IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-22685-2021 (O&M)
Date of Decision: July 4, 2022

Vijay Kumar Ghai

.....Petitioner

Vs.

Pritpal Singh Babbar

.....Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Aalok Jagga, Advocate,
for the petitioner.

Mr. Bal Krishan Mehta, Advocate
for the respondent.

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AMOL RATTAN SINGH, J.

1. Vide this petition, the petitioner challenges by way of invoking jurisdiction of this court under Section 482 of the Cr.P.C., the order passed by the learned JMIC, Jalandhar, dated 25.05.2021 (copy Annexure P-23), by which his application seeking a stay on the proceedings initiated under Section 138 of the Negotiable Instruments Act, 1881, was dismissed; with that court holding that simply because the petitioner had filed an application under Section 94 of the Insolvency and Bankruptcy Code, 2016 (in short "the IBC" or the "Code"), that would not mean that the proceedings under Section 138 would get automatically stayed even in terms of Section 96 of the said Code, in view of the fact that the cheque in question was issued by the petitioner in his personal capacity and was not in any manner in discharge of any corporate debt in respect of 'his company'.

Thus the entire controversy is as to whether criminal

proceedings under Section 138 of the Negotiable Instruments Act, 1881, (hereinafter referred to as the "NI Act" or the "Act"), would also remain stayed in terms of Section 96 of the Code, even where the cheque in question was not issued to discharge a 'corporate debt', though issued by a personal guarantor *qua* a corporate debtor, but is not a cheque *qua* parties as are adversaries or litigants in any proceedings before the National Company Law Tribunal/Resolution Professional/Interim Resolution Professional.

2. Before going further, a very brief reference to the complaint under the NI Act, filed by the respondent, needs to be made.

As per the respondent herein, the petitioner had requested him for a loan of Rs.1,00,000/- for his business requirements, with an offer made to repay the same with interest; and keeping in view their friendly relations, the complainant is stated to have given him a loan, vide a demand draft for an amount of Rs.11,00,000/-, issued by the State Bank of Patiala on 05.03.2008.

The petitioner is stated to have been paying interest @ Rs.24,700/- per quarter and eventually, to discharge his financial obligation to the respondent-complainant, he issued a cheque dated 20.02.2012 for an amount of Rs.11,00,000/- drawn on the State Bank of India, which cheque however is stated to have been returned by the bank on account of deficiency of funds in the petitioners' account, vide a memo issued by the bank on 24.02.2012.

A legal notice was got issued by the respondent to the petitioner on 02.03.2012 in terms of Section 138 of the Act, but with the amount still not having been paid, the complaint under the same provision was filed by the respondent herein on 21.03.2012, with summons having been issued to the

petitioner by the JMIC, Jalandhar, vide an order dated 28.05.2012.

The application under Section 94(1) of the Code (copy Annexure P-17) filed by the petitioner, is seen to be dated 04.02.2021, though with the written communication to the National Company Law Tribunal, Chandigarh Bench, by the proposed Interim Resolution Professional (in terms of Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016), is shown to be dated 14.12.2020.

3. Mr. Jagga, learned counsel for the petitioner, pointed to a notification issued by the Government of India in the Department of Corporate Affairs, on 15.11.2019 (copy Annexure P-15), wherein certain provisions of the IBC, including Section 2(e), the most part of Section 78, Section 79, Sections 94 to 187, as also Section 249 and certain clauses of Sections 239 and 240, were notified to have come into force, in relation to personal guarantors *qua* corporate debtors, with effect from 01.12.2019.

Upon query to the learned counsel as to how, even so, the said notification would apply to the case of the petitioner if he had issued the cheque in discharge of his personal liability and not as a personal guarantor to a corporate debtor, he then pointed to a judgment of the Supreme Court in **P. Mohanraj and others v. M/s Shah Brothers Ispat Pvt. Ltd.** (Civil Appeal no.10355 of 2018, decided on March 01, 2021), paragraph 38 of which also refers to individuals, with learned counsel also having pointed to paragraphs 26 and 27 of the same judgment, in which the insolvency resolution process relating to individuals is also referred to/discussed.

The argument therefore is that once the petitioner had filed an application under Section 94 of the said Code before the Adjudicating

Authority for initiation of a personal insolvency resolution process, in December 2020, on account of having became personally insolvent, necessarily all proceedings under Section 138 of the Act of 1881 would remain stayed in terms of the Section 96(1)(b) of the Code, which reads as follows:-

> "**96. Interim-moratorium**-(1) When an application is filed under Section 94 or Section 95-
>
> (a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and
>
> (b) during the interim-moratorium period-
>
> (i) any legal action or proceedings pending in respect of any debt shall be deemed to have been stayed; and
>
> (ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt."
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> (Emphasis applied in this judgment only)

4. Mr. Jagga further submitted that as a matter of fact the trial court, vide the impugned order, has wholly erred in holding that the provisions of the Code of 2016 do not apply to individuals, even in terms of Section 2(g) of the Code, which stipulates as follows:-

> "**Section 2.** Application-The provisions of this Code shall apply to:
>
> xxx xxx xxx
>
> (g) individuals, other than persons referred to in clause (e), in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be."
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> [Clause (e) in fact applies to personal guarantors to corporate debtors.]

5. He next submitted that the Supreme Court was in fact seized of the issue of application of the Code only to a corporate debtor and that is why Section 14 of the Code has been extensively referred to in the aforesaid judgment, with the said provision falling within Part II of the Code, which is

wholly relatable to insolvency resolution and liquidation proceedings for corporate persons, with Part III of the Code being applicable to insolvency resolution and bankruptcy for individuals and partnership firms; and that the said part contains Sections 78 to 187, obviously thereby including Sections 94, 96 and 101.

6. He next submitted that the application of the petitioner not having been admitted by the Adjudicating Authority as yet, Section 101 would not apply presently (unless that application is admitted), which is a provision dealing with moratorium after admission of the application.

7. In support of his arguments Mr. Jagga first referred to the following paragraphs of the judgment in **P. Mohanraj** (*supra*), which read as follows:-

> 36. 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.

37. Likewise, under Section 139, a presumption is raised that the holder of a cheque received the cheque for the discharge, in whole or in part, of any debt or other liability. To rebut this presumption, facts must be adduced which, on a preponderance of probability (not beyond reasonable doubt as in the case of criminal offences), must then be proved. Section 140 is also important, in that it shall not be a defence in a prosecution for an offence under Section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reasons stated in that Section, thus making it clear that strict liability will attach, mens rea being no ingredient of the offence. Section 141 then makes Directors and other persons statutorily liable, provided the ingredients of the section are met. Interestingly, for the purposes of this Section, explanation (a) defines "company" as meaning any body corporate and includes a firm or other association of individuals.

