

M/S Rajesh Exports Ltd vs Mr Kv Kishore on 25 June, 2024

Author: M.Nagaprasanna

Bench: M.Nagaprasanna

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Reserved on : 20.06.2024

Pronounced on : 25.06.2024

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF JUNE, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.14571 OF 2024 (GM - RES)

BETWEEN:

M/S. RAJESH EXPORTS LTD.,
REGISTERED UNDER
THE COMPANIES ACT, 1956
AND HAVING ITS OFFICE AT
NO.4, BATAVIA CHAMBERS
KUMARA KRUPA ROAD,
KUMARA PARK EAST
BENGALURU - 560 001
REPRESENTED BY ITS
AUTHORISED REPRESENTATIVE
MR.ARJUN SANJAY KUMAR.

... PETITIONER

(BY SRI ROHAN KOTHARI, ADVOCATE)

AND:

MR. K.V. KISHORE
AGED ABOUT 76 YEARS,
S/O K.R.V. RATNAM,
EX-MANAGING DIRECTOR

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M/S. JEWELS DE PARAGON PVT. LTD.,
RESIDING AT NO.123, NIKITHA MANSION,
3RD FLOOR, 3RD MAIN, 80 FEET ROAD,
SBM COLONY, NAGENDRA BLOCK
BSK, I STAGE,
BENGALURU - 560 050.

... RESPONDENT

(BY SRI S.R.KAMALACHARAN, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C., PRAYING TO QUASH AND SET ASIDE THE ORDER DTD 11.11.2014 PASSED BY THE LEARNED XXVIII ACMM, BENGALURU IN CC NO. 19781/2007, NOW PENDING BEFORE THE LEARNED XXIII ADDL. SCJ AND ACMM (SCCH 25), BENGALURU (ANNEXURE-A); DIRECT THE LEARNED XXIII ADDL. SCJ AND ACMM (SCCH 25) BENGALURU EXPEDITIOUSLY DISPOSE OFF THE PROCEEDINGS IN CC NO. 19781/2007, AT ANY RATE WITHIN 3 (THREE) MONTHS OF RECEIPT OF THE ORDER OF THIS HON'BLE COURT.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 20.06.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

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ORDER

The petitioner is before this Court calling in question an order dated 11-11-2014 passed by the XXVIII Additional Chief Metropolitan Magistrate, Bengaluru, in C.C.No.19781 of 2007 registered for offences punishable under Sections 138, 141 and 142 of the Negotiable Instruments Act,1881 ('the Act' for short) and has sought a further direction to expeditiously dispose of C.C.No.19781 of 2007 within the time frame that would be fixed by this Court.

2. Shorn of unnecessary details, facts germane, are as follows:-

The petitioner is one M/s. Rajesh Exports Limited and the respondent is the ex-Managing Director of one M/s Jewels De Paragon Private Limited ('the Company' for short). The petitioner enters into an agreement with the Company for supply of gold jewellery on 23-08-2000 and the respondent in his personal capacity gives a cheque for `3,00,00,000/- (without indicating the date on the cheque) in favour of the petitioner for repayment of the value of gold received by the Company from the hands of the petitioner. After about 7 years, on 05-04-2007, the petitioner presents

the cheque only to be dishonoured and returned with an endorsement "account closed" in the concerned Bank. This leads the petitioner to issue a demand notice to the respondent seeking payment of the outstanding amount. That having gone unheeded, the petitioner invoking Section 200 of the Cr.P.C., files a petition before the learned Magistrate who then registers a criminal case in C.C.No.19781 of 2007 in accordance with law. The petitioner is said to have filed another complaint against the respondent in C.C.No.19782 of 2007.

3. Certain analogous developments take place. One M/s Lalchand K. Chabria prefers a company petition before this Court in Company Petition No.221 of 2013 invoking Sections 433(e) and (f), 434 r/w. 439 of the Companies Act, 1956 ('the Companies Act' for short) seeking winding up of the Company. On 07-08-2014, this Court allows the company petition and orders winding up of the Company. Thus, the Company gets wound up. On the order passed by this Court directing winding up of the Company, the Company files a memo with the certified copy of the order passed by this Court seeking stay of further proceedings in C.C.No.19781 of 2007, before the concerned Court. On 11-11-2014, the Court of the learned Magistrate stays its own proceedings pending in the aforesaid criminal case. On 07-07-2018, again on a memo filed, the concerned Court recalls the order dated 11-11-2014 and resumes the proceedings in the aforesaid two cases. This leads the Company to knock at the doors of this Court in Writ Petition No.33760 of 2018 seeking to quash the order dated 07-07-2018, by which the concerned Court recalled its order dated 11-11-2014.

