

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Reserved on 1st of December, 2023
Pronounced on 12th of March, 2024

1.

CRM-M-12807-2019
M/S SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND ANR V/S M/S KAUR CHAND
MUNISH KUMAR
2.

CRM-M-13497-2018
DARPAN CHOPRA AND ORS V/S M/S RAJ KUMAR SANJEEV KUMAR AND ORS
3.

CRM-M-41290-2018
M/S SHIVA SHAKTI GRAINS INDIA PVT LTD AND ANOTHER V/S NARAIN SINGH
KAPOOR CHAND
4.

CRM-M-40825-2018
M/S SHIVA SHAKTI GRAINS INDIA PVT LTD AND ANOTHER V/S JASWANT RAI
ASHOK KUMAR
5.

CRM-M-54583-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S DHAN DHAN COMMISSION AND
OTHERS
6.

CRM-M-23704-2018
M/S SHIVA SHAKTI GRAINS INDIA PVT LTD AND OTHERS V/S BALJINDER SINGH
7.

CRM-M-24299-2018
SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHERS V/S HAZARI LAL
8.

CRM-M-23855-2018
M/S SHIVA SHAKTI GRAINS (INDIA) PVT.LTD & ORS V/S SUPRIYA CHHABRA
9.

CRM-M-23899-2018
SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHERS V/S SEEMA GOYAL
10.

CRM-M-24149-2018
SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHERS V/S RAJ KUMAR SANJEEV
KUMAR
11.

CRM-M-13877-2018
DARPAN CHOPRA AND OTHERS V/S M/S R.K GOYAL ENTERPRISES AND OTHERS
12.

CRM-M-23822-2018
M/S SHIVA SHAKTI GRAINS INDIA PVT LTD AND OTHERS V/S M/S SARDARA
SINGH
13.

CRM-M-23888-2018
SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHERS V/S NIRMAL SINGH
14.

CRM-M-23824-2018
M/S SHIVA SHAKTI GRAINS INDIA PVT LTD AND OTHERS V/S M/S DALBIR SINGH
& CO & ANOTHER
15.

CRM-M-52135-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND OTHERS V/S M/S WATALIA RAM JUGAL
KISHORE AND ANR
16.

CRM-M-54535-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ANR V/S JAGIR SINGH

17.

CRM-M-52152-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ORS V/S M/S RAM RATTAN HANS RAJ
AND ORS
18.

CRM-M-54518-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S M/S MASTER SATWINDER SINGH
19.

CRM-M-54579-2019
SHIVA SHAKTI GRAINS AND OTHERS V/S DES RAJ AGGARWAL AND OTHERS
20.

CRM-M-54470-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ORS V/S M/S NISHANT COMMISSION
SHOP
21.

CRM-M-54328-2019
M/S SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHERS V/S GURMEJ SINGH
22.

CRM-M-54514-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S M/S GIAN SINGH AND ANOTHER
23.

CRM-M-54988-2019
M/S SHIVA SHAKTI GRAINS (INDIA) AND OTHERS V/S M/S KALA AFGANA
COMMISSION SHOP
24.

CRM-M-54996-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ORS V/S M/S FATEH AGRO
25.

CRM-M-54620-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S M//S JULKA TRADERS AND SONS
AND ANOTHER
26.

CRM-M-54621-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ANR V/S M/S HARBHAJAN SINGH AND
BROS
27.

CRM-M-54631-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S VISHAL TRADING COMPANY AND
OTHERS
28.

CRM-M-54957-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ANOTHER V/S M/S KHALSA
COMMISSION AGENT AND ANOTHER
29.

CRM-M-55017-2019
M/S SHAKTI GRAINS (INDIA) PVT LTD AND ORS V/S M/S SUCHA SINGH AND SONS
30.

CRM-M-54598-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ORS V/S M/S BAJWA COMMISSIONER
SHOP AND ANR
31.

CRM-M-54630-2019
M/S SHIVA SHAKTI GRAINS (INDIA) PVT LTD AND OTHER V/S M/S KANS RAJ AND
SONS AND ANOTHER
32.

CRM-M-54626-2019
M/S SHIVA SHAKTI GRAINS AND ANOTHER V/S M/S KHALSA COMMISSION SHOP
33.