38. We have already seen how the language of Sections 96 and 101 would include a Section 138/141 proceeding against a firm so that the moratorium stated therein would apply to such proceedings. If Shri Mehta's arguments were to be accepted, under the same Section, namely, Section 141, two different results would ensue – so far as bodies corporate, which include limited liability partnerships, are concerned, the moratorium provision contained in Section 14 of the IBC would not apply, but so far as a partnership firm is concerned, being covered by Sections 96 and 101 of the IBC, a Section 138/141 proceeding would be stopped in its tracks by virtue of the moratorium imposed by these Sections. Thus, under Section 141(1), whereas a Section 138 proceeding against a corporate body would continue after initiation of the corporate insolvency resolution process, yet, the same proceeding against a firm, being interdicted by Sections 96 and 101, would not so continue. This startling result is one of the consequences of accepting the argument of Shri Mehta, which again leads to the position that inelegant drafting alone cannot lead to such startling

> results, the object of Sections 14 and 96 and 101 being the same, namely, to see that during the insolvency resolution process for corporate persons/individuals and firms, the corporate body/firm/individual should be given breathing space to recuperate for a successful resolution of its debts – in the case of a corporate debtor, through a new management coming in; and in the case of individuals and firms, through resolution plans which are accepted by a committee of creditors, by which the debtor is given breathing space in which to pay back his/its debts, which would result in creditors getting more than they would in a bankruptcy proceeding against an individual or a firm."
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> XXX XXX XXX XXX XXX XXX
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> 53. A conspectus of these judgments would show that the gravamen of a proceeding under Section 138, though couched in language making the act complained of an offence, is really in order to get back through a summary proceeding, the amount contained in the dishonoured cheque together with interest and costs, expeditiously and cheaply. We have already seen how it is the victim alone who can file the complaint which ordinarily culminates in the payment of fine as compensation which may extend to twice the amount of the cheque which would include the amount of the cheque and the interest and costs thereupon. Given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a "proceeding" within the meaning of Section 14(1)(a), the moratorium therefore attaching to such proceeding."

8. Thereafter, he referred to a judgment of the Supreme Court in **Swiss Ribbon Pvt. Ltd. and another v. Union of India and others** AIR 2019 (SC) 739, from which he specifically pointed to paragraphs 11 and 12, which read as follows:-

"11. As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganization and insolvency resolution of corporate debtors. Unless such reorganization is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximization of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme – workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximize their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. [See ArcelorMittal (supra) at paragraph 83, footnote 3].

12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from

that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor‘s assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.”

9. Mr.Jagga next referred to another judgment of the Supreme Court, in **Lalit Kumar Jain v. Union of India and others** 2021 (2)Law Herald (SC) 1462, from which he specifically referred to paragraphs 91, 92, 95 and 96, which read as follow:-

“91. The close proximity, or inter-relatedness of personal guarantors with corporate debtors, as opposed to individuals and partners in firms was noted by the report of the Working Group, which remarked that it:

“recognizes that dynamics, the interwoven connection between the corporate debtor and a guarantor (who has extended his personal guarantee for the corporate debtor) and the partnership firms en- gaged in business activities may be on distinct footing in reality, and would, therefore, require different treatment, because of eco- nomic considerations. Assets of the guarantor would be relevant for the resolution process of the corporate debtor. Between the financial creditor and the corporate debtor, mostly the guarantee would contain a covenant that as between the guarantor and the financial creditor, the guarantor is also a principal debtor, notwithstanding that he is guarantor to a corporate debtor.”

92. As noticed earlier, Section 60 had previously, under the original Code, designated the NCLT as the adjudicating authority in relation to two categories:

corporate debtors and personal guarantors to corporate debtors. The 2018 amendment added another category: corporate guarantors to corporate debtors. The amendment seen in the background of the report, as indeed the scheme of the Code (i.e., Section 2 (e), Section 5 (22), Section 29A, and Section 60), clearly show that all matters that were likely to impact, or have a bearing on a corporate debtor's insolvency process, were sought to be clubbed together and brought before the same forum. Section 5(22) which is found in Part II (insolvency process provisions in respect of corporate debtors) as it was originally, defined personal guarantor to say that it"means an indi- vidual who is the surety in a contract of guarantee to a corporate debtor." There are two more provisions relevant for the purpose of this judgment. They are Sections 234 and 235 of the Code; they read as follows:

"234. (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.

(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, sit- uated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

235. (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquida- tor or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the

> Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.
>
> (2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy pro- ceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request."

XXXXX XXXXX XXXXX

95. The impugned notification authorises the Central Government and the Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority. The intent of the notification, facially, is to allow for pending proceedings to be adjudicated in terms of the Code. Section 243, which provides for the repeal of the personal insolvency laws has not as yet been notified. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT.

96. This court in **V. Ramakrishnan** (supra), noticed why an application under Section 60(2) could not be allowed. At that stage, neither Part III of the Code nor Section 243 had not been notified. This

> meant that proceedings against personal guarantors stood outside the NCLT and the Code. The non-obstante provision under Section 238 gives the Code overriding effect over other prevailing enactments. This is perhaps the rationale for not notifying Section 243 as far as personal guarantors to corporate persons are concerned. Section 243 (2) saves pending proceedings under the Acts repealed (PIA and PTI Act) to be undertaken in accordance with those enactments. As of now, Section 243 has not been notified. In the event Section 243 is notified and those two Acts repealed, then, the present notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other forums, and would bring them under the provisions of the Code pertaining to insolvency and bankruptcy of personal guarantors. The impugned notification, as a consequence of the non obstante clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code."
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> (Emphasis applied in this judgment only)

10. Mr. Jagga also later referred to Section 79(15)(e) of the Code which reads as follow:-

> **79. Definitions**.
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> In this Part, unless the context otherwise requires-
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> XXXXX XXXXX XXXXX
>
> 15. "excluded debt" means -
>
> XXXXX XXXXX XXXXX
>
> (e) any other debt as may be prescribed;

He submitted that there is no exclusion of proceedings under Section 138 of the Act, in any Rules or Regulations promulgated under the Code.

11. On the aforesaid arguments notice of motion was issued to the respondent, with this court having, in the meanwhile, stayed proceedings under

the Act of 1881, (*qua* which the impugned order has been passed).

12. Thereafter, the respondent having put in an appearance through counsel (Mr. B.K. Mehta, Advocate), he had at the outset submitted that the judgment relied upon by learned counsel for the petitioner on the first date, i.e. **P. Mohanraj** (*supra*), actually does not hold to the effect as was contended before this court.

