, it has to be held that in view the imposition of a moratorium, the proceeding against the Company/corporate debtor will not be maintainable, however, the same would not be a bar to institute or continue the proceedings against the accused Nos.2, 3 and 4.

11] The accused Nos.2 and 3 from the complaint are the Managing Director and Joint Managing Director respectively. The accused No.4 is the Director. The accused No.4 has not placed on record any material to rebut the *prima facie* statements made in the complaint with regard to her liability for prosecution. The accused No.4 having the exclusive knowledge in this regard was supposed to place the acceptable material on record. The learned advocate for the non-applicant (complainant) submitted that the accused No.4 was participating in all the board meetings of the Company and drawing the salary. The accused Nos.2, 3 and 4 are conspicuously silent on this aspect. The perusal of the complaint would show that the necessary facts have been pleaded in the complaint in this regard to fasten the liability on the accused Nos.2, 3 and 4, as provided under Section 141 of the NI Act. Therefore, on this count, the impugned order does not warrant interference.

12] It is seen that the cheque in question is dated 12th April, 2018. On 16th April, 2018, the insolvency professional was appointed and the moratorium has been issued on the same date. The Interim Resolution Professional appointed by the NCLT has submitted the insolvency plan for the consideration of the NCLT. The aspect with regard to the liability of the erstwhile Directors is concerned, the same has been considered in the case of ***P. Mohanraj and Others*** (supra). It is held in this regard that the moratorium period would come to an end with the resolution plan by a new Management being approved by the adjudicating authority and after that, the corporate debtor would not be liable for prosecution under Section 138 of the NI Act. It is further held that the moratorium provision does not extinguish any liability civil or criminal, but only casts the shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. The relevant paragraphs of the judgment are paragraphs 41 and 42 of ***P. Mohanraj and Others*** (supra). In this judgment, the liability of the persons named in Section 141 for initiation or continuation of prosecution under Section 138 of the NI Act has been upheld.

13] It is to be noted that the cheque dated 12th April, 2018 was issued in respect of the liability prior to the initiation of the insolvency proceeding under the IB Code. It is, therefore, to be noted that the criminal complaint, in view of the law laid down in the decision in the case of ***P. Mohanraj and Others*** (supra), cannot be quashed against the accused Nos.2, 3 and 4. It is to be noted that Interim Resolution Professional has submitted the insolvency plan. It is under consideration. Therefore, in my view, the complaint under Section 138 of the NI Act cannot be continued against the accused No.1-Company. As far as the accused No.1 is concerned, the Management and day-to-day affairs of the accused No.1 are presently looked after by the Interim Resolution Professional. After approval of the interim resolution plan, the new Management would take charge. As far as the accused No.1 is concerned, parties would be required to take appropriate steps before the learned Magistrate for taking care of the accused No.1, as permitted by law and more particularly considered in the case of ***P. Mohanraj and Others*** (supra).

14] Ultimately, I conclude that the complaint against the accused No.1 cannot be continued. To this extent, the order passed by the learned Additional Sessions Judge upholding the order of issuance of process cannot be sustained. As far as the accused Nos.2, 3 and 4 are concerned, they are liable for prosecution.

15] The applicant Nos.2, 3 and 4, who are the accused Nos.2, 3 and 4 respectively before the learned Trial Court, shall appear before the learned Trial Court on the next date.

16] The application is, therefore, disposed of in terms of the above observations. Pending applications, if any, stand disposed of.

(G. A. SANAP, J.)

Vijay