IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MMO No. 924 of 2023
Date of Decision: 06.09.2024

Tushar Sharma .....**Petitioner**

Versus

State Bank of India .....**Respondent**

Coram
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting? Yes.

For the petitioner: Mr. Subhash Sharma, Advocate.

For the Respondent: Mr. Arvind Sharma and Ms. Kiran Sharma, Advocates.

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 21.07.2023, whereby an application on behalf of petitioner (hereinafter '***accused***') filed under Section 96 of Insolvency and Bankruptcy Code, 2016, praying therein to stay the proceedings initiated at the behest of respondent-complainant (hereinafter '***complainant***') under Section 138 of Negotiable Instruments Act (hereinafter '***Act***') came to be dismissed, petitioner has approached this Court in the instant proceedings filed under Section 482 of Code of Criminal Procedure, praying therein to set aside the aforesaid order and stay the further proceedings in the complaint filed by the complainant bank under Section 138 of the Act.

2. For having bird's eye view, facts relevant for adjudication of the case at hand are that complainant bank instituted proceedings under Section 138 of the Act in the Court of learned JMFC Court No. III, Una, alleging therein that accused and his wife Smt. Shaveta Sharma applied for term loan facility as house loan for sum of Rs. 2,00,00,000/- and same was

granted on 24.01.2015. Since accused failed to repay the loan amount as per the terms and conditions of agreement executed *inter se* accused and complainant bank and the sum of Rs. 2,04,66,124/- alongwith interest calculated up to 12.02.2019 was outstanding loan amount against the accused, he with a view to discharge his lawful liability issued cheque bearing No. 393682 dated 14.02.2019 amounting to Rs. 5,90,000/- of his account No. 35417139168 of State Bank of India, Branch Basal, District Una, H.P. in favour of complainant, but fact remains that aforesaid cheque on its presentation, was dishonoured on account of insufficient funds vide memo dated 14.02.2019. Since accused failed to make the payment good within the time stipulated in the legal notice, complainant bank was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

3. Learned trial Court on the basis of averments contained in the complaint as well as documents annexed therewith issued process against the accused. During pendency of afore complaint, accused filed an application under Section 96 of Insolvency and Bankruptcy Code, 2016 ***(Annexure P-7)***, stating therein that he has filed one application under Section 94(1) read with other applicable provisions of Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Chandigarh and in pursuance to the invocation of said provision of law, the same become operational, whereby interim moratorium has actually commenced on the date of filing of the petition. Accused also submitted in afore application that as per Section 96(1) (a) an interim moratorium will commence on the date of the application in relation to all the debts and

shall cease to have effect on the date of admission on such application. It was further stated in the application that as per Section 96 (1) (b) (i) that during interim moratorium period any pending legal action or proceedings in respect of any debt shall be deemed to have been stayed and as per 96 (1) (b) (ii) during the interim moratorium the creditors of the debtors shall not initiate any legal action or proceedings in respect of any debts.

4. Afore prayer made on behalf of accused came to be resisted at the behest of complainant bank, which by way of filing reply to the application, submitted that property comprised in plot No. 64, Sector 5-C of OMAX City, Chandigarh, against whom the present complaint is pending is exclusively owned by Smt. Shaveta Sharma and is mortgaged with the Basal Branch of the complainant bank. Complainant bank also submitted that complainant bank is a secured creditor and the loan is collaterally secured by way of equitable mortgage of this property and the said property has no other charge of any nature whatsoever, and the complainant bank has got paramount charge over the property against the house loan given to Shaveta Sharma for sum of Rs. 2,00,00,000/-. Most importantly, complainant bank submitted before learned trial Court that M/s Bhagat Ram Motorways Pvt. Ltd. and Smt. Shaveta Sharma are two entirely different entities. Learned trial Court taking note of aforesaid pleadings adduced on record proceeded to reject the application on the ground that proceedings under Section 138 of the Act and Insolvency and Bankruptcy Code are separate in nature and both the proceedings can run simultaneously. In the aforesaid background, accused has approached this

Court in the instant proceedings, praying therein to set aside the aforesaid order.