Since two orders were recalled, two petitions were preferred viz., W.P.Nos.33760 of 2018 and 33761 of 2018. On 23-09-2023, a coordinate Bench of this Court allows Writ Petition No.33761 of 2018 filed by the Company and restores the order dated 11-11-2014 by which the stay was operating. Therefore, the stay granted by the learned Magistrate stood restored. On 19-03-2024, the other writ petition in W.P.No.33760 of 2018 comes up before another coordinate bench. The said coordinate bench though allows the writ petition and sets aside the order dated 07-07-2018, reserves liberty to the present petitioner to challenge the order dated 11-11-2014. It is, therefore, the present petition is preferred by the petitioner.

4. Heard Sri Rohan Kothari, learned counsel appearing for the petitioner and Sri S.R. Kamalacharan, learned counsel appearing for the respondent.

5. The learned counsel appearing for the petitioner would vehemently contend that the learned Magistrate could not have stayed his own proceedings erroneously invoking Section 446 of the Act. He would, therefore, contend that the proceedings be permitted to be continued and a time line for its closure be directed by this Court as admittedly the issue dates back to more than two decades. It has not yet made its consideration on its merits.

6. Per contra, the learned counsel appearing for the Company, Sri S.R.Kamalacharan would vehemently refute the submissions to contend that there is no error committed by the learned Magistrate as Section 446 of the Companies Act springs into operation the moment a company is wound up in terms of Section 446 of the Companies Act and all suits and proceedings would automatically remain stayed. The coordinate Bench in Writ Petition No.33761 of 2018 has

appropriately restored the stay order which was sought to be tinkered with by the Presiding Officer of the concerned Court. He would contend that the order is dated 11-11-2014 and it is challenged in the year 2024. There is gross delay and, therefore, the petition should not be entertained.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

8. The afore-narrated facts, link in the chain of events and the dates are not in dispute. It would suffice if the story would commence from the date of initiation of proceedings by the petitioner against the Company. On 09-08-2007, the petitioner prefers two complaints in C.C.No.19781 of 2007 and C.C.No.19782 of 2007. During their pendency, a company petition comes about before this Court seeking winding up of the Company by one M/s Lalchand K.Chabria. This Court answering Company Petition No.221 of 2013, in terms of its order dated 7th August, 2014, passed the following order:

"7. In the result, the following:

ORDER i. The petition is allowed.

ii. The respondent-company is ordered to be wound up.

iii. The Official Liquidator is directed to take charge of the assets and all effects of the respondent- company and proceed further in accordance with law.

iv. The petitioner shall deposit the provisional cost of Rs.15,000/- (Rupees Fifteen Thousand only) with the Official Liquidator within 4 weeks from the date of receipt of a copy of this order.

v. The advertisement of this petition shall be taken out in one edition of "The Hindu" English daily and "Samyuktha Karnataka" Kannada Daily before four weeks.

vi. The copy of this order be filed with the Registrar of Companies within 30 days from the date of receipt of this order."

(Emphasis supplied) The Company was ordered to be wound up and consequential actions were directed to be taken by the Official Liquidator. After the winding up of the Company, a memo is filed by the Company before the concerned Court seeking stay of proceedings. The memo reads as follows:

"MEMO The Accused submits as follows:

The Accused is the Managing Director of M/s Jewels De Paragon Private Limited. The complaint has been filed in connection with alleged transactions and dues of the said Company to the complainant. The said company M/s Jewels De Paragon Private

Limited has been wound up vide order dated 07-08-2014 in Company Petition No.221 of 2013 passed by the Hon'ble High Court of Karnataka. Therefore, since these proceedings arise out of alleged transactions between the said Company and the complainant and that the Accused is being prosecuted as the Managing Director of the said Company in his official capacity, these proceedings are liable to be stayed as per the provisions of Section 446 of the Companies Act, 1956. A copy of the aforesaid order of the Hon'ble High Court of Karnataka dated 07-08-2014 is produced herewith.

