



Crl.O.P.No.24506 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.11.2023

Pronounced on :07.12.2023

Coram:

THE HONOURABLE DR.JUSTICE G. JAYACHANDRAN

Crl.O.P.No.24506 of 2023

and

Crl.M.P.No.17044 of 2023

1.Ashok B.Jeswani,
Director,
M/s Pacific Infotech Private Limited,
10/B, ABBAS Building, 1st Floor,
Jalbhai Street, Near Dreamland Cinema,
Grand Road (East), Mumbai 400 004.
Residence:
301/C, Teak Wood Apts,
Vasant Gardens, Mulund (W),
Mumbai 400 080.

2.Kishore B.Jeswani,
Director,
M/s Pacific Infotech Private Limited,
10/B, ABBAS Building, 1st Floor,
Jalbhai Street, Near Dreamland Cinema,
Grand Road (East), Mumbai 400 004.
Residence:
A-603, 6th Floor, Golden Willows,
Vasant Gardens, Swepna Nagari,
Mumbai 400 080.

..Petitioners

/versus/



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M/s Redington India Limited,
Rep.by its Power of Attorney,
Mr.M.Sundarrajan,SPL Guindy House,
95, Mount Road,Guindy,
Chennai-600 032.

.. Respondent

Criminal Original Petition has been filed under Section 482 of Cr.P.C., praying to set aside the docket order passed on 22.09.2023 in C.A.No.405 of 2023 pending before XXI Additional City Civil Court at Allikulam, Chennai.

For Petitioners :Mr.S.Suresh
For Respondent :Mr.V.T.Narendaran

ORDER

The petitioners herein are the second and third accused, convicted in a private complaint initiated under Section 138 of the Negotiable Instruments Act, 1881. Aggrieved by the judgement of conviction and sentence, they along with the first accused company had preferred appeal and the same is pending on the file of the Session Court at Chennai. The petitions filed for suspension of sentence was allowed on conditions to deposit 20% of the compensation amount. The petitioners not complied the said conditions, instead citing pendency of their applications under Section 94(a) of IBC before the



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NCLT, Mumbai, had filed a memo to stay further proceedings in the Appeal in view of Sections 94, 96 and 101 of Insolvency and Bankruptcy Code, 2016, which provides for an interim moratorium of legal action or proceedings pending in respect of any debt. Those memos were rejected by the learned Sessions Judge by a docket order. Against the rejection order dated 22/09/2023 the present petition under Section 482 of Cr.P.C is filed.

2. The docket order which is impugned in this petition read as below:-

“Perused representation conditional order passed by the Hon’ble Principal Judge. It appears none of the ground rises here (in the memo) have been agitated before the Hon’ble Principal Judge. Till date, no extension of time was also sought for by the petitioners before the Hon’ble Principal Judge. In such circumstances, this Court is not inclined to accept the memo. Hence, memo rejected.”

Sd/

XXI Additioonal Judge at Allikulam ”

3. The learned counsel appearing for the petitioners submitted that C.C.No:1425/2016 taken cognizance by the Metropolitan Magistrate, Fast Track Court at Magistrate Level-V, Saidapet, Chennai, is a private complaint presented by M/s Redington



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India Limited through its Power of Attorney against M/s Pacific Infotech Private Limited represented by its Directors. The two Directors of the first accused Company are the petitioners herein. The trial Court vide, its judgement dated 19/06/2023 held that the first accused company and its two Directors are guilty of offence under Section 138 of the Negotiable Instruments Act, 1881 for issuing cheques for Rs.1,34,23,970/- without sufficient fund, but instructing the bank to stop payment. The trial Court sentenced these two petitioners to undergo simple imprisonment for a period of Nine months and all the accused to pay jointly the cheque amount as compensation to the complainant.

4. Against the judgement of conviction and sentence, these petitioners preferred Crl A.No.405/2023 along with application to suspend the sentence, pending appeal. The Learned Principal Session Judge at Chennai allowed the application for suspension of sentence on condition to deposit 20% of the compensation amount. The Appeal was then made over to XXI Additional City Civil Court, Allikullam at Chennai. Before the XXI Additional City Civil Court, Allikullam at



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Chennai, a memo was filed reporting pendency of insolvency proceedings and the moratorium provided under the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) for the insolvent. The Court instead of recording the pendency of insolvency proceedings and stay further proceedings in the criminal appeal had rejected the memo with an endorsement that the conditional order imposed by the Principal Session Judge not complied and therefore, the memo rejected.

5. According to the learned counsel for the petitioners, they have preferred an application before the National Company Law Tribunal, Mumbai to initiate insolvency resolution process and the same is now taken up for consideration by the National Company Law Tribunal, Mumbai and the matter is pending for adjudication. So, the petitioners are entitled for interim moratorium provided under Section 96 of the IBC.

6. According to the learned counsel appearing for the petitioners, in *P.Mohanraj and others -vs- Shah Brothers Ispat Pvt. Ltd* reported in *[(2021) 6 SCC 258]*, the Hon'ble Supreme Court has



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held that, the proceedings under Section 138/141 of the Negotiable Instruments Act, 1881(in short NI Act) falls within the ambit of the expression “proceedings” in Section 14 of IBC. Hence, moratorium under Section 14 would apply in respect of Section 138/141 of the NI Act. Though the proceedings under Section 138 of NI Act, is couched in language making the act complained of an offence, is really in order to get back through a summary proceedings, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. The proceedings under Section 138 of NI Act is a quasi-criminal proceedings. It is hybrid provision to enforce payment under a bounced cheque, if it is otherwise enforceable in civil law.

