

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

114

1.

CRM-M-14595-2023

Date of decision: 21.04.2023

Charanbir Singh Sethi

.....Petitioner

Versus

Pooja Sharma and others

.....Respondents

2.

CRM-M-14596-2023

Date of decision: 21.04.2023

Gurjeet Singh Johar

.....Petitioner

Versus

Pooja Sharma and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present : Mr. Apoorv Aggarwal, Advocate,
Mr. Abhishek Kumar Jaiswal, Advocate,
Mr. Tanmoy Gupta, Advocate and
Mr. Gaurav Singh, Advocate for the petitioners.

MANJARI NEHRU KAUL, J. (ORAL)

1. This order shall dispose of above mentioned two petitions as they arise out of the same complaint and impugned orders.

2. The petitioners are seeking quashing of Complaint bearing NACT No.68 of 2020 dated 24.01.2020 titled as 'Pooja Sharma Vs. C & C Towers Ltd. and others' (Annexure P-2) filed under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') by respondent No.1-complainant, pending before learned Judicial Magistrate 1st Class, Khanna, District Ludhiana, summoning order dated 03.09.2021 (Annexure P-1) and bailable warrants issued vide order dated 22.03.2023 (Annexure P-5).

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3. Learned counsel for the petitioners submits that the petitioners are Directors of M/s C & C Towers Limited, respondent No.3 company (hereinafter referred as to 'Corporate Debtor'). Learned counsel contends that prior to the institution of the complaint in question, proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2019 (hereinafter referred to as 'the IBC') had been instituted against the Corporate Debtor and Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP'), as per the provisions of the IBC, had commenced against respondent No.2. Resultantly, vide order dated 10.10.2019, moratorium in terms of Section 14(1) of the IBC had been declared by the National Company Law Tribunal (hereinafter referred to as 'NCLT'), Chandigarh, pursuant to which one Amit Gupta was appointed as an Interim Resolution Professional (IRP) of the Corporate Debtor, as per provisions of Section 16(5) of the IBC. Later one Gaurav Khanna was appointed as Resolution Professional (RP) of the Corporate Debtor.

4. Learned counsel has further brought to the notice of this Court that apart from proceedings under Section 7 of the IBC being instituted against the Corporate Debtor, proceedings under Section 95 of the IBC had also been instituted against the petitioners by the State Bank of India in August 2021. He submits that in the circumstances, when an application had been filed under Section 94 or 95 of the IBC, an interim moratorium under Section 96 of the IBC would have commenced on the date of filing of such application. Furthermore, during the interim moratorium period, any legal action or proceeding, which may have been pending in respect of any debt would be deemed

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to have been stayed. Hence, by virtue of Section 96 of the IBC no legal action or proceedings in respect of any debt could have been initiated or continued against the petitioners which had, however, been illegally done in the instant case.

5. Learned counsel still further submits that once a moratorium under Section 14 of the IBC had been declared, proceedings under Section 138 of the NI Act also could not continue against the Corporate Debtor. Learned counsel submits that no doubt proceedings under Section 138 of the NI Act could continue against natural persons mentioned under Section 141 of the NI Act even if a moratorium under Section 14 of the IBC had been declared, however, the petitioners were not seeking protection under Section 14 of the IBC but under Section 96 of the IBC. Learned counsel, while placing reliance upon the judgment of Hon'ble the SC in ***P. Mohanraj and others Vs. Shah Brothers Ispat Private Limited : (2021) 6 SCC 258*** argues that the scope of Section 96 of the IBC is much wider than that of Section 14 IBC, therefore, proceedings under Section 138 of the NI Act cannot be permitted to continue or be initiated against the petitioners.

6. While juxtaposing the nature of proceedings of Section 14 and Section 96 of the IBC, Learned counsel vehemently asserts that there is no dispute that Section 14 of the IBC prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor, however, Section 96 of the IBC clearly prohibits, not only continuation of proceedings but also initiation of any legal action against the individual/firms. Therefore, the protection accorded to the petitioners under Section 96 of the IBC in respect of debts is much

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wider and covers criminal proceedings initiated under Section 138 of the NI Act.

7. While inviting the attention of this Court to the observations of the Hon'ble Supreme Court in ***State Bank of India Vs. Ramakrishnan and another : 2018 17 SCC 394***, learned counsel submits that even therein it had been observed by the Hon'ble Supreme Court that Sections 96 and 101 of the IBC when contrasted with Section 14, would show that Section 14 of the IBC could not possibly apply to a personal guarantor, and it had been further held that the protection of the moratorium under Sections 96 and 101 of the IBC was far greater than that of Section 14 of the IBC, in respect of pending legal proceedings qua a debt. He, thus, submits that moratorium mentioned in Section 101 of the IBC would cover such persons, as such moratorium would be in relation to the debt and not the debtor.