Wherefore, it is prayed that this memo may be taken on record in the interest of justice and necessary orders maybe passed thereon."

(Emphasis added) The memo is filed enclosing the order passed by this Court which directs winding up and avers that the proceedings be stayed in terms of Section 446 of the Companies Act. Objections are filed by the petitioner and the objections read as follows:

"OBJECTIONS TO THE MEMO FILED BY THE COMPLAINANT The complainant above named submits as follows:-

1. The complainant submits the prosecution proceedings and proceedings under the Company's act are distinct and separate both are not the same and are independent proceedings. Hence, winding up proceedings have no bearing for these proceedings.
2. The complainant submits that the accused No.2 is being proceeded under Section 141 of N.I. Act and hence these proceedings are not affected.
3. The complainant submits that the winding up order is only on 07-08-2014 and complaint is of the year 2007. Hence, these proceedings are required to be examined in the light of position during 2007.
4. The complainant submits that these proceedings are not affected and can be continued without any evidence.
5. The memo is only to protract these proceedings and hence be dismissed the memo.

Wherefore it is prayed that the meme be rejected with costs in the interest of justice."

The concerned Court orders stay of proceedings in both the criminal cases. Four years passed by. An order is passed by the concerned Court on 07-07-2018. The order reads as follows:

"7-07-2018:

Again case called out at 3.25 p.m. The complainant counsel has filed memo stating that, COP No.221 of 2013 is still pending before Hon'ble High Court. The present case

is filed in the year 2007 since then the matter is pending for adjudication. This Court by considering the submissions of both the counsels had stayed the further proceedings of this case on 11-11- 2024. But even after lapse of almost 4 years, there is no progress made in the case. No purpose would be served in keeping the matter in the same stage. Therefore, the order dated: 11-11-2014 is hereby recalled.

Call for cross-examination of PW-1 as last chance. The complainant is directed to keep the PW-1 without fail.

Call on 28-07-2018.

Sd/-

XXI ACMM & XXIII ASCJ"

(Emphasis added) This becomes the subject matter of challenge in two writ petitions -

one in W.P.No.33761 of 2018 and the other in W.P.No.33760 of 2018, since two criminal cases were sought to be re-commenced, there were two writ petitions preferred. They appear before two different coordinate Benches. A coordinate Bench in Writ Petition No.33661 of 2018 allows the petition in terms of its order dated 23rd September, 2023 and passes the following order:

" "

9. A perusal of Section 446 of the Companies Act, 1956 leaves no doubt that if any legal proceedings is commenced or if pending at the date of winding up order, it shall not be proceeded with against the company except the leave of the Company Court. It is not in dispute that as on the date of the order of winding up, the proceedings before the Trial Court was pending and therefore, the Trial Court could not have proceeded with the trial of the case. In that view of the matter, the impugned order dated 07.07.2018 deserves to be annulled.

10. The contention of the learned counsel for the respondent that if the proceeding was completed before the commencement of the proceedings under Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, it can continue, may not apply to the facts of this case since the proceedings before the Trial Court is yet to be completed.

11. In that view of the matter, this petition is allowed. The impugned order dated 07-07-2018 passed by the XXI Additional Chief Metropolitan Magistrate and XXIII Additional Senior Civil Judge, Bengaluru in C.C.No.19782 of 2007 is set aside and the order dated 11-11-2014 is restored."

(Emphasis supplied) The order which directed resumption of proceedings impugned was set aside and the order dated 11-11-2014 staying the proceedings before the concerned Court gets restored.

9. In the other matter concerning other criminal case before the other coordinate bench, the Court sets aside the order and restores the order dated 11-11-2014 but adds one clause. The order reads as follows:

"ORDER i. The writ petition is allowed.

ii. The order dated 7-7-2018 passed by the XXI Additional CMM in C.c.No.19781 of 2007 is hereby quashed.

iii. Needless to say, the order dated 11-11-2014 stands restored.

iv. Liberty is however reserved to the respondent to challenge the order dated 11-11-2014."

(Emphasis supplied) In the added clause, liberty was reserved to the present petitioner to challenge the order dated 11-11-2014. This order is passed on 19-03-2024. Immediately on 29-05-2024, the subject petition is preferred. Therefore, the contention of the learned counsel for the Company that there is gross delay of ten years, in raising a challenge to the order does not hold water, as liberty is granted/reserved by the coordinate Bench to challenge the order and it is immediately challenged. I, therefore, repel the contention of the Company that there is gross delay in approaching this Court in raising a challenge to the order dated 11-11-2014.

10. The issue now would be whether a cheque issued in his personal capacity as a personal guarantor to the subject transaction amount should be stalled on account of the Company being wound up. The entire statutory fulcrum of the lis, lies in Section 446 of the Companies Act. Section 446 of the Companies Act, reads as follows:

"446. SUITS STAYED ON WINDING UP ORDER.- (1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.

(2) The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court."

(Emphasis supplied) Section 446 (supra) deals with suits stayed on winding up orders.

There are about 4 clauses which deal with stay of any other suit pending on winding up of the Company.

11. The Company in the case at hand was wound up by an order of this Court dated 07-08-2014. The two criminal cases as aforesaid were pending as they had been filed on 09-08-2017. In the light of winding up order whether those criminal cases pending would automatically get stayed or otherwise, is the core issue and that need not detain this Court for long or delve deep into the matter. No doubt, the coordinate Bench has interpreting Section 447 of the Companies Act, held that the Court answering criminal case against the Company that is wound up cannot proceed in terms of Section 446 of the Companies Act. The said judgment would have to be followed without much ado, but there is a twist in the story. A Division Bench of the High Court of Bombay in a judgment reported in *INDORAMA SYNTHETICS (I) LIMITED v.*

*STATE OF MAHARASHTRA*¹, while considering the very issue of whether the proceedings under Section 138 of the Act should stop once an order under the provisions of the Companies Act is passed.

The Division Bench answers in the following manner:

"....

17. Thus, the main object of section 138 of N.I. Act, which can be inferred, is to safeguard the credibility of commercial transactions and to prevent bouncing of cheques by providing a personal criminal liability against the drawer of the cheque in public interest. No civil liability or any liability against the assets of the drawer of the cheque is contemplated under section 138 of the N.I. Act. Hence, it follows that the provisions of section 446(1) of the Companies Act can have apparently and in essence no application to the proceedings under section 138 of Negotiable Instruments Act, as it

is not a suit or proceeding having direct bearing on the proceedings for winding-up or the assets of the Company.

18. This view can be fortified from the various decisions of the Hon'ble Supreme Court, of our High Court and other High Courts also, some of which are relied upon by learned Single Judge of this Court [Coram : F.I. Rebello, J.] in the matter of Firth (India) (supra).

19. In the case of S.V. Kondaskar, Official Liquidator and Liquidator of the Colaba Land and Mills Co. Ltd. (In Liquidation) v. V.M. Deshpande, Income Tax Officer, Companies Circle I (8), Bombay, (1972) 1 SCC 438 : AIR 1972 SC 878, the Supreme Court, while considering the provisions of section 446 of the Companies Act, vis-a-vis, the provisions of section 147 of the Income Tax Act pertaining to initiation of reassessment proceedings against a company under liquidation, held that, obtaining of leave from Liquidating Court under section 446 of the Companies Act is not a condition precedent for initiating reassessment proceedings against a Company under liquidation.

2016 SCC OnLine Bom.2611 While elaborately dealing with the provisions of the Income Tax Act and the terms used in section 446(1) and (2) of the Companies Act, like, 'other legal proceedings', the Supreme Court has observed as follows:--

"7. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of section 446 read as a whole, it appears to us that the expression "other legal proceeding" in sub-section (1) and the expression "legal proceeding" in sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up Court. The Income-Tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income-tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income-tax payable also being a debt has to rank *pari passu* with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation Court under section 446 of the Act. The liquidation Court, in our opinion, cannot perform the functions of Income-Tax Officers while assessing the amount of tax payable by the assessee even if the assessee be the company which is being wound up by the Court. The orders made by the Income-tax Officers in the course of assessment or reassessment proceedings are subject to appeal to the higher hierarchy under the Income-tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income-tax. It would lead to anomalous consequences if the winding up Court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income-tax. The argument on behalf of the appellant by Shri. Desai is that the winding up Court is empowered in its discretion to decline to transfer the assessment proceedings in a

given case but the power on the plain language of section 446 of the Act must be held to vest in that Court to be exercised only if considered expedient. We are not impressed by this argument. The language of section 446 must be so construed as to eliminate such startling consequences as investing the winding up Court with the powers of an Income-tax Officer conferred on him by the Income-tax Act, because in our view, the legislature could not have intended such a result.

