Form No.J(1)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction

Present:

The Hon'ble Justice Madhumati Mitra

C.R.R. 3455 of 2018

With
C.R.A.N.678 of 2019 (extension)
With
C.R.A.N.770 of 2019 (vacating)

M/s.MBL Infrastructure Ltd. & Anr.
Vs.
Sri Manik Chand Somani

Advocate for the Petitioners	: Mr. Ratnanko Banerjee, Snr. Adv. Mr. Kaushik Gupta Ms. Pritha Basu Ms. Aryaa Chatterjee Ms. Shivangi Pathak
Advocate for the Opposite Party	: Mr. Sakya Sen Mr. Deb Kumar Sen Mr. Subhamay Dewanji
Heard on	: 02.04.2019
Judgment on	: 16.04.2019

Madhumati Mitra, J. :

This is application under Section 482 of the Code of Criminal Procedure filed by the petitioners praying for quashing of entire proceedings in connection with C.C.No.387 of 2017 pending before the Learned Judicial Magistrate, 4th Court, Serampore, Hooghly.

Brief facts which are necessary to consider the prayer of the petitioners may be mentioned as under:

Present opposite party being the complainant on 14.06.2017 filed a petition of complaint before the Learned Additional Chief Judicial Magistrate, Serampore, against the present petitioner for commission of alleged offence under Section 138 of the Negotiable Instruments Act. Learned Additional Chief Judicial Magistrate took cognizance of the alleged offence and transferred the same to the Learned Judicial, 4th Court, Serampore, for disposal. On 25.08.2017 Learned Magistrate issued process against the petitioners to face trial for commission of alleged offence punishable under Section 138 of the Negotiable Instruments Act. After appearance, the petitioner no.2 prayed for exemption from personal appearance before the Court in connection with the proceedings pending against him. On 30.07.2018, the said prayer of the petitioner no.2 under Section 205 of the Code of Criminal Procedure was rejected by the Learned Magistrate and the petitioner no.2/accused was directed to remain present in the Court on the next date i.e. on 31.08.2018.

By filing the present application under Section 482 of the Code of Criminal Procedure, the petitioners have challenged the legality and validity of the proceedings under Section 138 of the Negotiable Instruments Act, pending before the Leaned Magistrate.

Present opposite party is the complainant of the proceeding under Section 138/141 of the Negotiable Instruments Act, 1881 pending before the Learned Magistrate. Complainant is the sole proprietor of the business under the name and style D.K.Enterprise and carrying on business of supplier of building materials. Accused no.1 is the present petitioner no.1 and is a company incorporated within the meaning of Companies Act, engaged in the business as contractor and builder of infrastructural projects and accused no.2 is present petitioner no.2 who has been described in the petition of complaint as Managing Director of the company. As per purchase orders placed from time to time by the accused no.1 company, the complainant supplied materials and after supply of materials, the complainant raised bills. It has been alleged in the said complaint that the accused did not make any payment. On repeated demand, the accused no.2 on behalf of the company issued two account payee cheques in favour of complainant firm being cheque no.001189, dated 20.03.2017 drawn at Kotak Mahindra Bank, Apeejay House, 15, Park Street, Kolkata, of Rs.2,50,00,000/- and cheque no.001188, dated 02.03.2017, drawn on Kotak Mahindra Bank, Apeejay House, 15, Park Street, Kolkata of Rs.67,98,008/- in discharge of their legal debts and liabilities.

Complainant presented the cheque no.001188, dated 02.03.2017 for encashment to the complainant's Bank, Axis Bank, Rishra Branch, Rishra, Hooghly, but the said cheque returned unpaid with remarks 'funds insufficient' on 07.04.2017. Complainant served demand notice upon the accused with a request to pay Rs.67,98,008/- within a period of 15 days from the date of receipt thereof. Accused gave reply dated 05.05.2017 to said demand notice admitting the issuance of cheque towards their liability though some pleas were taken therein. Accused did not make any payment in spite of receipt of the demand notice.

Present petitioner no.1 M/s. MBL Infrastructures Ltd. is a company incorporated within the meaning of Companies Act and has been projected as accused no.l, in the proceeding pending before the Learned Magistrate whereas the petitioner no.2 has been described as Managing Director and Chairman of the accused no.1, Company.

By filing the present application under Section 482 of the Code of Criminal Procedure, the petitioners have prayed for quashing of the criminal proceedings pending before the Learned Magistrate on the following grounds:-

RBL Bank Limited started a proceeding from 30.03.2017 being company petition no.170 of 2017 before the Kolkata Bench of the National Company Law Tribunal against the present petitioner no.1, company. It has been specifically stated by the petitioners that petitioner no.2 was the Chairman and Managing Director of the petitioner no.1, company upto 30.03.2017 and again became the Chairman and Managing Director with effect from 19.04.2018. He was a suspended Director for the period from 30.03.2017 to 18.04.2018 by operation of law. The cause of action to file the complaint against the accused arose during the said period. By virtue of the order dated 30.03.2018 passed by the Kolkata Bench of the National Company Law Tribunal an Interim Resolution Professional was appointed. Emphasis has been given to the provisions as contained in Section 14 of the Insolvency and Bankruptcy Code, 2016, and it has been contended that the company was under moratorium at the relevant point of time. The petitioners admitted the factum of receipt of the demand notice under Section 138/141 of the Negotiable Instruments Act, 1881, but the petitioners have now claimed that they were under judicial restraint from making payment of the amount covered by the impugned cheque to the complainant within the statutory period of time and same was duly communicated to the complainant vide reply dated 05.05.2017. In view of the insolvency resolution process initiated under IBC, the petitioner no.2 was suspended Director with effect from 30.03.2017 and was thus neither in charge of the affairs of the company nor responsible for the conduct of its business during the period with effect from 30.03.2017. When the petitioner no.1, company was undergoing the Insolvency resolution process under the IBC, the affairs of the company were managed by the Insolvency

Resolution Professional (IRP) appointed by NCLT, Kolkata vide order dated 30.03.2017. It has been forcefully submitted that petitioner no.2 was not involved in and connected with the affairs of the company when the cheque in question was dishonoured. It has been stated by the petitioner that the very requirements of Section 141 of the Negotiable Instruments Act, by virtue of which the petitioner no.2 was alleged to have been made vicariously liable for the dishonour of the impugned cheque, are not satisfied, since on the date of alleged offence the petitioner no.2 was member of the suspended Board of Directors and was not person in charge of and responsible to the company for the conduct of the business of the company. It has been further submitted that petitioner-company was subjected to insolvency proceedings was public knowledge in view of public declaration dated 7th April, 2017. Issuance of summons against the petitioners for commission of alleged offence under Section 141/138 of the Negotiable Instruments Act was not legally tenable.

During the course of hearing Learned Counsel appearing for the petitioners has forcefully submitted that learned NCLT, Kolkata vide an order under Section 7 of the Insolvency and Bankruptcy Code started corporate insolvency resolution process against the petitioner no.1 company vide its order dated 30.03.2017 and declared moratorium and also directed for issuance of public notice. It has been contended that when the impugned cheque was presented for encashment and when the cheque was dishonoured vide return memo dated 07.04.2017, the petitioner no.2 was no way connected with the management and affairs of the company and as such he cannot be held responsible for dishonour of the cheque. He has further submitted that petitioner no.2 was not responsible for the affairs of the company after declaration of 'moratorium' of the company, i.e petitioner no.1. He has invited the attention of the Court to the various provisions of the Insolvency and Bankruptcy Code 2016 and submitted that the entire management of the company was under the control of Interim Resolution Professional and petitioner no.2 had no role to play regarding the management of the company. Though in their application under Section 482 of the Code of Criminal Procedure the petitioners have cited several decisions, but during the course of hearing Learned Advocate for the petitioners has not laid stress on the decisions as mentioned in the application under Section 482 of the Code of Criminal Procedure.

On the contrary, Learned Advocate appearing for the opposite party/complainant has vigorously argued that the proceedings under Section 138 of the Negotiable Instruments Act, pending before the Learned Magistrate is well maintainable. It is his specific contention that the provisions of moratorium as contained in Section 14 of the Code, has no manner of application to criminal proceedings. In support of his contention he has placed his reliance on the decision in ***Indorama Synthetics (I) Ltd. Nagpur***

Vs. State of Maharashtra and others *reported in* *2016(4) Mh.L.J.249* and submitted that the provisions of moratorium of Section 14 of the Code are not applicable to criminal proceedings. Learned Counsel for the complainant has further contended that admittedly the petitioner no.2 issued the cheque in question as Managing Director and Chairman of the company and the factum of dishonour of the said cheque has not been disputed by the petitioners. The only plea as taken by the petitioners is that at the time of commission of alleged offence i.e. when the cheque was presented for encashment and when the cheque was dishonoured, the petitioner no.2 ceased to be the Managing Director of the company due to the declaration of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016. The continuation of criminal proceedings under Section 138/141 of the Negotiable Instruments Act, has been challenged by the petitioners on the ground that due to declaration of moratorium the management of the company was vested with Interim Resolution Professional and when the cheque was dishonoured company was under the management of Interim Resolution Professional.