8. Learned counsel further asserts that the objective of Sections 96 and 101 of the IBC is to give a breather to the partnership firm/individual to recuperate for a successful resolution of its debts, and to provide time to the debtor to negotiate with the creditors for foregoing a part of the debt, and also for restructuring the schedule of the debt. Learned counsel, therefore, submits that independent recovery as well as criminal proceedings cannot continue against the petitioners by virtue of operation of Section 96 of the IBC.

9. Learned counsel while concluding his submissions has further argued that as per the facts of the instant case, legal notice had been issued to Corporate Debtor on 16.12.2019, however, it was a matter of record that prior thereto, proceedings under Section 7 of the

IBC had already been initiated against the Corporate Debtor and IRP/RP had been appointed for its management. Thus, on the given date as per the provisions of Section 17 of the IBC, management of the Corporate Debtor vested in the hands of IRP and the status of the petitioners was that of suspended Directors. The petitioners were neither in-charge of the affairs of the Corporate Debtor at the relevant time nor any legal notice had been served upon them. Therefore, the impugned order vide which the petitioners had been summoned deserved to be set aside. In support of his submissions, learned counsel has also relied upon ***Vijay Kumar Ghai Vs. Pritpal Singh Babbar : (2022) SCCOnLine P&H 1672; Stitching Doen Postcode Loterij Vs. Vin Poly Recylers Pvt. Ltd. and others: 2010(115) DRJ 708 (DB) and Axis Trustee Services Limited Vs. Brij Bhushan Singhal and another : 2022 SCC OnLine Del 3634.***

10. I have heard learned counsel and perused the relevant material on record.

11. Learned counsel for the petitioner has claimed protection under Section 96 of the IBC. The thrust of the arguments of the learned counsel rest on the contention that the scope of the protection accorded to individuals/firms under Section 96 of the IBC is wider than that of Section 14 of the IBC, therefore, the petitioners would be entitled to protection under Section 96 of the IBC, and criminal proceedings initiated under Section 138 NI Act could not be permitted to continue against them. This Court, however, does not find any force in the contentions raised by the learned counsel for the petitioners for the reasons to follow.

12. As per the settled law, even in the wake of legal impediment under Section 14 of the IBC, natural persons mentioned in Section 141 of the NI Act, e.g. the petitioners in the instant case, would continue to be statutorily liable under Section 138 of the NI Act.

13. While explaining the extent of Section 14 IBC vis-a-vis Section 96 and Section 101 of the IBC, the Hon'ble Supreme Court, in ***P. Mohanraj's case (supra)***, has observed as under:-

“35. When the language of Section 14 and Section 85 are 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.

35.1. XXXX XXXX XXXX

35.2. A legal action or proceeding in respect of any debt would, on its plain language, include a Section 138 proceeding. This is for the reason that a Section 138 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 – see Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd., (2018) 2 SCC 674 (at page 709) and Giriraj Garg v. Coal India Ltd., (2019) 5 SCC 192 (at pages 202-203). 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.

35.3. When the language of these Sections is juxtaposed against the language of Section 14, it is clear that the width of Section 14 is even greater, given that Section 14 declares a moratorium prohibiting what is mentioned in clauses (a) to (d) thereof in respect of transactions entered into by the corporate debtor, inclusive of transactions

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relating to debts, as is contained in Sections 81, 85, 96, and 101. Also, Section 14(1)(d) is conspicuous by its absence in any of these Sections. Thus, where individuals or firms are concerned, the recovery of any property by an owner or lessor, where such property is occupied by or in possession of the individual or firm can be recovered during the moratorium period, unlike the property of a corporate debtor.”

14. Furthermore, the Hon’ble Supreme Court in ***P. Mohanraj's case (supra)***, while referring to the observations made in ***Ramakrishnan's case (supra)***, observed as under:-

“37. V. Ramakrishnan (supra) 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:

“26. 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.

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.”

These observations, when viewed in context, are correct.

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However, this case is distinguishable in that the difference between these provisions and Section 14 was not examined qua moratorium provisions as a whole in relation to corporate debtors vis-à-vis individuals/firms.”

15. Therefore, it is abundantly clear that when the provisions of Section 14 and 96 of the IBC are viewed in context of Corporate Debtors vis-a-vis individuals, as is the case in hand, the scope of Section 14 of the IBC comes across as being much wider than that of Section 96 of the IBC.

16. Even if for the sake of arguments, the submissions made by the Learned Counsel qua protection available to the petitioners under Section 96 of the IBC are accepted, even then the proceedings initiated against the petitioners, under Section 138 of the NI Act, would at best be liable to be stayed but not quashed. However, at the same time, even this protection of stay of proceedings would not be available to the petitioners as the case laws relied upon by the learned counsel would not come to his rescue in view of the ratio of law laid down in '**Ajay Kumar Radheyshyam Goenka Vs. Tourism Finance Corporation of India Ltd.**' : 2023(2) R.C.R.(Criminal) 161 wherein the Hon'ble Supreme Court while dealing with the proceedings under Section 138 of the NI Act vis-a-vis proceedings under the IBC, held as under:

*“16. We have no hesitation in coming to the conclusion that the **scope of nature of proceedings under the two Acts are quite different and would not intercede each other**. In fact, a bare reading of Section 14 of the IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings, which is the nature of proceedings under Section 138 of the N.I. Act. We are unable to appreciate the plea of the learned counsel for the Appellant that because Section 138 of the N.I. Act proceedings arise from a default in financial debt, the proceedings under Section 138 should be taken as akin to civil proceedings rather than criminal proceedings. We*

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cannot lose sight of the fact that Section 138 of the N.I. Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of the N.I. Act. It is not a recovery of the amount with interest as a debt recovery proceedings would be. They are not akin to suit proceedings.

17. XXX XXX XXX

18. *We are unable to accept the plea that Section 138 of the N.I. Act proceedings are primarily compensatory in nature and that the punitive element is incorporated only at enforcing the compensatory proceedings. The criminal liability and the fines are built on the principle of not honouring a negotiable instrument, which affects trade.*

This is apart from the principle of financial liability per se. To say that under a scheme which may be approved, a part amount will be recovered or if there is no scheme a person may stand in a queue to recover debt would absolve the consequences under Section 138 of the N.I. Act, is unacceptable.”

17. Adverting to the submissions made by learned counsel qua the petitioners not being vicariously liable in view of their status being that of ‘suspended Directors’, it would be pertinent to notice that the cheques in question had been issued on 15.09.2019 i.e. prior to the order dated 10.10.2019 passed by the NCLT, Chandigarh Branch, appointing Amit Gupta as IRP. Therefore, there can be no manner of doubt that on the date of issuance of the cheque in question, the petitioners were still in-charge of the management of the affairs of the Corporate Debtor as it was a matter of record that they were its Managing Directors. Not only this, a perusal of the complaint in question also reveals that specific averments were made therein against the petitioners of being responsible for the day to day affairs of the Corporate Debtor. Even if the submissions made by learned counsel are accepted qua no statutory notice having been served upon the petitioners, there is nothing which prevented the petitioners from making good the cheque amount within

15 days of the receipt of summons.

18. While dealing with a similar issue, the Hon'ble Supreme Court in ***C.C. Alavi Haji Vs. Palapetty Muhammed : 2007 (6) SCC 555*** has held as under:-

“17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskarans case (supra), if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.”

19. In ***Kirshna Texport & Capital Markets Ltd Vs. Ila Aggarwal : 2015 (8) SCC 28***, the Hon'ble Supreme Court has further held as under:-

“17. If the requirement that such individual notices to the directors must additionally be given is read into the concerned provisions, it will not only be against the plain meaning and construction of the provision but will make the remedy under Section 138 wholly cumbersome. In a given case the ordinary lapse or negligence on part of the Company could easily be rectified and amends could be made upon receipt of a notice under Section 138 by the Company. It would be unnecessary at that point to issue notices to all the directors, whose names the payee may not even be aware of at that stage. Under Second proviso to

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Section 138, the notice of demand has to be made within 30 days of the dishonour of cheque and the third proviso gives 15 days time to the drawer to make the payment of the amount and escape the penal consequences. Under clause (a) of Section 142, the complaint must be filed within one month of the date on which the cause of action arises under the third proviso to Section 138. Thus a complaint can be filed within the aggregate period of seventy five days from the dishonour, by which time a complainant can gather requisite information as regards names and other details as to who were in charge of and how they were responsible for the affairs of the Company. But if we accept the logic that has weighed with the High Court in the present case, such period gets reduced to 30 days only. Furthermore, unlike proviso to clause (b) of Section 142 of the Act, such period is non-extendable. The summary remedy created for the benefit of a drawee of a dishonoured cheque will thus be rendered completely cumbersome and capable of getting frustrated”

20. As a sequel to the above discussion, this Court does not find any merit in the instant petitions and they stand dismissed.

21.04.2023
Vinay

(MANJARI NEHRU KAUL)
JUDGE

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No