8. The argument that the proceedings for assessment or re-assessment of a company which is being wound up can only be started or continued with the leave of the liquidation Court is also, on the scheme both of the Act and of the Income-tax Act, unacceptable."

20. In the case of *Joshi Trading Co. (P.) Ltd. v. Essa Ismail Sait*, (1980) 50 Kerala 801, the Kerala High Court, while dealing with the issue as to whether for continuing with the proceeding for eviction filed before the Rent Controller, leave of the Company Court under section 446(1) of the Companies Act was essential, was pleased to hold that, "The object of section 446 of the Companies Act, 1956, is to see that the assets of the company are brought under the control of the winding up Court; to avoid wherever possible expensive litigation and to see that all matters in dispute which are capable of being expeditiously disposed of by the winding up Court are taken up by that Court. This does not, however, mean that all disputes wherein a company is involved should be proceeded with only by the company Court or that if they are pending with other statutory bodies, leave of the company Court should be obtained. Matters where collection or distribution of assets are not involved, those which are outside the purview of the winding up Court and other Courts of law and those which are within the exclusive jurisdiction of other statutory bodies may not come under the purview of section 446.

A proceeding for eviction not being a proceeding which can be appropriately dealt with by the winding up Court, does not come under the category of "other legal proceeding" in section 446(1) and, therefore, leave of the winding up Court is not necessary for proceeding with a petition filed against a company in liquidation.

A similar reasoning was adopted in *B.V. John v. Coir Yam and Textiles Ltd.*, [1960] 30 Comp Cas 162 (Ker), which related to proceedings under the Industrial Disputes Act. Raman Nayar J., as he then was, held that a suit or proceeding for which leave is necessary under section 446(1) must be a suit or proceeding capable of being withdrawn and disposed of by the winding-up Court."

21. In the case of *Official Liquidator, Swaraj Motors (P.) Ltd. v. Income-Tax Officer*, [1972] 42 Comp Cas 96, while considering 'whether leave under section 446(1) of the Companies Act would be necessary to proceedings regarding reassessment and imposition of penalty under Income Tax Act in respect of the company in liquidation?', it was held that the said section would apply only to a legal proceeding in respect of a matter which the Company Court has got jurisdiction to entertain and dispose of and those matters are enumerated in sub-section (2) of section 446 of the Companies Act. It was observed therein that, "The object of sub-section (1) is to prohibit the initiation or continuance of any suit or legal proceeding in respect of such a matter in any other forum without

the leave of the winding-up Court. If such a prohibition is not enacted in the light of the jurisdiction conferred on the winding-up Court by sub-section (2) of section 446, there would be conflict of proceedings and conflict of decisions. Sub-section (1) is intended to avoid such a situation; and it confers the ultimate control in the matter on the winding up Court which is entrusted with the function of collecting and distributing the assets of the company according to law."

22. The Division Bench of the Calcutta High Court also in the case of Mukerjee (S.N.) v. Krishna Dassi, (1933) 3 Comp Cas 269, while dealing with section 171 of Indian Companies Act, 1913, predecessor of section 446(1) of the Companies Act, 1956, held that;

"Section 171 of Indian Companies Act, 1913, was intended to safeguard the company's assets against wasteful and expensive litigation with regard to the matters which are capable of determination more expeditiously and more cheaply in the winding up and that the provision is not meant to override section 145 of the Criminal Procedure Code which empowers the criminal Court to enquire into claims as regards actual possession."

23. The Division Bench of Madras High Court in the case of Price (R.G.N.), Official Liquidator, Andhra Paper Mills Co.

Ltd. v. M. Chandrasekharan, (1951) 21 Comp Cas 251 (Mad), went to the extent of saying that, "Section 171, Indian Companies Act, 1913, had no application to enquiries, investigations and orders made either by Government or statutory bodies in exercise of statutory powers."