5. Precisely, the grouse of the petitioner, as has been highlighted in the petition and further canvassed by Mr. Subhash Sharma, learned counsel for the petitioner, is that learned trial Court, while passing impugned order, failed to take note of the fact that accused had filed one application under Section 94 (1) of Insolvency and Bankruptcy Code, as a result thereof, interim moratorium had actually commenced on the date of filing of the petition by the company qua all the debts of the petitioner. Mr. Sharma, submitted that on account of interim moratorium all the proceedings with regard to realization of debts are deemed to be stayed and as such, there was otherwise no occasion, if any, for the learned trial Court to dismiss the application filed by the complainant bank under Section 96 of Insolvency and Bankruptcy Code.

6. To substantiate the aforesaid plea, Mr. Subhash Sharma, learned counsel for the petitioner, specifically invited attention of this Court to judgment passed by Hon'ble Apex Court in case titled ***P.Mohanraj & Ors. Vs. Shah Brothers Ispat Private Ltd. (2021) 6 SCC 258.*** Mr. Sharma, state that as per aforesaid judgment, moratorium under Section 14 would also apply in respect of proceedings initiated under Sections 138 and 141 of the Act against corporate debtor.

7. To the contrary, Mr. Arvind Sharma, learned counsel for the complainant bank, supported the impugned order. He submitted that bare perusal of pleadings adduced on record by the accused would itself suggests that complaint filed under Section 138 of the Act at the behest of

complainant bank is qua the loan advanced to the wife of the accused. He submitted that property comprised in plot No. 64, Sector 5-C of OMAX City, Chandigarh, is exclusively owned by Smt. Shaveta Sharma wife of the accused and afore property stands mortgaged with the Basal Branch of the complainant bank against the house loan given to the wife of the accused not to the accused. He submitted that proceedings pending, if any, before National Company Law Tribunal is qua the property and debt, if any, of M/s Bhagat Ram Motorways Pvt. Ltd., but certainly not qua the property and debt, if any, of Smt. Shaveta Sharma.

8. While referring to judgment passed by the Hon'ble Apex Court in ***Ajay Kumar Radheshyam Goenka Vs. Tourism Finance Corporation of India Ltd.*** decided on 15.03.2023 in Cr. Appeal No. 170, 171 & 172 of 2023, which has been otherwise taken note by learned trial Court, while passing impugned order, Mr. Arvind Sharma, learned counsel for the respondent, vehemently argued that proceedings under Section 138 of the Act do not **abate** on triggering of the provisions of Insolvency and Bankruptcy Code, rather both the proceedings can run simultaneously.

9. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned in the impugned order, this court finds no illegality or infirmity and as such, no interference is called for.

10. Careful perusal of application filed under Section 94(1) read with other applicable provisions of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 (1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal

Guarantors to Corporate Debtors) Rules, 2019 ***(Annexure P-3)*** itself suggests that accused, was a Director/Promoter of companies namely i.e. Magma Autolinks Pvt. Ltd.; Shaveta Golden Foods Pvt. Ltd.; Tanishka Agro Ventures Pvt. Ltd.; Maxim Infra Venues Pvt. Ltd. and Tanishka Automotive Pvt. Ltd. and their companies had obtained various credit facilities from the financial institutions. Accused had given a personal guarantee for repayment of said credit facilities. Since accused failed to clear the outstanding dues, lender bank issued notice under Section 13(2) of SARFAESI Act, for payment of guarantee amount, however, accused did not make any payment in response to the said notice, as a result thereof, bank concerned issued possession notice to the Personal Guarantor i.e. accused under Section 13(4) of SARFAESI Act, 2002. In the aforesaid background, company namely Magma Autolinks Pvt. Ltd. filed an application under Section 10 of IBC before learned National Company Law Tribunal, Chandigarh bearing Company Petition (IB) No. 127/CHD/HP/2018, titled "Magma Autolinks Pvt. Ltd." to initiate Corporate Insolvency Resolution Process ("**CIRP**") of the company. The CIRP of the company was initiated on 13.09.2018 and thereafter, bank concerned submitted its claim in Form-C, which was duly accepted by the Interim Resolution Professional of the Corporate Debtor. On account of initiation of aforesaid proceedings interim moratorium came to be declared qua all debts of the aforesaid company.

