



2024 : DHC : 857



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on: 30th January 2024**
Judgment pronounced on: 7th February 2024
+ **CO.PET. 36/2013**
RE- M/S CATMOSS RETAIL PVT. LTD. Petitioner
Through:
versus
.... Respondent
Through: Mr. Sangram Patnaik and Ms. Shankari Mishra, Advs. for applicant in CA No. 58/2024
Mr. Ruchir Mishra, Mr. Mukesh Kumar Tiwari, Ms. Poonam Shukla and Ms. Reba Jena Mishra, Advs. for UOI
Ms. Ruchi Sindhwani, Sr. Standing Counsel with Ms. Megha Bharara, Adv. for OL

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

CO.APPL. 58/2024 (application moved on behalf of Ex-Management seeking stay on proceedings)

1. This application is moved on behalf of the applicant Mr. Ashwani Chawla, Ex-Management/Director under Sections 446 and 447 of the Companies Act, 1956¹ seeking stay of the proceedings initiated against the company under liquidation as well as the applicant in various Courts exercising criminal jurisdiction in Delhi under Section 138 of the Negotiable Instrument Act 1881².

¹ The Act

² NI Act



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2. Shorn of unnecessary details, it is stated that the company in question has been ordered to be wound up vide order dated 28.02.2013 and a Provisional Liquidator has been ordered to take over the assets and other records of the company (in liquidation) vide order dated 27.03.2014 passed by this Court.

3. The grievance of the applicant/Ex-Management is that certain complaints have been instituted under Section 138 of the NI Act against the company as well as directors, which cannot be allowed to continue in view of Sections 446 and 447 of the Act.

4. Advance notice of the present application has not been served upon the Official Liquidator. However, a copy of the same is ordered to be supplied to learned Senior Standing Counsel for the Official Liquidator. No reply is called for since only a question of law is involved.

5. Learned counsel for the applicant has vehemently urged that all legal proceedings which have been filed against the director after the winding up order dated 28.02.2013 cannot continue without the leave of this Court and there is a serious handicap in a director representing the company in such proceedings since all the records are now available with the Official Liquidator.

6. Learned counsel for the applicant has relied on decisions in **Davi V. Thattil and Anr. v. Rosy Joseph and Ors³**; **Shashikant Patel v. Swadhyay Flex Pack Pvt. Ltd.⁴**; **Davi V. Thattil and Ors v.**

³ 2020 SCC OnLine Ker 13838

⁴ 2020 SCC OnLine MP 4643



O.R. Sekharan and Ors.⁵; Vijay Steel Tubes & Fittings v. Apollo Pipes Ltd.⁶; Ranjit Sham Chougale v. State of Haryana & Anr.⁷; Ratan Lal Garera and Ors. v. State (NCT of Delhi) and Ors.⁸; ML Gupta & Ors. v. Ceat Financial Services Ltd.⁹ and Govind Prasad Todi and Another v. Govt. of NCT of Delhi and Another¹⁰.

7. Learned Senior Standing Counsel for the Official Liquidator has also relied upon the decisions in **Krishna Texport Industries Ltd. v. DCM Limited¹¹** and **D.K. Kapur v. Reserve Bank of India and Ors.¹²**.

ANALYSIS & DECISION:

8. Having given my thoughtful consideration to the submissions advanced by the learned counsel for the parties and on perusal of the record, the decisions in **D.K. Kapur (supra)** and **Krishna Texport Industries Ltd. (supra)** cited by the learned Senior Standing Counsel for the Official Liquidator are *per incuriam* in view of several pronouncements on the subject by the Supreme Court in subsequent cases. Suffice to state that the view taken in such decisions that expressions ‘suit’ or ‘other legal proceedings’ in Section 446(1) of the Act does not envisage complaint cases under Section 138 of the NI Act, are no longer the law. The same have not even been followed in

⁵ CrI. Rev. Pet. No. 1070/2014, Kerala

⁶ MANU/DE/4485/2015

⁷ CrI. Misc. No. M-36819/2013 (O&M)

⁸ 2006 SC OnLine Del 1442

⁹ MANU/DE/9842/2006

¹⁰ 2023 SCC OnLine Del 3717

¹¹ MANU/DE/0787/2008

¹² MANU/DE/0038/2001



the subsequent decisions of this Court in *ML Gupta & Ors. (supra)*, *Ratan Lal Garera (supra)* and *Vijay Steel Tubes & Fittings (supra)*.

9. The meaning assigned to the aforesaid expressions has come to be discussed in several decisions of the Supreme Court and avoiding the temptation to go into a long academic discussion, reference can be invited to decisions in **P. Mohanraj & Others v. Shah Brothers Ispat Private Limited**¹³ and **Ashok Shewakramani & Others v. State of Andhra Pradesh**¹⁴. The issue is a simple one, which is no longer *res integra* as to whether the proceedings against the corporate debtor and its directors or those in-charge of control or affairs of the corporate debtor can continue after moratorium comes to set in terms of Section 14 of the The Insolvency and Bankruptcy Code, 2016¹⁵ or for that matter upon admission of the winding up proceedings, has been addressed in *P.Mohanraj (supra)* and it has been categorically laid down as under:-

“Whether natural persons are covered by Section 14 IBC

101. As far as the Directors/persons in management or control of the corporate debtor are concerned, a Sections 138/141 proceeding against them cannot be initiated or continued without the corporate debtor-see *Aneeta Hada*. This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the Company for the conduct of the business of the Company, *as well as the Company*. The Court, therefore, in *Aneeta Hada* held as under: (SCC pp. 686-88, paras 51, 56 & 58-59)

"51. We have already opined that the decision in *Sheoratan Agarwal* runs counter to the ratio laid down in *C.V. Parekh* which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* has to be treated as not laying down

¹³ (2021) 6 SCC 258

¹⁴ (2023) 8 SCC 473

¹⁵ IBC



the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the Company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.