24. Thus, the sum and substance of all these judicial decisions is that the provisions of section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up proceedings or with the assets of the Company. The expression "suit or other proceedings", therefore, as used in section 446(1) of the Companies Act, has to be construed accordingly and not to be interpreted so liberally and widely so as to include each and every proceeding of whatsoever nature initiated against the Company, including even the criminal proceedings like for the offence under section 138 of N.I. Act, which has got no bearing on the winding-up proceedings of the Company and are not concerned with, directly with the assets of the Company, but are mainly dealing with the penal and personal liability of the Directors of the Company.

... ..

30. Thus, there is a long line of decisions making the position clear that the expression 'suit or legal proceedings', used in section 446(1) of the Companies Act, can mean only those proceedings which can have a bearing on the assets of the companies in winding-up or have some relation with the issue in winding-up. It does not mean each and every civil proceedings, which has no bearing on the winding-up proceedings, or criminal offences where the Director of the Company is presently liable for penal action.

31. After taking note of all these decisions and, especially, relying on the decision of the Apex Court in the case of S.V. Kondaskar (supra), it was held by learned Single Judge of this Court [Coram : F.I. Rebello, J.] in the matter of Firth (India) (Supra), that the expression "legal proceedings" or "other legal proceedings" for the purpose of sections 442 and 446 must be read ejusdem generis with the expression 'suit' and can mean only civil proceedings which have a bearing in so far as the winding-up is concerned, namely, realization of the assets and discharge of liabilities of the Company. Hence, the proceedings under section 138 of N.I. Act, which are in the nature of a criminal complaint and not directly against the assets of the Company, cannot be included in the terms "suit or other legal proceedings", as used in section 446(1) of the Companies Act."

(Emphasis supplied) The issue inter alia decided by the Division Bench of the High Court of Bombay was that the personal liability of Directors of the Company would not get stalled or absolved on an order being passed under Section 446(1) of the Companies Act. A three Judge Bench of the Apex Court in a judgment rendered in the case of AJAY KUMAR RADHEYSHYAM GOENKA v. TOURISM FINANCE CORPORATION OF INDIA LIMITED², has held as follows:

"....

104. In Indorama Synthetics (I) Ltd. v. State of

Maharashtra [Indorama Synthetics (I) Ltd. v. State of Maharashtra, 2016 SCC OnLine Bom 2611] , the question that arose before the Bombay High Court was whether the (2023) 10 SCC 545 expression "suit or other proceedings" mentioned in Section 446(1) of the Companies Act, 1956 would include criminal proceedings under Section 138 of the NI Act. It was held that: (SCC pp. 256 & 259-606, paras 17, 24-25, 28 &

30) "17. Thus, the main object of Section 138 of the NI Act, which can be inferred, is to safeguard the credibility of commercial transactions and to prevent bouncing of cheques by providing a personal criminal liability against the drawer of the cheque in public interest. No civil liability or any liability against the assets of the drawer of the cheque is contemplated under Section 138 of the NI Act. Hence, it follows that the provisions of Section 446(1) of the Companies Act can have apparently and in essence no application to the proceedings under Section 138 of the Negotiable Instruments Act, as it is not a suit or proceeding having direct bearing on the proceedings for winding-up or the assets of the Company.

24. Thus, the sum and substance of all these judicial decisions is that the provisions of Section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up proceedings or with the assets of the Company. The expression "suit or other proceedings", therefore, as used in Section 446(1) of the Companies Act, has to be construed accordingly and not to be interpreted so liberally and widely so as to include each and every proceeding of whatsoever nature initiated against the Company, including even the criminal proceedings like for the offence under Section 138 of the NI Act, which has got no bearing on the winding-up proceedings of the Company and are not concerned with, directly with the assets of the

Company, but are mainly dealing with the penal and personal liability of the Directors of the Company.

25. The conflict involved in the case can also be looked into from another aspect 'as to whether the provisions of Section 138 of the NI Act can override the provisions of the Companies Act, as it is a very special provision incorporated in the Negotiable Instruments Act, though the Companies Act contains certain special provisions in order to safeguard the rights of the Company under liquidation?' ***

28. If one considers the provisions of Section 138 of the NI Act, which are introduced subsequently by way of amendment in the said Act, in the year 1988, it being a subsequent Statute, it will necessarily override the provisions of General Statute, like, the Companies Act.

30. Thus, there is a long line of decisions making the position clear that the expression "suit or legal proceedings", used in Section 446(1) of the Companies Act, can mean only those proceedings which can have a bearing on the assets of the companies in winding-up or have some relation with the issue in winding-up. It does not mean each and every civil proceedings, which has no bearing on the winding-up proceedings, or criminal offences where the Director of the Company is presently liable for penal action."

(emphasis supplied)

105. In Manish Kumar [Manish Kumar v. Union of India, (2021) 5 SCC 1 : (2021) 3 SCC (Civ) 50] , this Court upheld Section 32-A IBC and stated thus : (SCC pp. 168-71, paras 318- 19 & 326-27) "318. The first proviso in sub-section (1) declares that if there is approval of a resolution plan under Section 31 and a prosecution has been instituted during CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub-section (1), however, the designated partner in respect of the liability partnership or the officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, in charge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the report submitted and report filed by the investigating authority, will continue to be liable to be

prosecuted and punished for the offence committed by the corporate debtor.

319. Thus, the combined reading of the various limbs of sub-section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

327. ... Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor."

(emphasis supplied)

106. In P. Mohanraj [P. Mohanraj v. Shah Bros. Ispat (P) Ltd., (2021) 6 SCC 258: (2021) 3 SCC (Civ) 427: (2021) 2 SCC (Cri) 818] the Full Bench of this Court held thus: (SCC pp. 310- 12, paras 41-43 & 45) "41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the [Ed. : The matter between two asterisks has

been emphasised in original.] extinguishment [Ed. : The matter between two asterisks has been emphasised in original.] of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.

42. Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A(1) speaks of persons who are in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence"

i.e. the offence referred to in sub-section (1), 'as per the report submitted or complaint filed by the investigating authority ...'. The report submitted here refers to a police report under Section 173CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints. If the language of the second proviso is taken to interpret the language of Section 32-A(1) in that the "offence committed" under Section 32-A(1) would not include offences based upon complaints under Section 2(d)CrPC, the width of the language would be cut down and the object of Section 32-A(1) would not be achieved as all prosecutions emanating from private complaints would be excluded. Obviously, Section 32-A(1) cannot be read in this fashion and clearly includes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process. Doubtless, a Section 138 proceeding would be included, and would, after the moratorium period comes to an end with a resolution plan by a new management being approved by the adjudicating authority, cease to be an offence qua the corporate debtor.

43. ... the expression "prosecution" in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in.

45. Section 138 contains within it the ingredients of the offence made out. The deeming provision is important in that the legislature is cognizant of the fact that what is otherwise a civil liability is now

also deemed to be an offence, since this liability is made punishable by law. It is important to note that the transaction spoken of is a commercial transaction between two parties which involves payment of money for a debt or liability. The Explanation to Section 138 makes it clear that such debt or other liability means a legally enforceable debt or other liability. Thus, a debt or other liability barred by the law of limitation would be outside the scope of Section 138. This, coupled with fine that may extend to twice the amount of the cheque that is payable as compensation to the aggrieved party to cover both the amount of the cheque and the interest and costs thereupon, would show that it is really a hybrid provision to enforce payment under a bounced cheque if it is otherwise enforceable in civil law. Further, though the ingredients of the offence are contained in the first part of Section 138 when the cheque is returned by the bank unpaid for the reasons given in the section, the proviso gives an opportunity to the drawer of the cheque, stating that the drawer must fail to make payment of the amount within 15 days of the receipt of a notice, again making it clear that the real object of the provision is not to penalise the wrongdoer for an offence that is already made out, but to compensate the victim."

(emphasis supplied)

107. In *Narinder Garg v. Kotak Mahindra Bank Ltd.* [*Narinder Garg v. Kotak Mahindra Bank Ltd.*, (2022) 19 SCC 623 : 2022 SCC OnLine SC 517], this Court held that :

(SCC paras 3-6) "3. In *P. Mohanraj v. Shah Bros. Ispat (P) Ltd.* [*P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*, (2021) 6 SCC 258 :

(2021) 3 SCC (Civ) 427 : (2021) 2 SCC (Cri) 818], a Bench of three Judges of this Court considered the matter whether a corporate entity in respect of which moratorium had become effective could be proceeded against in terms of Sections 138 and 141 of the Negotiable Instruments Act, 1881 ("the Act" for short).