11. Besides above, accused and his wife Smt. Shaveta Sharma, applied for term loan facility as house loan for a sum of Rs. 2,00,00,000/-, which was granted on 24.01.2015. Since accused failed to repay the loan

amount as per the terms and conditions of agreement executed by the accused with complainant bank, he with a view to discharge his lawful liability issued cheque bearing No. 393682 dated 14.02.2019 amounting to Rs. 5,90,000/- of his account No. 35417139168, but fact remains that aforesaid cheque on its presentation, was dishonoured on account of insufficient funds vide memo dated 14.02.2019, as detailed hereinabove. Since accused failed to make the payment good within the time stipulated in the legal notice, complainant bank was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act, but before same could be taken to its logical end, accused filed an application under Section 96 of Insolvency and Bankruptcy Code, 2016, for staying the proceedings under Section 138 of the Act, stating that he has filed an application under application under Section 94 (1) of Insolvency and Bankruptcy Code before National Company Law Tribunal, as a result thereof, interim moratorium stands issued against all the existing debts including debt which is the subject matter of the proceedings under Section 138 of the Act, however, such plea of him was not accepted by the Court on the ground that proceedings under Section 138 of the Act do not abate on account of initiation of proceedings, if any, under Insolvency and Bankruptcy Code, 2016, rather both can run concurrently.

12. Precisely, the question, which needs to be determined in the instant proceedings is that "whether proceedings under Section 138 of the Act also abate on account of initiation of proceedings, if any, under Section 94 (1) of Insolvency and Bankruptcy Code, or same can proceed simultaneously alongwith afore proceedings initiated under Insolvency and

Bankruptcy Code?" Aforesaid question has already been answered by the Hon'ble Apex Court in case titled ***Ajay Kumar Radheyshyam Goenka Vs. Tourism Finance Corporation of India Ltd***. (*supra*), wherein Hon'ble Apex Court taking note of its earlier judgment passed in **P.Mohanraj & Ors.** (supra) has categorically held that where the proceedings under Section 138 of the Act had already commenced with the Magistrate taking cognizance upon the complaint and during pendency of the company gets dissolved, signatories, directors cannot escape from their penal liability under Section 138 of the Act by citing its resolution. Hon'ble Apex Court further held in the afore judgment that an offence under Section 138 of the Act, which has been committed by the company and is proved that offence has been committed with consent and connivance of, any neglect on the part of any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Relevant paras of the afore judgment reads as under:

> *45. In **P. Mohanraj** (supra), this Court in clear terms held that Section 32A only protects the corporate debtor and not the signatories/directors etc. The prosecution against the signatories/directors would continue. In **P. Mohanraj** (supra):-*
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> > ***a**. The issue involved was whether the institution/continuation of a proceeding under Section 138/141 of the NI Act, 1881 is said to be covered by Section 14 of the IBC, 2016.*

***b**. That Section 138 proceedings can be said to be a "civil sheep" in a "criminal wolf's" clothing. i. The Court relied upon **Kaushalya Devi Massand v. Roopkishore Khore**, (Para 59) [(2011)4 SCC 593] and **Meters & Instruments (P) Ltd. v. Kanchan Mehta**, (Para 63) [(2018)1 SCC 560]*

***c.** Section 138 proceedings are covered by Section 14 of the IBC, 2016. (Para 67)*

***d.** Moratorium under Section 14, IBC only applies to the Corporate Debtor and does not apply to natural persons mentioned under Section 141 of NI Act, 1881. The said conclusion is reached after considering **Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661**. (Para 102)*