It appears that when the cheque in question returned unpaid with remarks 'funds insufficient' on 07.04.2017 and when the demand notice was served on the company and the Managing Director on 25.04.2017 and 26.04.2017 respectively, the management of the company was under Interim Resolution Professional who was appointed vide order dated 30.03.2017 in company petition no.170 of 2017. Issuance and dishonor of cheque are admitted fact.

Annexure at 'page-47' is the said order of moratorium as referred by the Learned Counsel for the petitioners. The order of moratorium mentions about prohibition of certain activities, as contained in the said order. I am referring the consequences of the said order as reflected in the order itself. The relevant portion of the said order runs as under:-

> *"(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 judgement, 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 (54 of 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.*

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

It appears that the said declaration of moratorium does not prohibit continuation of criminal proceeding against the company or its Directors.

From the order of moratorium dated 30.03.2017 as well as from Section 14 of the Insolvency and Bankruptcy Code it can be said that the declaration of moratorium has no manner of application to criminal proceedings. Hence, the plea as raised by the petitioners that at the relevant point of time when the cheque was dishonoured and demand notice was receipt by the petitioners, company was under the management of Interim Resolution Professional and as such the petitioners were not responsible for the dishonour of cheque and criminal proceedings should not be continued against them cannot be accepted at this stage.

Declaration of moratorium itself does not create any bar for continuation of the criminal proceedings under Section 138/141 of the Negotiable Instruments Act. It is well settled that while considering an application under Section 482 of the Code of Criminal Procedure for quashing any criminal proceedings, the Court has ordinarily to proceed on the basis of the averments made in the written complaint. In the present case admittedly cheque was issued by the petitioners in favour of complainant. In terms of Section 139 of the Negotiable Instruments Act there shall be necessary presumption of existing liability in favour of holder of the cheque.

Averments made in the petition of complaint prima facie clearly indicate the commission of alleged offence under Section 138/141 of the Negotiable Instruments Act.

Reliance has been placed by the opposite party on the decision of ***Indorama Synthetics (I) Ltd. Nagpur Vs. State of Maharashtra and others.*** In that case, a question arose whether the expression 'suit or other proceedings mentioned in Section 446(1) of the Companies Act', would include criminal proceedings under Section 138 of the Negotiable Instruments Act. It has been held in that case that the said expression 'suit or other proceedings used in Section 446(1) of the Companies Act', does not mean each and every civil proceedings, which has no bearing on the winding up proceedings or criminal offences where the Director of the company is personally liable for penal action. Moreover, in paragraph 28 of the said judgment it has also been observed that if one considers the provisions of section 138 of the Negotiable Instruments Act, which were introduced subsequently by way of amendment in the said Act, in the year 1988, it being a subsequent statute, it would necessarily override the provisions of general statute, like, the Companies Act.

In this connection I would like to mention paragraph 17 of the Judgment in ***Indorama Synthetics (I) Ltd. Nagpur Vs. State of Maharashtra and others*** *reported in 2016(4) Mh.L.J.249*.

Paragraph 17 of the above referred judgment runs as under:-..

> *"17. Thus, the main object of section 138 of N. I. Act, which can be inferred, is to safeguard the credibility of commercial transactions and to prevent bouncing of cheques by providing* ***a personal criminal liability against the drawer of the cheque in public interest.*** *No civil liability or any liability against the*

assets of the drawer of the cheque is contemplated under Section 138 of the N. I. Act. Hence, it follows that the provisions of section 446(1) of the Companies Act can have apparently and in essence no application to the proceedings under section 138 of Negotiable Instruments Act, as it is not a suit or proceeding having direct bearing on the proceedings for winding-up or the assets of the Company."

While dealing with an application under Section 482 of the Code of Criminal Procedure the High Court should not assume the jurisdiction of the trial Court and hold a parallel trial. High Court in exercise of its power under Section 482 of the Code of Criminal Procedure is not expected to discharge the function of trial judge.

The Court while considering the prayer of quashing should not delving deep into the merit of the case or adjudicate upon a defence of the accused. Moreover, the petitioner is at liberty to place his plea by way of defence during trial.

In my considered view, it is not a fit case to exercise discretion under Section 482 of the Code of Criminal Procedure and to quash the proceedings pending against the petitioner.

As a result, the application under Section 482 of the Code of Criminal Procedure is dismissed.

Interim order, if any stands vacated.

Re: C.R.A.N.678 of 2019
With
C.R.A.N.770 of 2019 :-

In view of the order passed in CRR 3455 of 2018, both the applications become infructuous and stand dismissed.

Urgent Photostat certified copy of this order, if applied for, shall be supplied expeditiously after complying with all necessary legal formalities.

(Madhumati Mitra, J.)