CRM-M-55038-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ANOTHER V/S M/S NATT AND
COMPANY AND ANOTHER
34.

CRM-M-54614-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ANR V/S M/S VICKY TRADERS

- 35. CRM-M-54601-2019
SHIVA SHAKTI GRAINS AND OTHERS V/S DHADIALA AND ANOTHER
- 36. CRM-M-54641-2019
M/S SHIVA SHAKTI GRAINS AND OTHERS V/S M/A DURGA RICE AND GENERAL
MILL
- 37. CRM-M-54585-2019
M/S SHIVA SHAKTI GRAINS AND ANOTHER V/S RAMESH LAL
- 38. CRM-M-54976-2019
SHIVA SHAKTI GRAINS AND OTHERS V/S CHEEMA COMMISSION AND ANOTHER
- 39. CRM-M-54979-2019
M/S SHIVA SHAKTI GRAINS PVT LTD AND ORS V/S ACHLESHWAR TRADING CO
AND ANR

CORAM: HON’BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Aalok Jagga, Advocate
for the petitioner(s).

Ms. Surinder Garg, Advocate
for respondent No.1 in CRM-M-24149, 23899, 13877 of 2018.

Mr. B.B.S. Randhawa, Advocate
for the respondent(s) in CRM-M-54641, 54585, 54518,
55017, 54583, 54579, 54470, 54988, 54601, 54621, 54631,
54976, 54626 and 55038 of 2019.

Mr. Suneet Pal S. Aulakh, Advocate for
Mr. Ravish Bansal, Advocate
for the respondent(s) in CRM-M-23704, 23822, 23855, 23888,
24299, 40825, 41290 & 23704 of 2018.

PANKAJ JAIN, J.

By way of this common order I intend to dispose off the bunch
of afore-captioned 39 petitions.

2. Petitioners herein are Company as well as Directors of the
Company who have been summoned by issuance of process to stand trial in
the complaint cases for offence punishable under Section 138 of the
Negotiable Instruments Act, 1881 (hereinafter referred to as ‘the N.I. Act’).
The petitioners invoked jurisdiction of this Court under Section 482 of the

Code of Criminal Procedure, 1973 seeking quashing of criminal complaints as well as the summoning orders.

3. Initially the ground pressed into service was on facts claiming that the complaints are abuse of process of law. The cheques on the basis of which complaints have been filed are all security cheques, which were lying with the commission agents and have been misused. Lateron, application was filed under Section 482 of the Code to submit that subsequent to the filing of the instant petition(s) creditors have initiated proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as '2016 Code'). The application was admitted to Corporate Insolvency Resolution Process on 8th of June, 2023 and interim resolution professional was appointed by suspending the management of the Company. The Director of Management stood suspended and the management was taken over by IRP and the Moratorium stands declared in terms of Section 14(1) of the 2016 Code. It has been further claimed that on 8th of July, 2023 the same financial creditor i.e. R.K. Enterprises also initiated and preferred petition for personal insolvency of petitioner No.2 Anil Kumar Vig and Shiv Kumar Vig by invoking personal guarantees for the loan under Section 95 of the 2016 Code. Reliance is being placed upon Section 96 of the Code to submit that interim Moratorium having been imposed, the proceedings even against directors cannot proceed and are deemed to have been stayed.

4. Counsel for the petitioner(s) claims that the proceedings under Section 138 of the N.I. Act cannot continue against the personal guarantors

to corporate debtor who were also the Directors of the Corporate Debtor/
petitioner No.1 in view of imposition of moratorium under Section 96 of the
2016 Code as the expression, ‘proceedings’ under the provision was include
proceeding under Section 138 of the N.I. Act 1881 as well. In order to
support his submission reliance is being placed upon **P Mohanraj vs. Shah
Brothers Ispat Pvt. Ltd., 2021 AIR (SC) 1308** and **Vijay Kumar Ghai vs.
Pritpal Singh Babbar- CRM-M No.22685 of 2021 decided on 04th of
July, 2022.**