*e. I quote para 102 of **P. Mohanraj** (supra) as under:*

*"102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of Sections 138/141 proceedings against the corporate debtor and initiation of Sections 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paras 51 and 59 in Aneeta Hada ((2012) 5 SCC 661) would then become applicable. The legal impediment contained in Section 14 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 Sections 138/141 proceeding can continue or be initiated against the corporate debtor because of a statutory bar, such proceedings can be initiated or continued against the persons mentioned in Sections 141(1) and (2) of the Negotiable Instruments Act. This being the case,***

> ***it is clear that the moratorium provision contained in Section 14 IBC would apply only to the corporate debtor, the natural persons mentioned in Section 141 continuing to be statutorily liable under Chapter XVII of the Negotiable Instruments Act."*** *(Emphasis supplied)*

46. While dealing with the issue of Section 14, IBC, this Court had the occasion to deal in detail with Section 32A also. The 2nd proviso to Section 32A(1) is a complete answer to the issue in question. The said provision is discussed in detail from Paras 39-43 in ***P. Mohanraj's*** *case. Paras 39 to 43 read thus:*

> *"39. The raison d'être for the enactment of Section 32-A has been stated by the Report of the Insolvency Law Committee of February 2020, which is as follows:*
>
> > *"17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP [Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.]*
> >
> > *17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29-A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in*

the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

Liability where a Resolution Plan has been approved

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the adjudicating authority. [SBI v.

Bhushan Steel Ltd., 2018 SCC OnLine NCLT 32305, para 83(i)] Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty-bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

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17.6. <u>Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the</u>

CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29-A. [For example, where the exemption under Section 240-A is applicable.]

17.7. Thus, the Committee agreed that a new section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be

liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased." (emphasis in original and supplied)

40. This Court in Manish Kumar v. Union of India [(2021) 5 SCC 1], upheld the constitutional validity of this provision. This Court observed : (SCC pp. 170-71, para 326)

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

thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision."

41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.

42. Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A(1) speaks of persons who are in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence" i.e. the offence referred to in sub-section (1), "as per the report submitted or complaint filed by the investigating

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

43. A section which has been introduced by an amendment into an Act with its focus on cesser of liability for offences committed by the corporate debtor prior to the commencement of the corporate insolvency resolution process cannot be so construed so as to limit, by a sidewind as it were, the moratorium provision contained in Section 14, with which it is not at all concerned. If the first proviso to Section 32-A(1) is read in the manner suggested by Shri Mehta, it will impact Section 14 by taking out of its ken Sections 138/141 proceedings, which is not the object of Section 32A(1) at all. Assuming, therefore, that there is a clash between Section 14 IBC and the first proviso of Section 32-A(1), this clash is best resolved by applying the

doctrine of harmonious construction so that the objects of both the provisions get subserved in the process, without damaging or limiting one provision at the expense of the other. If, therefore, the expression "prosecution" in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in." (Emphasis applied)

Thus, the heart of the matter is the second proviso appended to Section 32A(1) (b) of the IBC which provides statutory recognition of the criminal liability of the persons who are otherwise vicariously liable under Section 141 of NI Act, in the context of Section 138 offence.

46. Thus, Section 32A broadly leads to:

a. Extinguishment of the criminal liability of the corporate debtor, if the control of the corporate debtor goes in the hands of the new management which is different from the original old management.

b. The prosecution in relation to ***"every person who was a "designated partner" as defined in clause (j) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in***

clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013) , or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence" *shall be proceeded and the law will take it's own course. Only the corporate debtor (with new management) as held in Para 42 of* ***P. Mohanraj*** *will be safeguarded.*

c. ***If the old management takes over the corporate debtor*** *(for MSME Section 29A does not apply (see 240A), hence for MSME old management can takeover)* ***the corporate debtor itself is also not safeguarded from prosecution under Section 138 or any other offences.***

Thus, I am of the view that by operation of the provisions of the IBC, the criminal prosecution initiated against the natural persons under Section 138 read with 141 of the NI Act read with Section 200 of the CrPC would not stand terminated.