7. The learned counsel appearing for the complainant/respondent submitted that the cheque was issued by the first accused Company drawn by the authorised signatories. These two petitioners as Directors responsible for the day-to-day affairs of the company and hence, they are also liable for dishonouring the cheques. On 19/06/2023, they were convicted and sentenced. Thereafter, these two petitioners have moved individual applications to declare them as



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insolvent and for appointment of resolution professional. The Judgement of *Mohanraj case* is not applicable to the petitioners herein, since that case is in respect of corporate debtor, wherein the moratorium mentioned under Section 14(1) of the IBC discussed and explained. In that judgment, it is made clear that the moratorium is only for the corporate debtor and not to the sureties in a contract of guarantee to a corporate debtor, in the light of Section 14 (3) (b) of the Code.

8. In a proceedings under Section 138/141 of NI Act, already initiated and culminated in conviction, the application under Section 94 of the Code, after the judgement of conviction by the petitioners before NLCT will not provide them any moratorium. The application by debtor under Section 94 of IBC will not provide them the protection of interim moratorium under Section 96 of the IBC for the proceedings initiated against the petitioners as representatives of the accused Company being vicariously liable on behalf of the company.



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9. Further, in the application for suspension of sentence, the Court of appeal passed a conditional order against these petitioners being the Directors of the first accused company to deposit 20% of the compensation amount jointly along with the first accused company. These petitioners have neither complied the condition nor disclosed to the Court of appeal about the pendency of their applications before NCLT. The docket order, which is impugned in these petition are in respect of non-compliance of condition imposed for suspension of sentence and it is not in respect of any debt. Hence, the petitions to be dismissed.

10. Heard both sides and perused the records.

11. The IBC is a comprehensive and consolidated legislation for effective implementation of Insolvency and Bankruptcy. Chapter II of the Code deals with corporate insolvency resolution process. Under this Chapter, Sections 7 to 10 list out persons, who can initiate/apply for corporate insolvency resolution process and Section 11 list out persons who shall not be entitled to make an application to initiate



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corporate resolution process. In this Chapter, particularly, Section 9 of the Code deals with the application for initiation of corporate insolvency process by operational creditor. Section 14 of the Code deals with moratorium for the corporate debtor during the resolution process. Under Section 92 of the code, atleast 7 days before the end of moratorium period, the discharge order shall be passed by the Adjudicating Authority, based on the resolution professional's final list of qualifying debts. Whereas Chapter III of the Code, is in respect of insolvency resolution process (other than corporate debtor). Section 94 is in respect of application by debtor to initiate insolvency resolution process. Section 96 speaks about interim moratorium till the date of admission of the application made under Section 94 (debtor's application) or under Section 95 (creditor's application). Section 101 is about moratorium, after admission of the application.

12. The fundamental facts in this petition is that the application by the petitioners herein are debtors application under Section 94 of the Code. It was filed, after they were found guilty for offence under Section 138//141 of NI Act. The Hon'ble Supreme



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Court in *Mohanraj case* had unequivocally held that the proceedings under Section 138/141 of NI Act will fall under the scope of moratorium referred in IBC subject to the exceptions mentioned in the Code.

13. The judgement of *Mohanraj case* cited by the learned Counsel for the petitioners is in respect of corporate debtor, which filed application under Section 9 of the IBC. In the said judgment, the Hon'ble Supreme Court has held that the proceedings initiated under Section 138 of NI Act falls within the scope of Section 14(1)(a) of the Code. In that judgment, at paragraph 102, the Hon'ble Supreme Court has made it clear that interim moratorium in a corporate debtor's application will not extend to the natural persons, who are prosecuted under Section 138/141 of NI Act. Section 14 of IBC will apply only to the corporate debtor, the natural persons mentioned in Section 141 of NI Act continue to be statutorily liable

14. Later, on considering the judgement rendered in



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Mohanraj case (cited supra), the Hon'ble Supreme Court in **Ajay Kumar Radheyshyam Goenka -vs- Tourism Finance Corporation of India Ltd** reported in [2023 (1)MadWN (cri) 145] has reiterated that, if the guarantors does not get the benefit of extinguishment of debt, the Signatory or Director cannot get any benefit. If the argument that the Signatories or Directors are not liable to be proceeded under Section 138/141 of NI Act, once the resolution plan is approved, it may lead to absurd situations.

15. In the light of the above observations made by the Hon'ble Supreme Court, if one looks at the facts of the case in hand, it makes clear that the Directors as Signatory or Guarantor or Person responsible for the affairs of the company, which has issued cheque to discharge its liability, can not have the advantage of their application to declare them as insolvent as an individual to seek moratorium. If such plea is entertained, then as observed by the Hon'ble Supreme Court, it will lead to absurdity. To demonstrate, for instance, in this case, if the interim moratorium under Section 96 is extended to these petitioners, who are the representatives of the company, which is not a



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corporate debtor facing resolution process under the Code, then the first accused company will stand without a natural person to represent. Being a proceedings with penal action, there can be no substitution for the petitioners as the Directors of the first accused company. As a result, for the insolvency of the Directors, the company a legal entity by itself liable for the penal action will be saved from the prosecution. Ultimately, any discharge order passed in the application of the two petitioners will also cover the debt their company owe to the respondent herein.

16. As the Hon'ble Supreme Court held that the moratorium given to the corporate debtor under Chapter II will not cover the individuals, who are the Guarantors of Directors. Similarly, the moratorium given to an individual under Chapter III will not cover the proceedings initiated against them as Directors or Guarantors of any company, which is not a corporate debtor under this Code.



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17. As a result, this Criminal Original Petition is dismissed.

Consequently, connected Miscellaneous Petition is closed.

07.12.2023

Index:yes/no

Neutral Citation:yes/no
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To

The XXI Additional City Civil Court at Allikulam, Chennai.

DR.G.JAYACHANDRAN,J.



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delivery Order made in
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and
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