Mr. Mehta next pointed to the application itself filed by the petitioner in terms of Section 94(1) of the Code, (copy Annexure P-17), wherein the title thereof is "In the matter of Vijay Ghai son of Sohal Lal Ghai (personal Guarantur, Priknit Retails Limited), 3177, Gurdev Nagar, Street No.7, Ludhiana. and in the matter of Vijay Ghai (personal gurantur, Priknit Retails Limited), 3177, Gurdev Nagar, Street No.7, Ludhiana versus 1. ICICI Bank Limited, BKC, Bandra Kurla Complex, Bandra East, Mumbai, Maharashtra 400051 Email:, 2. State Bank of India, SAMB branch, Fountain Chowk, Civil Lines, Ludhiana, Email: sbi.15631@sbi.co.in. 3. ASREC (India) Ltd. Regd. Office: Salitaire Corporate Park, Bldg. No.2, Unit No.201-202 & 200-200B, Gr. Floor, Andheri Ghatkopar Link Road, Chakala, Andhere(East), Mumbai-400093 through it's authorized official of it's Delhi Office: 91, 7-78, 9th Floor, Hemkunt Chamber, 89 Nehru Place, New Delhi-110019, Email: asrec@asrec.co.in".

He therefore submitted that the said application made by the petitioner is not in his individual capacity at all, but in his capacity as a personal guarantor for his company, i.e. M/s Priknit Retails Limited, and specifically in the context of a dispute between his company (and him) on the one side, with the ICICI Bank, State Bank of India and M/s ASREC (India)

Ltd; and therefore it has nothing at all to do with the loan taken in a wholly personal capacity by the petitioner from the respondent.

He next submitted that the paragraphs in the judgment of *P. Mohanraj*, as have been referred to by the learned counsel for the petitioner, were only by way of observations by the Supreme Court and therefore do not lay down any ratio in the context of the present controversy, as this court would be bound to follow.

13. Learned counsel for the respondent submitted that the conclusion drawn by the Supreme Court in *P. Mohanrajs'* case (supra) shows that it was a case on the issue that the provisions of the Code, as regards the moratorium, would not cover an individual but only a corporate debtor.

In support of his argument, Mr. Mehta specifically referred to the following part of paragraph 77 of that judgment, which reads as follows:-

> "Since the corporate debtor would be covered by the moratorium provision contained in Section 14 of the IBC, by which continuation of Section 138/141 proceedings against the corporate debtor and initiation of Section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paragraphs 51 and 59 in Aneeta Hada (supra) would then become applicable. The legal impediment contained in Section 14 of the IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. Thus, for the period of moratorium, since no Section 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 Section 141(1) and (2) of the Negotiable Instruments Act. <u>This being the case, it is clear that the moratorium provision contained in Section 14 of the 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</u>

Negotiable Instruments Act."

(Emphasis applied in this judgment only)

14. Next, Mr. Mehta submitted that though in the next paragraph (78) the Supreme Court disagreed with the judgments of the Bombay High Court and Calcutta High Court in **Tayal Cotton Pvt. Ltd. v. State of Maharashtra**, 2018 SCC OnLine Bom 2069 and **M/s MBL Infrastructure Ltd. v. Manik Chand Somani**, CRR 3456/2018 respectively, their Lordships went on thereafter to dismiss all other appeals before the Apex Court, as would be apparent from the following paragraphs at the end of the judgment:-

> **"Criminal Appeals arising out of SLP (Criminal) Nos.10587/2019, 10857/2019, 10550/2019, 10858/2019, 10860/2019, 10861/2019, 10446/2019**.
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> 1. Leave granted.
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> 2. On the facts of these cases, all the complaints filed by different creditors of the same appellant under Section 138 read with Section 141 of the Negotiable Instruments Act were admittedly filed long before the Adjudicating Authority admitted a petition under Section 7 of the IBC and imposed moratorium on 19.03.2019.
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> 3. Given our judgment in Civil Appeal No.10355 of 2018, the said moratorium order would not cover the appellant in these cases, who is not a corporate debtor, but a Director thereof. Thus, the impugned order issuing a proclamation under Section 82 CrPC cannot be faulted with on this ground. The appeals are therefore dismissed.
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> **Criminal Appeal arising out of SLP (Criminal) Nos.2246-2247 of 2020**
>
> 1. Leave granted.
>
> 2. In this case, the two complaints dated 12.03. 2018 and 14.03.2018 under Section 138 read with Section 141 of the Negotiable Instruments Act were filed by the respondent against the corporate debtor along with persons in charge of and responsible for the conduct of business of the corporate debtor. On 14.02.2020, the Adjudicating Authority admitted a petition under Section 9 of the IBC against the corporate debtor and imposed a moratorium. The impugned interim

order dated 20.02.2020 is for the issuance of non-bailable warrants against two of the accused individuals.

3. Given our judgment in Civil Appeal No.10355 of 2018, the moratorium provision not extending to persons other than the corporate debtor, this appeal also stands dismissed.

Criminal Appeal arising out of SLP (Criminal) No.2496 of 2020

1. Leave granted.

2. In the present case, a complaint under Section 138 read with Section 141 of the Negotiable Instruments Act was filed by Respondent No.1 against the corporate debtor together with its Managing Director and Director on 15.05.2018. It is only thereafter that a petition under Section 9 of the IBC, filed by Respondent No.1, was admitted by the Adjudicating Authority and a moratorium was imposed on 30.10.2018. The impugned judgment dated 16.10.2019 held that a petition under Section 482, CrPC to quash the said proceeding would be rejected as Section 14 of the IBC did not apply to Section 138 proceedings.

3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the complaint is directed to be continued against the Managing Director and Director, respectively.

Criminal Appeal arising out of SLP (Criminal) No.3500 of 2020

1. Leave granted.

2. The complaint in the present case was filed by the respondent on 28.07.2016. An application under Section 7, IBC was admitted by the Adjudicating Authority only on 20.02.2018 and moratorium imposed on the same date. The impugned judgment rejected a petition under Section 482 of the Cr.P.C. on the ground that Section 138 proceedings are not covered by Section 14 of the IBC.

3. The impugned judgment is set aside in view of our judgment in Civil Appeal No.10355 of 2018, and the complaint is directed to be continued against the appellant.

Criminal Appeal arising out of SLP (Criminal) No.5638-5651/2020, 5653-5668/2020

Leave granted.