56. We have referred to the aforesaid passages only to highlight that there has to be strict observance of the provisions regard being had to the legislative intendment because it deals with penal provisions and a penalty is not to be imposed affecting the rights of persons, whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the Company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the section is of immense significance and, in its tentacle, it brings in the Company as well as the Director and/or other officers who are responsible for the acts of the Company and, therefore, a prosecution against the Directors or other officers is tenable even if the Company is not arraigned as an accused. The words "as well as" have to be understood in the context.

58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the Company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the Company" appearing in the section make it absolutely unmistakably clear that when the Company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the Company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders



can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V. Parekh* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision *Anil Hadals* is overruled with the qualifier as stated in para 51. The decision in *Modi Distillery* has to be treated to be restricted to its own facts as has been explained by us hereinabove."

102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of Sections 138/141 proceeding against the corporate debtor and initiation of Sections 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paras 51 and 59 in *Aneeta Hada* would then become applicable. The legal impediment contained in Section 14 IBC would make it impossible for such proceeding continue or be instituted against the corporate debtor. Thus, for the period of moratorium since no Sections 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Sections 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.

Conclusion

103. In conclusion, disagreeing with the Bombay High Court and the Calcutta High Court judgments in *Tayal Cotton (P) Ltd. v. State of Maharashtra* and *MBL Infrastructures Ltd. v. Manik Chand Soman*, respectively, we hold that a Sections 138/141 proceeding against a corporate debtor is covered by Section 14(1)(1) IBC.

104. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Sections 138/141 proceedings in this case will continue both against the Company as well as the appellants for the reason given by us in paras 101 and 102 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case."





10. In a subsequent case of *Ashok Shewakramani (supra)* on an issue as to how the expressions ‘was in-charge of’ and ‘was responsible to the company for the conduct of business of the company’ have to be interpreted in terms of Section 141(1) of the NI Act, it was observed as under:-

“**21.** Section 141 is an exception to the normal rule that there cannot be any vicarious liability when it comes to a penal provision. The vicarious liability is attracted when the ingredients of sub-section (1) of Section 141 are satisfied. The section provides that every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company shall be deemed to be guilty of the offence under Section 138 of the NI Act.

22. In the light of sub-section (1) of Section 141, we have perused the averments made in the complaints subject-matter of these three appeals. The allegation in Para 1 of the complaints is that the appellants are managing the Company and are busy with day-to-day affairs of the Company. It is further averred that they are also in charge of the Company and are jointly and severally liable for the acts of Accused 1 Company. The requirement of sub-section (1) of Section 141 of the NI Act is something different and higher. Every person who is sought to be roped in by virtue of sub-section (1) of Section 141 of the NI Act must be a 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. Merely because somebody is managing the affairs of the Company, *per se*, he does not become in charge of the conduct of the business of the Company or the person responsible for the Company for the conduct of the business of the Company. For example, in a given case, a manager of a Company may be managing the business of the Company. Only on the ground that he is managing the business of the Company, he cannot be roped in based on sub-section (1) of Section 141 of the NI Act.”

11. All said and done, what needs to be emphasized is that it has been a consistent legal proposition that if the demand notice and the cognizance of complaint under Section 138 of the NI Act is taken after initiation of winding up proceedings and/or IBC proceedings, the



proceedings under Section 138 of the NI Act cannot continue not only against the corporate debtor but also its directors. It is pertinent to mention that this Court in an earlier case titled **Govind Prasad Todi & Another v. Govt. of NCT of Delhi**¹⁶ rightly distinguished the aspect in the case *P. Mohanraj (supra)*, wherein 51 cheques were issued by the company in favour of the respondent towards the amounts payable from 21.09.2015 to 11.11.2016 and it was a case where statutory notice of demand under Section 138 read with Section 141 of the NI Act was issued on 21.03.2017 while the commencement of Corporate Insolvency Resolution Process¹⁷ under Section 14 of the IBC came to be enforced on 06.06.2017. It was a case where the cheques had got dishonoured and even demand notices were issued prior to the moratorium kicking in. In other words, if the statutory demand notice is issued before the moratorium sets in or winding up proceedings are initiated and cognizance of the offence is taken subsequent to the moratorium or winding up proceedings kicking in, the prosecution against the corporate debtor and its directors cannot be allowed to be continued. Incidentally, the same view had been taken in the decisions of *ML Gupta & Ors. (supra)*; *Ratan Lal Garera (supra)*; and *Vijay Steel Tubes & Fittings (supra)* decided by this Court.

12. Hence, the present application is disposed of with the directions that all complaints under Section 138 of the NI Act instituted against the corporate debtor and its directors after the company has been

¹⁶ 2023 SCC OnLine Del 3717

¹⁷ CIRP



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ordered to be wound up vide order dated 28.02.2013, shall not be continued and shall remain in abeyance. The reasons are not far to seek since in such matters when the IRP or for that matter the Official Liquidator has taken over the entire records of the case, it would be impossible for the directors of the corporate debtor or company (in liquidation) to defend themselves in such criminal matters.

13. The application is, therefore, decided accordingly.

DHARMESH SHARMA, J.

FEBRUARY 07, 2024

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Signature Not Verified

Digitally Signed By PRAKASH K. PET. 36/2013
KUMAR VATS
Signing Date: 07.02.2024
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