5. Per contra, counsels for the respondents/complainant on the
other hand submit that the present petition under Section 482 of the Code
was initially preferred purely on factual issues alleging misuse of security
cheques. The same being purely an issue related to factual aspect cannot be
adjudicated here under Section 482. Further counsels for the complainants
submit that a personal guarantor to the corporate debtor will not be covered
under Part II of the 2016 Code to claim shield under Section 96 of the Code.
It has been contended that Section 2 of the Code deals with the application
of the Code. The provision prescribes various categories to which the Code
shall apply. Section 2(e) deals with personal guarantors to corporate debtors.
Section 2(g) deals with individuals other than the persons referred to in
Clause (e). Meaning thereby that ‘individuals’ and ‘personal guarantors to
corporate debtors’ have been treated as two distinct categories. It has been
further contended that Section 3 of the Code deals with definition clause
which is applicable to the whole of the Code. As per the scheme of the

Code, it has been divided into five parts. Part I contains Sections 1, 2, 3. Section 4 to Section 77 contained in VII Chapters comprised Part II and the same deals with insolvency and liquidation for corporate persons. Likewise, Section 78 to Section 187 divided in VII Chapters constitute Part III of the Code which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms. Section 5 comprised in Part II defines ‘personal guarantor’ under Sub Section (22). In the definition clause, appended to Part III contained in Section 79 of the 2016 Code, there is no mention of the word ‘personal guarantor’. It has been thus contended that any moratorium declared under Section 96 against any of the directors may be against an individual but that cannot have any effect on the capacity of such ‘individual’ as a personal guarantor which is confined only to Part II. It has been further claimed that by issuance of standing order No.4126E dated 15th of November, 2019, 1st Day of December, 2019 has been appointed as the date for bringing into force various provisions of the Code including Sections 94 to 187 not with an intent to grant immunity from any law but only to avoid ostensible transfer of assets from the corporate debtor to the directors/personal guarantors so that the assets of corporate debtor may not be dishonestly usurped by the persons related to it. Reliance is being placed upon law laid down by Supreme Court in **Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. 2023(10) SCC 545.**

6. In order to appreciate the legal proposition canvassed by counsels representing both the sides, it will be apposite to peruse Sections 138 and 141 of the 1881 Act. The same read as under:

“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 4 [a term which may be extended to two years’], or with fine 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, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, 5 [within thirty days] of the receipt of 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 of other liability” means a legally enforceable debt or other liability.

“141 Offences by companies. — (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

[Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in subsection (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section,—
(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm.”

7. Section 141 has unique tapings as the same makes Director(s) or person(s) incharge of affairs of the company *qua* whose debt/liability the cheque has been issued, also liable in addition to the liability casted upon the accused-company. Proceedings under Section 138 of the N.I. Act relate to debt or liability of the accused-company and not that of the Director. Thus, Director becomes offender even though he is not a debtor.

8. Counsel representing the petitioner(s) has placed heavy reliance on *P. Mohanraj's case* (supra). *P. Mohanraj* has been well discussed in *Ajay Kumar Radheyshyam Goenka's case* (supra). Justice Kaul speaking for himself and for Justice Oka held as under:

“16. The issue whether the respondent is a Secured Financial Creditor or an Unsecured Financial Creditor within the meaning of the said Code is not something we can deal with as that is the matter of the proceedings under the said Code or any appeal preferred therefrom. The only issue with which we are concerned with is whether during the pendency of the proceedings under the said Code which have been admitted, the present proceedings under the N.I. Act can continue simultaneously or not.

17. We have no hesitation in coming to the conclusion that the scope of nature of proceedings under the two Acts and 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 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.

18. It cannot be said that the process under the IBC whether under Section 31 or Sections 38 to 41 which can extinguish the debt would ipso facto apply to the extinguishment of the criminal proceedings. No doubt in terms of the Scheme under the IBC there are sacrifices to be made by parties to settle the debts, the company being liquidated or revitalized. The Appellant before us has been roped in as a signatory of the cheque as well as the Promoter and Managing Director of the Accused company, which availed of the loan. The loan agreement was also signed by him on behalf of the company. What the Appellant seeks is escape out of criminal liability having defaulted in payment of the amount at a very early stage of the loan. In fact, the loan account itself was closed. So much for the bona fides of the Appellant.

19. We are unable to accept the plea that if proceedings against the company come to an end then the Appellant as the Managing Director cannot be proceeded against. 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.”