In these appeals, the appellants have approached us directly from the learned Magistrate's impugned orders. The learned

> Magistrate has held that Section 14 of the IBC would not cover proceedings under Section 138 of the Negotiable Instruments Act. As a result, warrants of attachment have been issued under Section 431 read with Section 421 Cr.P.C. against various accused persons, including the corporate debtor and persons who are since deceased. While setting aside the impugned judgments, given our judgment in Civil Appeal No.10355 of 2018, we remand these cases to the Magistrate to apply the law laid down by us in Civil Appeal No.10355 of 2018, and thereafter decide all other points that may arise in these cases in accordance with law.
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> **Writ Petition (Criminal) Nos.330/2020, 339/2020, Writ Petition (Civil) No.982/2020, Writ Petition (Criminal) Nos.297/2020, +342/2020, Writ Petition (Civil) No.1417/2020, 1439/2020, 18/2021, Writ Petition (Criminal) No.9/2021, 26/2021**.
>
> 1. All these writ petitions have been filed under Article 32 of the Constitution of India by erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor. They are all premised upon the fact that Section 138 proceedings are covered by Section 14 of the IBC and hence, cannot continue against the corporate debtor and consequently, against the petitioners.
>
> 2. Given our judgment in Civil Appeal No.10355 of 2018, all these writ petitions have to be dismissed in view of the fact that such proceedings can continue against erstwhile Directors/persons in charge of and responsible for the conduct of the business of the corporate debtor."
>
> (All emphasis applied in this judgment only)

15. Thus, Mr.Mehta submitted that the Supreme Court having specifically held that, first, where the proceedings under Section 138/141 of the Act of 1881, were initiated far before the moratorium was imposed in terms of Section 14 of the Code, the proceedings under Sections 138/141 of the NI Act would continue; and second, it also having held eventually in the other criminal appeals (as per the orders reproduced hereinabove), that a complaint against the erstwhile directors/persons incharge of and responsible

for the conduct of the business of the corporate debtor would also continue, then obviously where the cheque in question issued by the petitioner herein was completely unrelated to any corporate debt between the petitioner and the respondent herein, the complaint filed by the respondent herein in terms of Section 138 of that Act, has to continue against the petitioner and cannot be stayed even in terms of Sections 96 and 101 of the Code, given the fact that even the aims and objects of the Code are only to protect corporate debtors and have nothing to do at all with regard to a debt incurred wholly in a personal capacity with an individual who is not concerned in any manner with any corporate debt (i.e. the respondent herein).

He thus reiterated that simply because the petitioner is a personal guarantor to a corporate debtor in a dispute wholly between banks and companies, with the respondent herein having nothing at all to do with that dispute in any manner, the petitioner cannot be allowed to take undue advantage of the provisions of the Code as actually do not apply at all to the debt he owes the respondent herein.

16. On query by this court in terms of Section 79 (15) (e) of the Code, i.e. as to whether the term “excluded debt” would cover any loan taken by one individual from another, Mr. Mehta had very fairly submitted that as far as he has been able to determine, no rules have been prescribed to include any other debt in the term “excluded debt”.

17. Learned counsel for the respondent next referred to sub-sections (1) and (2) of Section 179 of the Code (which would be reproduced further ahead in this judgment).

He contended that even in terms of the aforesaid provision, when the petitioner had issued a cheque from his personal account as an individual, to repay the debt that he owed the respondent as an individual, with such debt having been incurred as a personal loan, it would not be the National Company Law Tribunal to which the petitioner should have applied for appointment of an IRP/RP and in fact he should have applied to the Debt Recovery Tribunal and consequently the application made to the NCLT in respect of his debt as a personal guarantor to a corporate personality (M/s Priknit Retails Pvt. Ltd.), would not cover any debt that he owes another individual in a purely individual capacity (and not in his capacity as a personal guarantor to a corporate person), and consequently a complaint made by one individual against another under Section 138 of the Negotiable Instruments Act, would not be affected by the application made by the petitioner under Section 94 of the Code.

18. Mr. Mehta next submitted that the petitioner has taken undue advantage of the Code after it came into effect, the cheque in question having bounced in the year 2012, with the complaint under the provisions of Section 138 of the Act of 1881 also having been instituted in that very year by the respondent herein, and with all evidence of the respondent (as the complainant in those proceedings) having concluded by 13.01.2015, but with the application/petition having been filed before the NCLT in December 2020 under Section 94 of the Code, i.e. after almost 9 years. Hence, that would simply amount to taking undue advantage of a subsequent legislation.

19. To rebut the aforesaid contentions, Mr. Jagga, learned counsel for the petitioner, again referred to Sections 79, 96, 102, 105, 107, 108, 109, 114

and 115 of the Code.

He contended that the term "excluded debt" would include only those debts as are described in clauses (a) to (d) of Section 79; and consequently, any debt incurred even between two individuals would come within the ambit of Section 94 of the Code, resulting in an interim moratorium as prescribed in Section 96 thereof, being applicable to any complaint pending under the provisions of Section 138 of the Negotiable Instruments Act, 1881, till either admission of the petition filed by the petitioner before the adjudicating authority/NCLT, or at least upto its rejection (without admission), under Section 100 thereof.

20. He next submitted that though the ratio of the judgment in **P. Mohanraj and others v. M/s Shah Brothers Ispat Pvt. Ltd**. (Civil Appeal no.10355 of 2018, decided on March 01, 2021), may not strictly apply to the case of the petitioner, in view of the fact that the petitioner is a guarantor in his personal capacity as a Director of the company as is now in insolvency/ liquidation proceedings, that judgment being one pertaining to only corporate debtors, i.e. companies as were in bankruptcy/liquidation proceedings etc.; yet, while dealing with the issue, the Supreme Court has also referred to Sections 94 and 96 contained in Part III of the Code, which are the provisions pertaining to 'personal debtors'; in the context of which he pointed to paragraphs 5, 26, 27 and 38 of the said judgment, with him specifically stressing on what is contained in Paragraph 5, which reads as follows:-

> "5. The important question that arises in this appeal is whether the institution or continuation of a proceeding under Section 138/141 of the Negotiable Instruments Act can be said to be covered by the

> moratorium provision, namely, Section 14 of the IBC."

The contention of learned counsel for the petitioner was that though the essential question before the Supreme Court was pertaining to Section 14 of the Code which falls within Part-II thereof, which exclusively applies to corporate debtors, i.e. companies, however their Lordships also having referred to Section 96 in paragraph 38, and having held that even Section 14 of the code would apply to proceedings under Section 138 of the Act, the ratio of the judgment would apply to proceedings between individuals even under Section 138 of the Act.

21. The argument therefore is that the petitioner having initiated an insolvency resolution process against himself by way of an application (copy Annexure P-17) on 03.02.2021, but that application not having been adjudicated upon as to whether the resolution process should apply in the case of the petitioner or not, he is fully covered by the provisions of Section 94(1) read with sub-section (4) thereof; and consequently the interim moratorium in terms of Section 96 would apply, at least till the decision on his application, if not thereafter also in terms of Section 101.

Thus even if the debt alleged to have been incurred by the petitioner at the hands of the respondent is in their individual capacities, yet once the petitioner has invoked proceedings under the Code before the NCLT even in his capacity as a personal guarantor to a corporate debtor, under Section 94 of the Code, if in those proceedings he is eventually declared to be insolvent or bankrupt, he obviously cannot discharge any liability even in his individual capacity, because as a personal guarantor to a corporate creditor he is not a corporate personality himself and still remains an individual who 'is in

the process of becoming bankrupt/has already become bankrupt'.

