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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 12TH DAY OF FEBRUARY 2025 / 23RD MAGHA, 1946

OP(CRL.) NO. 790 OF 2024

(AGAINST THE ORDER DATED 10.09.2024 IN CC NO.996 OF 2021 OF SPECIAL COURT OF JUDICIAL MAGISTRATE OF FIRST CLASS FOR TRIAL OF CASES U/S.138 NI ACT(JMFC XI), THIRUVANANTHAPURAM)

PETITIONER/1ST ACCUSED:

CARNIVAL FILMS PVT. LTD
CARNIVAL HOUSE, BEHIND DINDOSHI FIRE STATION,
OFF. GENERAL A. K. VAIDYA MARG, MALAD (EAST),
MUMBAI, MAHARASHTRA, PIN - 400097, REPRESENTED BY
ITS RESOLUTION PROFESSIONAL, ASHOK KUMAR GULLA,
C/O RBSA RESTRUCTURING ADVISORS LLP, DLF CORPORATE
PARK, 4TH FLOOR, 4B TOWER, GURGAON,
HARYANA, PIN - 122001.

BY ADVS.ARUN SAMUEL
JITHIN BABU A
ANOOD JALAL K.J.

RESPONDENTS/STATE OF KERALA & COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.



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2 MALABAR COMMERCIAL PLAZA PVT. LTD.
HAVING ITS REGISTERED OFFICE AT 41/2299,
3RD FLOOR, MALABAR GATE, RAM MOHAN ROAD,
PUTHIYARA P. O., CALICUT DISTRICT, KERALA,
PIN - 673004, REPRESENTED BY ITS AUTHORIZED
REPRESENTATIVE SHADULY HASSAN, AGED 39 YEARS,
S/O HASSAN T., RESIDING AT SAYOOK, KODATHUMPOYIL,
KACHERI ROAD, KAKKODI P. O., CALICUT DISTRICT,
KERALA, PIN - 673611.

R1 BY P.P.SRI.G.SUDHEER

R2 BY ADV.SRI.M.SREEKUMAR

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON
12.02.2025, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



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JUDGMENT

The prayers in this original petition are as follows:-

- “(a) Set aside Exhibit P5 order passed by the Judicial Magistrate of the First-Class, Thiruvananthapuram in C.M.P.4843/2024 in C.C.No.996/2021 in the interest of justice.
- (b) Declare that Ext.P1 cannot be proceed against the petitioner until the moratorium declared under section 14 of the Insolvency and Bankruptcy Code, 2016 in terms of Ext.P2 is expired.
- (c) Issue any other order, or direction, as the petitioner may seek and this Hon’ble Court deems fit, in the facts and circumstances of the case and allow this petition with all costs.”

2. The petitioner is a non-Government private limited company incorporated with the Registrar of Companies, Gwalior engaged in the business of motion picture, radio, television and other entertainment activities.

3. In 2021, respondent No.2 filed a complaint numbered as C.C.No.996/2021 against the petitioner and three others before the Judicial First Class Magistrate Court-XII, Thiruvananthapuram alleging



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offence under Section 138 of the Negotiable Instruments Act, 1881. The petitioner is accused No.1 in this case. Accused No.2 is the petitioner's former Chief Executive Officer. Accused Nos.3 and 4 are the petitioner's former Directors.

4. M/s.Amar Constructions (operational creditor) approached the National Company Law Tribunal (NCLT) by presenting an insolvency petition on 28.11.2022 in terms of Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short 'the Code') for initiating the Corporate Insolvency Resolution Process against the petitioner (corporate debtor). As a consequence thereof, the petitioner has been admitted to the Insolvency Resolution Process. An interim resolution professional has also been appointed. The NCLT, Indore Bench, where the proceedings are pending, has declared a moratorium under Section 14 of the Code vide order dated 22.3.2024 in C.P.(IB)/81/MP/2022.

5. The petitioner filed C.M.P.No.4843 of 2024 before the trial Court challenging the maintainability of the complaint against the petitioner in the light of the declaration of moratorium. The learned



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Magistrate dismissed the application as per order dated 31.7.2024, which is under challenge in this original petition.

6. The learned counsel for the petitioner submitted that since Corporate Insolvency Resolution Process of the petitioner company is underway before the NCLT and the Tribunal has declared a moratorium under Section 14 of the Code, any proceedings, including the prosecution under Section 138 of the N.I. Act, shall not be continued as against the petitioner. The learned counsel relied on **P.Mohanraj and Others v. M/s.Shah Brothers Ispat Pvt. Ltd. [(2021) 6 SCC 258]** in support of his contention.

7. The learned counsel for the respondent, relying on **Ajay Kumar Radheyshyam Goenka v. Tourism Finance Corporation of India Ltd. [(2023) 10 SCC 545]** contended that the criminal prosecution initiated against a natural person under Section 138 would not stand terminated even after declaration of the moratorium under Section 14 of the Code. The learned counsel also relied on **P.Mohanraj** (supra) to support his contention.



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8. Admittedly, the petitioner is a corporate debtor. One M/s.Amar Constructions (operational creditor) has approached the NCLT, Indore Bench by presenting an insolvency petition against the corporate debtor. The applicant therein filed CP(IB)/81/MP/2022 before the NCLT under Section 9 of the Code. The Tribunal has declared a moratorium under Section 14 of the Code as per its order dated 22.3.2024. Subsequently, as per order dated 16.5.2024, the Tribunal appointed a resolution professional for the petitioner. The Corporate Insolvency Resolution Process is now underway.