54. Thus, while interpreting Sections 14, 31 & 32A reply of the IBC vis-a-vis Sections 138 and 141 reply of the NI Act, the principle of harmonious construction should be applied and followed. By permitting to proceed against the signatories/directors even after the approval of the plan, what is achieved is uniformity in the functioning of the law by removing the anomalous and absurd situations, thereby, making it compliant with Article 14 of the Constitution. The said interpretation shields the relevant provisions from attack of being manifestly arbitrary.

55. The distinction between a strict construction and a more free one has disappeared in the modern times and now mostly the question is, "what is the true construction of the statute?" A passage in Craies on Statue Law 7th Edn. reads to the following effect:-

> *"The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. 'All modern Acts are framed with regard to equitable as well as legal principles.' "A hundred years ago", said the court in Lyons' case, "statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature."*

56. At page-532 of the same book, observations of Sedgwick are quoted as under: "The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy."

58. This Court in Lalit Kumar Jain v. Union of India and Others reported in (2021) 9 SCC 321 has held that the approval of the resolution plan per se does not operate as a discharge of guarantors' liability. That is because:

> *a. an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability.*

b. a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability.

59. The same principle is applicable to the signatory/director in the case of Section 138/141 proceedings. The signatory/director cannot take benefit of discharge obtained by the corporate debtor by operation of law under the IBC.

60. If the argument that extinguishment of debt under Section 31 of the IBC leads to the discharge of signatory/director under Section 138 proceedings is accepted, the same will lead to conflict in law as laid down compared to the guarantor's liability wherein in spite of the plan being approved, the guarantor is held separately liable for the ***remaining amount****. If the guarantor does not get the benefit of extinguishment of debt under Section 31 of the IBC, then similarly for extinguishment of debt, the signatory/director cannot get any benefit.* ***If accepted, this may lead to uncertainty in the first Principles of law on interpretation of extinguishment of debt****. In* ***Lalit Kumar Jain*** *(supra) this Court held as under:*

> *"122. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] the liability of the guarantor (in a case where liability of the principal debtor was discharged under the*

Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act. This Court observed as follows: (SCC pp. 362-63, para 7)

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract.* ***A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the***

creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath [1939 SCC OnLine Bom 65 : AIR 1940 Bom 247] ; see also Fitzgeorge, In re [Fitzgeorge, In re, (1905) 1 KB 462]).""

(Emphasis supplied)

85. Thus, the upshot of all the decisions referred to above is where the proceedings under Section 138 of the NI Act had already commenced with the Magistrate taking cognizance upon the complaint and during the pendency, the company gets dissolved, the signatories/directors cannot escape from their penal liability under Section 138 of the NI Act by citing its dissolution. What is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act.

13. It is quite apparent from the aforesaid exposition of law laid down by Hon'ble Apex Court that the signatory/director cannot take benefit of discharge obtained by corporate debtor by operation of law under the IBC, meaning thereby that personal liability of signatory/ director of the company in a cheque dishonour case cannot be absolved because there is pending corporate liability resolution proceedings against the company under the provisions of IBC. Directors/ signatories cannot escape from their penal liability by citing its dissolution, only the accused company is

dissolved and director/signatory cannot be permitted to go scot-free after the approval of resolution plan.

14. Moreover, this Court finds from the pleadings adduced on record that though loan in question was sanctioned jointly in the name of accused and his wife Smt. Shaveta Sharma, but admittedly, while granting loan in favour of afore persons property belonging to Smt. Shaveta Sharma situate in Chandigarh was mortgaged with the complainant bank. Since complainant bank is a secured creditor and loan is strictly secured by way of equitable mortgage of the property in question, coupled with the fact that such property has no other charge of having nature, complainant bank has otherwise paramount charge of the property against the house loan given to the accused and Smt. Shaveta Sharma for Rs. 2,00,00,00/-.

15. Consequently, in view of detailed discussion made hereinabove as well as law taken into consideration, this Court finds no illegality or infirmity in the impugned order, which appears to be based upon proper appreciation of facts and law and as such, same is upheld. Present petition fails and dismissed accordingly.

(Sandeep Sharma)
Judge

September 06, 2024
(sunil)