22. Learned counsel for the petitioner last submitted that the petitioner has included the name of the respondent herein (Pritpal Singh Babbar), in the list of those persons whom he owes a debt to, alongwith his application under Section 94 of the Code; and therefore the interest of the respondent would get duly protected at the relevant time if the assets of the petitioner are to be distributed to his creditors.

23. Having considered the matter the three essential facts that first need to be noticed from the arguments of learned counsel for the respondent as are not denied by learned counsel for the petitioner, are that:-

i. That the complaint filed by the respondent herein against the petitioner under the provisions of Section 138 of the NI Act (copy Annexure P-1), is seen to be dated 21.03.2012 and with summons having been issued to the petitioner by the learned trial court (JMIC, Jalandhar), on 28.05.2012 (copy Annexure P-2).

ii. The application made by the petitioner before the National Company Law Tribunal (Chandigarh Bench) (hereinafter referred to as the Tribunal), under the provisions of Section 94 (1) of the Code (copy Annexure P-17), is seen to be dated 04.02.2021, though the written communication from the proposed Interim Resolution Professional (as proposed by the petitioner) in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, is seen to be accompanied by a receipt issued by the office of the Tribunal on 14.12.2020.

iii. The application under Section 94 of the Code is titled as follows:-

> "In the matter of Vijay Ghai son of Sohal Lal Ghai (personal Guarantur, Priknit Retails Limited), 3177, Gurdev Nagar, Street No.7, Ludhiana. and in the matter of Vijay Ghai (personal gurantur, Priknit Retails Limited), 3177, Gurdev

> Nagar, Street No.7, Ludhiana versus 1. ICICI Bank Limited, BKC, Bandra Kurla Complex, Bandra East, Mumbai, Maharashtra 400051 Email:, 2. State Bank of India, SAMB branch, Fountain Chowk, Civil Lines, Ludhiana, Email: sbi.15631@sbi.co.in. 3. ASREC (India) Ltd. Regd. Office: Salitaire Corporate Park, Bldg. No.2, Unit No.201-202 & 200-200B, Gr. Floor, Andheri Ghatkopar Link Road, Chakala, Andhere(East), Mumbai-400093 through it's authorized official of it's Delhi Office: 91, 7-78, 9th Floor, Hemkunt Chamber, 89 Nehru Place, New Delhi-110019, Email: asrec@asrec.co.in"
>
> The first two lines of the application read as follows:-
>
> "Madam/Sir,
> I/We hereby submit this application to initiate an insolvency resolution process in respect of VIJAY KUMAR GHAI."
>
> (iv) That the petitioner has admittedly filed the aforesaid application before the Tribunal in his capacity as a personal guarantor to M/s Priknit Retails Ltd., of which he was/is a Director.

24. The question before this court therefore is as to whether in the aforesaid circumstances the interim moratorium under Section 96 of the Code would apply to the complaint filed by the respondent herein under Section 138 of the NI Act, or not.

As already noticed, learned counsel for the petitioner referred to Sections 78 to 115 of the Code and specifically to the Sections already referred to in this judgment, to submit that once the provisions of the Code are applicable to even individuals, then upon an application under Section 94 having been filed, the interim moratorium stipulated in Section 96(1) of the

Code would operate *qua* all legal proceedings pending in respect of any debt incurred by the applicant, i.e. the petitioner herein.

Per contra, learned counsel for the respondent essentially submitted that the respondent in no way being even remotely connected to the liability of the petitioner or his company, i.e. M/s Priknit Retails Ltd., and the cheque issued by the petitioner in favour of the respondent being in respect of a transaction/loan entered into wholly in their own individual capacities, from the personal account of the petitioner, no provision of the Code would apply to any proceedings arising out of such liability of the petitioner, including proceedings under Section 138 of the NI Act.

25. First and foremost, the following provisions of the Code need to be reproduced, as are germane to the controversy:-

> "**Section 2.** The provisions of this Code shall apply to—
>
> (a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;
>
> (b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;
>
> (c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008(6 of 2009);
>
> (d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;
>
> [(e) personal guarantors to corporate debtors;
>
> (f) partnership firms and proprietorship firms; and
>
> (g) individuals, other than persons referred to in clause (e)]
>
> in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be."
>
> xxxx xxxx xxxx xxxx
>
> "**Section 5.Definitions**
>
> In this Part, unless the context otherwise requires,-

(1) "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013 (18 of 2013);

xxxxx xxxxx xxxxx

(22) "personal guarantor" means an individual who is the surety in contract of guarantee to a corporate debtor;

xxxx xxxx xxxxx xxxxx

Section 14: Moratorium.

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

xxxx xxxx xxxx xxxx

"**Section 60: Adjudicating Authority for corporate persons.**

(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction

over the place where the registered office of the corporate persons located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or 1 [liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor] shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or 2[liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor] pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person,including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing

the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

xxxx xxxx xxxx xxxx

"**Section 78. Application**

This Part shall apply to matters relating to fresh start, insolvency and bankruptcy of individuals and partnership firms where the amount of the default is not less than one thousand rupees:

PROVIDED that Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one lack rupees.

Section 79. Definitions.

In this Part, unless the context otherwise requires,—

(1) "Adjudicating Authority" means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(2) "associate" of the debtor means—

(a) a person who belongs to the immediate family of the debtor;

(b) a person who is a relative of the debtor or a relative of the spouse of the debtor;

(c) a person who is in partnership with the debtor;

(d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;

(e) a person who is employer of the debtor or employee of the debtor;

(f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the

trust confer a power on the trustee which may be exercised for the benefit of the debtor; and

(g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company.

Explanation.—For the purposes of this clause, "relative", with reference to any person, means anyone who is related to another, if—

(i) they are members of a Hindu Undivided Family;

(ii) one person is related to the other in such manner as may be prescribed;

(3) "bankrupt" means—

(a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;

(b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or

(c) any person adjudged as an undischarged insolvent;

(4) "bankruptcy" means the state of being bankrupt;

(5) "bankruptcy debt", in relation to a bankrupt, means—

(a) any debt owed by him as on the bankruptcy commencement date;

(b) any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and

(c) any interest which is a part of the debt under section 171;

(6) "bankruptcy commencement date" means the date on which a bankruptcy order is passed by the Adjudicating Authority under section 126;

(7) "bankruptcy order" means an order passed by an Adjudicating Authority under section 126;

(8) "bankruptcy process" means a process against a debtor under Chapters IV and V of this Part;

(9) "bankruptcy trustee" means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125;

(10) "Chapter" means a chapter under this Part;

(11) "committee of creditors" means a committee constituted under section 134;

(12) "debtor" includes a judgment-debtor;

(13) "discharge order" means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be;

(14) "excluded assets" for the purposes of this part includes—

(a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,

(b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;

(c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

(d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and

(e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed;

(15) "excluded debt" means—

(a) liability to pay fine imposed by a court or tribunal;

(b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;

(c) liability to pay maintenance to any person under any law for the time being in force;

(d) liability in relation to a student loan; and

(e) any other debt as may be prescribed;

(16) "firm" means a body of individuals carrying on business in partnership whether or not registered under section 59 of the Indian Partnership Act, 1932 (9 of 1932);

(17) "immediate family" of the debtor means his spouse, dependent children and dependent parents;

(18) "partnership debt" means a debt for which all the partners in a firm are jointly liable;

(19) "qualifying debt" means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include—

(a) an excluded debt;

(b) a debt to the extent it is secured; and

(c) any debt which has been incurred three months prior to the date of the application for fresh start process;

(20) "repayment plan" means a plan prepared by the debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs;

(21) "resolution professional" means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process;

(22) "undischarged bankrupt" means a bankrupt who has not received a discharge order under section 138."

xxxx xxxx xxxx xxxx

"**Section 94.** Application by debtor to initiate insolvency resolution process.-

1) A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.

2) Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

3) An application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.

4) A debtor shall not be entitled to make an application under sub-section (1) if he is –

a) an undischarged bankrupt;
b) undergoing a fresh start process;
c) undergoing an insolvency resolution process; or
d) undergoing a bankruptcy process.

5) A debtor shall not be eligible to apply under subsection (1) if an application under this Chapter has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this section.

6) The application referred to in sub-section (1) shall be in such form and manner and accompanied with such fee as may be prescribed."

xxxx xxxx xxxx xxxx

"**96. Interim-moratorium**-(1) When an application is filed under Section 94 or Section 95-

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period-

(i) any legal action or proceedings pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt."

xxxx xxxx xxxx xxxx

"**Section 100: Admission or rejection of application.**

(1) The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

(2) Where the Adjudicating Authority admits an application under sub-section (1), it may, on the request of the resolution professional, issue instructions for the purpose of conducting negotiations between the debtor and creditors and for arriving at a repayment plan.

(3) The Adjudicating Authority shall provide a copy of the order passed under sub-section (1) along with the report of the resolution professional and the application referred to in section 94 or 95, as the case may be, to the creditors within seven days from the date of the said order.

(4) If the application referred to in section 94 or 95, as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the

application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.

Section 101: Moratorium.

(1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

(2) During the moratorium period—

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

xxxx xxxx xxxx xxxx

"**Section 179 Adjudicating authority for individuals and partnership firms-**

(1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or

carries on business or personally works for gain and can entertain an application under this Code regarding such person.

(2) The Debt Recovery 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 individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

3. XXXXX XXXXX XXXXX"

26. Therefore, as regards the applicability of the Code, it would cover even individuals in terms of clause (g) of Section 2. Though the said clause itself excludes personal guarantors to corporate debtors, that category of debtors has been specifically referred to in clause (e) of Section 2.

Also, at least in the context of Section 14 of the Code, the Supreme Court in **P. Mohanraj** (*supra*) has specifically held that there would be a moratorium even on proceedings under Section 138 of the Act, once the adjudicating authority, on the insolvency commencement date, has ordered that such moratorium be declared.

27. In that context it needs to be observed that the term "insolvency commencement date" has been defined in Section 5 (12) of the Code to be the date of admission of an application for initiating a corporate insolvency resolution process under Section 7/9/10 as the case may be.

(The said provisions, i.e. Sections 7, 9 and 10, refer to initiation of such process by a financial creditor, operational creditor and a corporate applicant respectively).

Section 5(11) of the Code defines an "initiation date" to be the

date on which the applicant makes an application to the adjudicating authority for initiating the corporate insolvency resolution process etc.

28. What is important to again notice here is that Sections 5, 7, 10 and 14 of the Code all fall within **Part-II** thereof, with the heading of that Part reading as follows:-

"Insolvency Resolution and Liquidation for corporate persons"

The said Part-II commences with Section 4 of the Code and continues till Section 77-A thereof, after which Part-III of the Code commences from Section 78 and continues till Section 187 thereof.

The heading of **Part-III** reads as follows:-

"Insolvency Resolution and Bankruptcy for individuals and partnership firms."

It is also necessary to notice at this stage that the petitioner having filed the application before learned NCLT as a personal guarantor to a corporate debtor, the term 'personal guarantor' is defined only in Section 5(22) of the Code which is again reproduced here:-

"**5. Definitions**

In this Part, unless the context otherwise requires,-

(22) "personal guarantor" means an individual who is the surety in contract of guarantee to a corporate debtor;"

Thus, the said provision is defined only in Part-II of the Code relating to insolvency resolution and liquidation proceedings in respect of corporate persons and is not seen to be defined anywhere in Section 79 of the Code, which comes within the ambit of Part III and which pertains to such process for individuals and partnership firms.

Section 79 thus contains the definitions as would seem to be

relevant to Part-III whereas Section 5 contains definitions as would be relevant to Part-II.

29. Having thus looked at the aforesaid provisions of the Code, let us now examine the other parts of the judgment of the Supreme Court in *P. Mohanraj* (supra) as have not been already reproduced hereinabove but would have specific significance qua the issue in question.

Though paragraph 26 thereof would also have some relevance, that paragraph is not being reproduced as it essentially reproduces Sections 81 and 85 of the Code, after referring to them in the context of Section 14.

Thereafter the relevant part of paragraph 27 of that judgment (without reproducing Sections 96 and 101 again), reads as follows:-

> "27. When the language of Section 14 and Section 85 are contrasted, it becomes clear that though the language of Section 85 is only in respect of debts, the moratorium contained in Section 14 is not subject specific. The only light thrown on the subject is by the exception provision contained in Section 14(3) (a) which is that "transactions" are the subject matter of Section 14(1). "Transaction" is, as we have seen, a much wider expression than "debt", and subsumes it. Also, the expression "proceedings" used by the legislature in Section 14(1)(a) is not trammelled by the word "legal" as a prefix that is contained in the moratorium provisions qua individuals and firms. Likewise, the provisions of Section 96 and Section 101 are moratorium provisions in Chapter III of Part III dealing with the insolvency resolution process of individuals and firms, the same expression, namely, "debts" is used as is used in Section 85. Sections 96 and 101 read as follows:
>
> xxxxx xxxxx xxxxx
>
> A legal action or proceeding in respect of any debt would, on its plain language, include a Section 138 proceedings.

xxxxx xxxxx xxxxx"

(Emphasis applied in this judgment only)

Paragraph 28 thereafter reads as follows:-

"28. When the language of these Sections is juxtaposed against the language of Section 14, it is clear that the width of Section 14 is even greater, given that Section 14 declares a moratorium prohibiting what is mentioned in clauses (a) to (d) thereof in respect of transactions entered into by the corporate debtor, inclusive of transactions relating to debts, as is contained in Sections 81, 85, 96 and 101. Also, Section 14(1)(d) is conspicuous by its absence in any of these sections. Thus, where individuals or firms are concerned, the recovery of any property by an owner or lessor, where such property is occupied by or in possession of the individual or firm can be recovered during the moratorium period, unlike the property of a corporate debtor. For all these reasons, therefore, given the object and context of Section 14, the expression "proceedings" cannot be cut down by any rule of construction and must be given a fair meaning consonant with the object and context. It is conceded before us that criminal proceedings which are not directly related to transactions evidencing debt or liability of the corporate debtor would be outside the scope of this expression."

30. Thereafter in paragraph 29 of *P. Mohanraj*, their Lordships referred to paragraphs 26 and 26.1 of an earlier judgment of the Supreme Court in **State Bank of India versus V. Ramakrishnan and another** (2018) 17 SCC 394. Those paragraphs read as follows and are extremely significant in the context of Sections 96 and 101 when juxtaposed with Section 14 of the Code:-

"**26.** We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is

> filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.
>
> **26.1** Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor -- often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor"
>
> (Emphasis applied in this judgment only)

31. Having referred to the aforesaid paragraphs in *V. Ramakrishnan,* in **P. Mohanraj** their Lordships held as follows by way of a comment on the significance of the context of the judgment in *V. Ramakrishnan*:-

> "These observations, when viewed in context, are correct. However, this case is distinguishable in that the difference between these provisions and Section 14 was not examined qua moratorium provisions as a whole in relation to corporate debtors vis-a-vis individuals/firms."

32. In the context of the present case before this court, what is to be observed is that in paragraph 26.1 of *V. Ramakrishnan,* the Supreme Court has specifically observed that in a vast majority of cases personal guarantees are given by the Directors of the companies (as are in debt), which is the admitted position in the present case as already noticed earlier also. Thus the petitioner herein is a personal guarantor to a corporate debtor, such corporate debtor being the company of which he is a Director.

In the aforesaid background the only judgment of the Supreme Court as has been referred to by learned counsel for the parties (actually for the petitioner), as has been pronounced on the subject after the amendment of the Code in 2018, is that in *Lalit Kumar Jains*' case (supra).

From that judgment, other than the paragraphs specifically referred to by learned counsel for the petitioner, what needs to be referred to by this court is that part of paragraph 86 as reproduces sub-section (2) of Section 60 of the Code, with that provision again being reproduced here, by highlighting what is considered necessary by this court for the purpose of the present petition:-

> "86. XXXXX XXXXX XXXXX
>
> The amended Section 60(2) reads as follows:-
>
> "(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, <u>where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal.</u>"

33. Thus, even after the amendment of 2018 in the Code, sub-section (2) of Section 60 effectively states (even in terms of sub-section (1) thereof) that an application relating to the insolvency resolution or bankruptcy of a corporate guarantor or a personal guarantor, shall be filed before the NCLT.

Further, any application filed by a personal guarantor to a corporate debtor can only be filed if a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before the NCLT.

In other words, a plain reading of the aforesaid provision would show that a personal guarantor to a corporate debtor cannot independently seek initiation of insolvency or bankruptcy etc. proceedings even before the NCLT in terms of sub-section (1) of Section 60, unless the corporate debtor itself is already subject to such pending proceedings before the Tribunal.

In the present case, as already noticed (in paragraph 23 (iii) of this judgment, supra), the application filed by the present petitioner (copy Annexure P-17), under the provisions of Section 94(1) of the Code read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for personal Guarantors to corporate Debtors) Rules, 2019 (hereinafter referred to as the Rules of 2019), is to initiate “an insolvency resolution process in respect of VIJAY KUMAR GHAI”, which would only be possible, on a bare reading of Section 60 (2), if the company of which he is a Director and stands as a personal guarantor to, i.e. M/s Priknit Retails Ltd., is already in proceedings before the NCLT for insolvency resolution/liquidation, either initiated by itself or initiated by the two banks or the company as have been made respondents by the petitioner in his application, i.e. M/s ICICI Bank, State Bank of India and ASREC (India)

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It is not denied that in fact proceedings under Section 7 of the Code were initiated by the State Bank of India against the petitioners' company, i.e. M/s Priknit Retails Ltd., upon which an order was initially passed on 11.09.2019 by the learned Tribunal, after which IA no.138 of 2020 was filed by the Resolution Professional appointed by that forum, under the provisions of Sections 23(1) and 34 of the Code, seeking that the corporate debtor (Priknit) be liquidated as per the procedure laid down in the Code, with that application having been allowed and with the Resolution Professional himself having been appointed as the Liquidator on 18.05.2020.

Subsequently, Mr. Jagga also produced an order dated 11.05.2022, (after the matter had been put up for rehearing by this court), also passed by the Tribunal, taking on record the progress report in the liquidation proceedings and with the next date of hearing in those proceedings before the Tribunal now being 19.07.2022.

Hence, as regards the basic maintainability of the application of the petitioner in view of the already pending proceedings initiated against the corporate debtor, the application would be maintainable (though of course with no comment made by this court as to whether the application under Section 94 (1) should be accepted on merits or rejected, by the Tribunal).

34. Consequently, the two questions now before this court are:-

(1) Whether in such circumstances the complaint under Section 138 of the Act of 1881 would also fall within the ambit of the phrases “all the debts” and “any legal actions or proceedings pending in respect of <u>any debt</u>” as occur in clauses (a) and (b)(i) of sub-section (1) respectively of

Section 96, or would the aforesaid expressions be limited to any debt as is concerned or linked in any manner to the corporate debtor for whom the petitioner stands as a personal guarantor, with the respondent herein not being in any manner concerned with the debt of either the corporate debtor or the personal guarantee furnished by the petitioner in respect of the corporate debtor;

(2) If the answer to the aforesaid question is in the affirmative, whether proceedings under Section 138 of the Act would be deemed to have been stayed in terms of Section 96 of the Code in view of the fact that the complaint against the petitioner was filed 8 to 9 years prior to the petitioners' application under Section 94 and even about 6 years before the initiation of proceedings against the corporate debtor by the State Bank of India under Section 7 of the Code.

35. As regards the first question, there are two ways of interpreting the phrases “all the debts” and “any legal actions or proceedings pending in respect of any debt” as are referred to in Section 96 of the Code.

First, that as per a plain reading of the aforesaid phrases in the provision, once a personal guarantor to a corporate debtor has filed an application under Section 94(1) before the Adjudicating Authority, all legal proceedings in respect of any debt that the personal guarantor is facing, would be covered by the interim moratorium and consequently the proceedings in the complaint filed by the respondent herein under Section 138 of the Act also would remain stayed, such proceedings being in respect of a debt alleged to have been incurred by the petitioner qua the respondent, (with such interim moratorium to continue till the application under Section 94 is either rejected or accepted by the Adjudicating Authority. If the application is admitted, proceedings under Section 138 would remain stayed till the proceedings before

the Tribunal are taken to their logical conclusion, in terms of Sections 100 and 101 of the Code).