9. While concurring with the conclusions arrived at by the two Judges, third member of the Bench gave his own reasoning to conclude as under:

“109.1. I may draw my final conclusions as under: (a) After passing of the resolution plan under Section 31 of the IBC by the adjudicating authority & in the light of the provisions of Section 32A of the IBC, the criminal proceedings under section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new management.

109.2 Section 138 proceedings in relation to the signatories/directors who are liable/covered by the two provisos to Section 32A(1) will continue in accordance with law.”

10. Backing the said conclusion following reasons were recorded:

“68. Thus, the heart of the matter is the second proviso appended to Section 32A(1) (b) of the IBC which provides statutory recognition of the criminal liability of the persons who are otherwise vicariously liable under section 141 of NI Act, in the context of Section 138 offence.

69. Thus, Section 32A broadly leads to:

69.1. Extinguishment of the criminal liability of the corporate debtor, if the control of the corporate debtor goes in the hands of the new management which is different from the original old management.

69.2. The prosecution in relation to

“...every person who was a "designated partner" as defined in clause (j) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly

involved in the commission of such offence...."

(emphasis supplied)

shall be proceeded and the law will take it's own course. Only the corporate debtor (with new management) as held in Para 42 of P. Mohanraj will be safeguarded.

69.3. *If the old management takes over the corporate debtor (for MSME Section 29A does not apply (see 240A), hence for MSME old management can takeover) the corporate debtor itself is also not safeguarded from prosecution under Section 138 or any other offences.*

xxxx

74. What follows from the aforesaid is that for difficulty in prosecuting the corporate debtor under section 138 of the NI Act after the approval of the resolution plan under the IBC, we need not let the natural persons i.e., the signatories to the cheques/directors of the corporate debtor escape prosecution. How can one allow the natural persons to escape liability on such specious plea? In such a situation the Latin maxim *Lex Non Cogit Ad Impossibilia* is attracted which means law does not compel a man to do which he cannot possibly perform. *Broom's "Legal Maxims"* contains several illustrative cases in support of the maxim. This maxim has been referred to with approval by this Court in *State of Rajasthan v. Shamsher Singh* reported in 1985 supp SCC 416.

75. Thus, where the proceedings under section 138 of the NI Act had already commenced and during the pendency the plan is approved or the company gets dissolved, the directors and the other accused cannot escape from their liability by citing its dissolution. What is dissolved is only the company, not the personal penal liability of the accused covered under section 141 of the NI Act. They will have to continue to face the prosecution in view of the law laid down in *Aneeta Hada* (supra). Where the company continues to remain even at the end of the resolution process, the only consequence is that the erstwhile directors can no longer represent it.”

11. On the strength of ratio of law as laid down in *Ajay Kumar Radheyshyam Goenka's* case which also considered dictum of law laid down in the case of *P. Mohanraj ibid*, this Court finds that the legal proposition as arises is that:

(a) The proceedings under Section 138 of the N.I. Act do not fall within the ambit of expression 'proceedings' as contemplated under Section 14 as well as Section 96 of the 2016 Code, the same being criminal proceedings and not recovery proceedings.

(b) Offence punishable under Section 138 of the N.I. Act is complete on the day the accused i.e. in the case of company – company itself and the Directors who were incharge of the affairs of the company fail to make the payment in response to statutory notice issued under Section 142 of the N.I. Act.

(c) Section 32A of the Code specifically deals with liability for offences committed prior to the commencement of the corporate insolvency resolution process. Mere declaration of Moratorium under Section 14 does not lead to lapse of proceedings under Section 138 of the N.I. Act.

(d) In case, the control of the corporate debtor goes in the hands of new management which is different from the original old management, only then the corporate debtor i.e. the new management will be safeguarded. In case, the old management

takes over the corporate debtor, the safeguard as provided under the provisions of the 2016 Code will not come to its rescue.

(e) The Director being personally liable under Section 142 of the N.I. Act cannot claim protection under the 2016 Code. Neither Section 14 nor Section 96 will come to their rescue.

12. As a result none of the moratoriums can enure any relief in favor of the petitioners.

13. In view of above, this Court does not find any reason to quash the proceedings initiated under Section 138 of the N.I. Act against the petitioners.

14. Resultantly, the present petitions are dismissed.

15. A copy of this order be kept on the files of other connected cases

March 12, 2024
Dpr

(Pankaj Jain)
Judge

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes