

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Reserved on 20th of May, 2024
Pronounced on 30th of May, 2024**

- 1. CRM-M-52340-2021 (O&M)
SUKHINDER SINGH AND ANOTHER V/S VISHWAS KUMAR**
- 2. CRM-M-19570-2022 (O&M)
SUKHINDER SINGH AND ORS V/S SATISH KUMAR**
- 3. CRM-M-19643-2022 (O&M)
SUKHINDER SINGH AND ORS V/S M/S SHIVAM MILK CHILLING
CENTRE**
- 4. CRM-M-23419-2022
SUKHINDER SINGH AND ORS V/S JAIN DAIRY**
- 5. CRM-M-23415-2022
SUKHINDER SINGH AND ORS V/S JAIN DAIRY**
- 6. CRM-M-23810-2022
SUKHINDER SINGH AND ORS V/S NARESH KUMAR**
- 7. CRM-M-4622-2023 (O&M)
SUKHINDER SINGH AND ANOTHER V/S M/S GOYAL MILK
CHILLING CENTER**
- 8. CRM-M-4653-2023 (O&M)
SUKHINDER SINGH AND ANOTHER V/S M/S GOYAL MILK
CHILLING CENTER**

CORAM: HON’BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Anand Chhibbar, Sr. Advocate with
Mr. Shikhar Sarin, Advocate,
Mr. Manuj Nagrath, Advocate for the petitioners.

Mr. Mukund Gupta, Advocate
for the respondent in CRM-M-4622-2023 and
CRM-M-4653-2023.

PANKAJ JAIN, J.

By way of this common order I intend to dispose off the bunch
of afore-captioned 8 petitions.

2. Petitioners herein are 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. The following table narrates the dates of the cheques in each of the petition:

S. No.	Case No.	Date of issuance of cheque	Date of moratorium
1	CRM-M-52340-2021	25.02.2019	28.02.2019
2	CRM-M-19570-2022	25.12.2018 25.02.2019	28.02.2019
3	CRM-M-19643-2022	25.12.2018 25.12.2018 25.02.2019	28.02.2019
4	CRM-M-23419-2022	25.02.2019	28.02.2019
5	CRM-M-23415-2022	25.12.2018	28.02.2019
6	CRM-M-23810-2022	25.12.2018	28.02.2019
7	CRM-M-4622-2023	25.12.2018	28.02.2019
8	CRM-M-4653-2023	25.02.2019	28.02.2019

4. Both the counsels have placed reliance upon the judgment passed in **CRM-M No.12807 of 2019** titled as **M/s Shiva Shakti Grains (India) Pvt. Ltd. and another vs. M/s Kaur Chand Munish Kumar,**

decided on 12th of March, 2024 wherein similar issue has already been dealt by this Court in detail observing as under :

“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 sub-section 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 sub-section (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.*

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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.”

5. Ld. Senior Counsel representing the petitioners submits that in some of the cases moratorium was declared even prior to the date of dishonour of the cheque. By the time the statutory notice was issued to the Directors, they had already lost the position on account of declaration of moratorium, thus, offence punishable under Section 138 of the N.I. Act cannot be alleged against them.

6. I have heard Counsel representing the parties and carefully gone through records of the case.

7. The question relates to the effect of declaration of moratorium under the provisions of Insolvency and Bankruptcy Code, 2016 (for short, ‘2016 Code’).

8. This Court in the case of **M/s Shiva Shakti Grains (India) Pvt. Ltd.’s** case (supra) after relying upon the dictum of law laid down by Apex Court in the case of **Ajay Kumar Radheyshyam Goenka’s** case has already held that the Directors being personally liable under Section 142 of the N.I. Act cannot claim protection under 2016 Code and mere declaration of

moratorium will not lead to lapse of proceedings under Section 138 of the N.I. Act.

9. In view of above, this Court does not find any reason to quash the proceedings under Section 138 of the N.I. Act initiated against the petitioners as the same do not fall within the ambit of Section 14 as well as Section 96 of the Insolvency and Bankruptcy Code, 2016. Criminal liability is subject to Section 32A of the 1996 Code and not subject to declaration of moratorium.

10. Resultantly, the present petitions are dismissed.

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

May 30, 2024		(Pankaj Jain)
Dpr		Judge
Whether speaking/reasoned	:	Yes
Whether reportable	:	No