The other interpretation that can be given is that the phrases "all legal proceedings" and "any debt", only pertain to debts as are relatable to the corporate debtor in any manner; and any other personal debt incurred by the guarantor to a corporate debtor, as has nothing to do with such corporate debtor or corporate debt, would not be affected in any manner by the application filed under Section 94 by the personal guarantor to a corporate debtor and consequently the complaint filed by the respondent herein under Section 138 of the Act can continue wholly independently of the proceedings before the Adjudicating Authority/NCLT.

36. To further try and understand as to which of the aforesaid two interpretations would apply, the following part of the judgment of the Supreme Court (in paragraph 26.1) of *V. Ramakrishnans'* case (supra) would need to be looked at again:-

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

Further, the judgment in *Lalit Kumar Jains'* case (supra) may also be again referred to wherein, while upholding the distinction created between other individuals and personal guarantors to corporate debtors vide sub-section (2) of Section 60 of the Code (as regards the forum before which a personal guarantor would be required to apply under Section 94), it was thereafter held in paragraph 100 (Law Finder edition = para 113 SCC edition) as follows:-

> "100. It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate species of individuals, for whom the Adjudicating Authority was common with the corporate debtor to whom they had stood guarantee. The fact that the process of insolvency in Part III is to be applied to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity. On the other hand, there appear to be sound reasons why the forum for adjudicating insolvency processes – the provisions of which are disparate- is to be common, i.e. through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors."
>
> (Emphasis applied in this judgment only).

37. Hence, it is obviously clear from a reading of the aforesaid part of the said judgment as also from the relevant provisions of the Code as have

been reproduced hereinabove, that personal guarantors to corporate debtors are to be treated differently from other categories of individuals who would be covered by **Part III** of the Code, with it to be again observed that personal guarantors have however only been defined in Section 5(22) falling in **Part II** thereof and not in **Part III**.

Yet, the rule making authority under Section 239 of the Code (the Central Government) promulgated the Rules of 2019 by invoking jurisdiction under the said provision as also under the other provisions referred to in the preamble to the rules, and stipulated in Rule 6 therein that an application to be made by such a guarantor under the provisions of Section 94(1) would be submitted in terms of the procedure laid down under that Rule.

Thus, the application to be made by a personal guarantor to a corporate debtor, even though such a person/individual is referred to in Section 5(22) and Section 60, both falling in **Part II** of the Code and not in **Part III** thereof, is to be made under Section 94(1) falling within **Part III** and with the said application to be made before the NCLT, in terms of Section 60(1) which falls under **Part II** of the Code.

Now in the aforesaid background, if one is to consider Mr. Jaggas' argument that the petitioner having sought his own insolvency under Section 94, all his debts would necessarily have to be considered by the Tribunal, that would seem to be in consonance with what has been observed in paragraph 100 of *Lalit Kumar Jains'* case (reproduced earlier also, *supra*), to the effect that:-

> "As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency

process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors.”

(Emphasis applied in this judgment only).

38. Hence, though in the opinion of this court otherwise a proceeding under Section 138 of the Act, qua a debt as is wholly incurred qua an individual who is not in any manner connected to the corporate debtor that the petitioner stood a personal guarantor for, nor to the corporate debt itself, would need to proceed independently so as not to make the complainant in such proceedings under Section 138 suffer further delays, especially when in the present case he has already suffered a delay of about 10 years since his complaint was initially filed, however, in the light of the aforesaid observations as also the fact that Section 96 of the Code does not specifically carve out any exception qua such a debt as is subject matter of an instrument in the context of which a complaint under Section 138 of the Act has been filed, this court would have to interpret the terms “all the debts” and “any legal action or proceedings pending in respect of any debt” as occur in Section 96 of the Code, to mean that it would cover all such debts including any debt not pertaining to a corporate debtor for whom the accused in such a complaint under Section 138 stood as a personal guarantor to, even in his capacity as a Director of such corporate debtor.

This would be further so in the opinion of this court, because a “debt” has been defined in the absolutely generic meaning of the word, in Section 3 (11) of the Code (falling in the preliminary Part-I thereof); and further, as admitted by learned counsel for the respondent, a debt as is subject matter of proceedings under Section 138 of the Act, has not been prescribed to

be an "excluded debt" in terms of Section 79(e) of the Code.

In this regard, it also needs to be observed here that unless the wordings of a statute are "unworkable" or wholly impractical, nothing extra can be read into a statute or taken away therefrom.

39. As regards the second question posed to itself by this court in paragraph 34 (supra), it would have to be held that by virtue of the term "any legal action or proceedings pending in respect of any debt (as per Section 96), proceedings under Section 138 of the Act, would be deemed to be stayed irrespective of the fact that such proceedings were initiated far before the application under Section 94 of the Code was filed by the personal guarantor to a corporate debtor.

In that very context, as regards the dismissal by the Supreme Court of other appeals and writ petitions as were heard with *P. Mohanrajs'* case (as have been pointed to by Mr. Mehta, learned counsel for the respondent), the dismissal would seem to be on account of the fact that the proceedings under Section 138 against the Dire7ctors of the companies as were corporate debtors in those cases, were firstly held to be independent of the proceedings under the Code against the corporate debtor itself and further, there is no interim moratorium referred to in Section 14, with the moratorium mentioned in that provision, being one as has to be declared by the Adjudicating Authority; and consequently the Supreme Court held that such declaration having come at a stage far after the proceedings were initiated under Section 138 of the Act, the moratorium would not apply (obviously also because the Directors were treated different to the corporate debtor itself); which is a wholly different situation to that as is postulated in Section 96,

wherein it is an interim moratorium that comes into effect, by which all proceedings qua any debt of the individual/partnership firm etc. would be deemed to have been stayed.

40. Consequently, even though the respondent herein may suffer longer delays due to the stay that would be deemed to be operating on the proceedings in the complaint filed by him under Section 138 of the Act, by virtue of the interim moratorium stipulated in Section 96 of the Code, there would seem to be no option with this court but to allow the petition and set aside the impugned order passed by the learned JMIC, Jalandhar, dated 25.05.2021. It is therefore ordered accordingly.

Hence, till a decision is taken by the Adjudicating Authority in terms of Sections 100 and 101 of the Code, on the application filed by the petitioner under Section 94(1) thereof, the proceedings before the learned trial court under Section 138 of the Act, would remain stayed.

41. The Adjudicating Authority however is requested to expedite such a decision in view of the fact that the respondent has already suffered a delay of 10 years qua his complaint filed under the Act.

July 4, 2022 **(AMOL RATTAN SINGH)**
nitin/Dinesh/dharamvir **JUDGE**

Whether speaking/reasoned Yes
Whether Reportable Yes