4. A subsidiary issue was also about the liability of natural persons like a Director of the Company. In para 77 of its judgment [*P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*, (2021) 6 SCC 258 : (2021) 3 SCC (Civ) 427 : (2021) 2 SCC (Cri) 818], this Court observed that the moratorium provisions contained in Section 14 of the Insolvency and Bankruptcy Code, 2016 would apply only to the corporate debtor and that the natural persons mentioned in Section 141 of the Act would continue to be statutorily liable under the provisions of the Act.

5. It is submitted by Mr Gopal Sankaranarayanan, learned Senior Advocate that the resolution plan having been accepted in which the dues of the original complainant also figure, the effect of such acceptance would be to obliterate any pending trial under Sections 138 and 141 of the Act.

6. The decision rendered in *P. Mohanraj* [*P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*, (2021) 6 SCC 258 :

(2021) 3 SCC (Civ) 427 : (2021) 2 SCC (Cri) 818] is quite clear on the point and, as such, no interference in this petition is called for."

(emphasis supplied)

108. Thus, the upshot of all the decisions referred to above is where the proceedings under Section 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint and during the pendency, the company gets dissolved, the signatories/Directors cannot escape from their penal liability under Section 138 of the NI Act 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."

(Emphasis supplied) The Apex Court approves INDORAMA SYNTHETICS (I) LIMITED's case (supra) of the High Court of Bombay and holds that all the findings supra are that if proceedings under Section 138 of the NI Act had already commenced and the Magistrate has taken cognizance and the Company gets dissolved, the signatory Directors of the Company cannot escape from the very penal liability under Section 138 of the NI Act by citing its dissolution. The Apex Court holds that what is dissolved is only Company and not the personal penal liability of the accused covered under Section 141 of the Act.

12. In the light of the judgment of the Division Bench of High Court of Bombay which gets its imprimatur at the hands of the Apex Court, is what is required to be followed. The coordinate Bench while answering Section 446 of the Companies Act was not apprised of the judgment of the Division Bench in INDORAMA SYNTHETICS (I) LIMITED'S case supra and the judgment rendered by the Apex Court in AJAY KUMAR RADHEYSHYAM GOENKA'S case, both of them were rendered long after the judgment of the Apex Court in the case of AJAY KUMAR RADHEYSHYAM GOENKA supra.

13. Thus, in the considered view of this Court, those judgments of the coordinate benches are to be held as per incuriam. Per incuriam is one of those exceptions, to the rule of precedent and a decision rendered by the Apex Court not being followed by the High Court notwithstanding the fact that the judgments of the Apex Court preceded the orders of the High Court for manifold reasons, one of which would be that it was not brought to the notice of the High Court. Therefore, those decisions would become per incuriam. It is trite law that an order passed by this Court, without considering the judgment of the Apex Court on the issue, despite the order of the Apex Court preceding the order passed by this Court, the judgment would be rendered per incuriam and lose its precedential value.

14. Therefore, I deem it appropriate to take a different path following the judgments of the Apex Court, which approves the judgment of the Division Bench of the High Court of Bombay and clearly holds that personal liability of personal guarantors or Directors cannot be seen to be washed away by the winding up orders under Section 446 of the Companies Act for the offences punishable under Section 138 of the Act on a clear interpretation of Section 141 of the Act. Therefore, the order of the learned Magistrate dated 11-11-2014 is on the face of it, erroneous. I deem it appropriate to obliterate the same despite being restored by two coordinate Benches of this Court by following the three Judge Bench of the Apex Court.

15. For the aforesaid reasons, the following:

ORDER

(i) Writ Petition is allowed.

(ii) The order dated 11-11-2014 passed by the learned XXVIII Additional Chief Metropolitan Magistrate, Bengaluru in C.C.No.19781 of 2007 stands quashed.

(iii) The learned Magistrate is directed to resume proceedings both in C.C.19781 of 2007 and C.C.No.19782 of 2007.

(iv) Since the issue is now close to more than a decade old, the learned Magistrate shall conclude the

proceedings within three months from the date of receipt of a copy of this order.

Sd/-

JUDGE nvj CT:MJ