9. The contention of the petitioner is that in view of the moratorium declared under Section 14 of Code, the present proceedings initiated under Section 138 of the Negotiable Instruments Act shall not be continued as against the petitioner.

10. Section 14 of the Code reads thus:-

“(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 judgement, decree or order in any Court of



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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.

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11. A Three-Judge Bench of the Supreme Court in **P.Mohanraj** (supra) has considered the question whether a Section 138/141 proceeding under the Negotiable Instruments Act against a corporate debtor is covered by Section 14(1)(a) of the Code. In **P.Mohanraj** (supra), the Supreme Court held thus:-

"Whether natural persons are covered by Section 14 IBC

101. As far as the Directors/persons in management or control of the corporate debtor are concerned, a Sections 138/141 proceeding against them cannot be initiated or continued without the corporate debtor—see *Aneeta Hada v. Godfather Travels & Tours (P) Ltd.*, [(2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241]. This is because Section 141 of the Negotiable Instruments Act speaks of persons in charge of, and responsible to the Company for the conduct of the business of the Company, *as well as the Company*. The Court, therefore, in *Aneeta Hada* held as under : (SCC pp. 686-88, paras 51, 56 & 58-59).



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"51. We have already opined that the decision in *Sheoratan Agarwal v. State of M.P.*, [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] runs counter to the ratio laid down in *State of Madras v. C.V. Parekh*, [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada v. Indian Acrylic Ltd.*, [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the Company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.

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

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58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the Company is an express condition precedent to attract the vicarious liability of others.



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Thus, the words “as well as the Company” appearing in the section make it absolutely unmistakably clear that when the Company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the Company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V. Parekh* which is a three-Judge Bench decision. Thus, the view expressed in *Sheoratan Agarwal* does not correctly lay down the law and, accordingly, is hereby overruled. The decision in *Anil Hada* is overruled with the qualifier as stated in para 51. The decision in *U.P. Pollution Control Board v. Modi Distillery*, [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 IBC, by which continuation of Sections 138/141 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* 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



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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."

12. In **Ajay Kumar Radheyshyam Goenka** (supra), the Supreme Court observed thus:-

"17. We have no hesitation in coming to the conclusion that the scope of nature of proceedings under the two Acts is quite different and would not intercede each other. In fact, a bare reading of Section 14 IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings, which is the nature of proceedings under Section 138 of the NI Act. We are unable to appreciate the plea of the learned counsel for the appellant that because Section 138 of the NI Act proceedings arise from a default in financial debt, the proceedings under Section 138 should be taken as akin to civil proceedings rather than criminal proceedings. We cannot lose sight of the fact that Section 138 of the NI Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of the NI Act. It is not a recovery of the amount with interest as a debt recovery proceedings would be. They are not akin to suit proceedings.

18. It cannot be said that the process under IBC whether under Section 31 or Sections 38 to 41 which can extinguish the debt would ipso facto apply to the extinguishment of the criminal proceedings. No doubt in terms of the scheme under IBC there are sacrifices to be made by parties to settle the debts, the company being liquidated or revitalised. The appellant before us has been roped in as a signatory of the



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cheque as well as the Promoter and Managing Director of the accused Company, which availed of the loan. The loan agreement was also signed by him on behalf of the Company. What the appellant seeks is escape out of criminal liability having defaulted in payment of the amount at a very early stage of the loan. In fact, the loan account itself was closed. So much for the bona fides of the appellant."

13. In **Ajay Kumar Radheyshyam Goenka** the Apex Court further held thus:-

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

109. I may draw my final conclusions as under:

109.1. After passing of the resolution plan under Section 31 IBC by the adjudicating authority & in the light of the provisions of Section 32-A IBC, the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same is taken over by a new management.

109.2. Section 138 proceedings in relation to the signatories/Directors who are liable/covered by the two provisos to Section 32-A(1) will continue in accordance with law."

14. This Court in **Jacob Samson v. State of Kerala (2023 KHC 3349)** reiterated the principles underlined by the Supreme Court.



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Thus, the conclusions are the following:-

- (i) When the Corporate Insolvency Resolution Process of the company is underway, the corporate debtor would be covered by the moratorium provision contained in Section 14 of the Code 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.
- (ii) The moratorium provision under Section 14 of the Code would apply only to the corporate debtor.
- (iii) The natural persons referred to in Section 141 of the N.I.Act continues to be statutorily liable under Chapter XVII of the N.I. Act.

15. Therefore, the order impugned stands set aside. All further proceedings in C.C.No.996 of 2021 on the file of the Judicial First Class Magistrate Court-XII, Thiruvananthapuram against the petitioner (corporate debtor)/accused No.1 shall stand deferred till the moratorium is lifted by the competent authority. The learned Magistrate is at liberty to proceed against the natural persons.



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16. This Court in O.P.(Crl.)No.730 of 2023 had directed the learned Magistrate to expedite the trial in the Calendar Case. The learned Magistrate may proceed with the case against the natural persons in compliance with the directions of this Court in O.P. (Crl.)No.730 of 2023.

The Original Petition is disposed of as above.

Sd/-
K.BABU
Judge

TKS



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APPENDIX OF OP (CRL.) 790/2024

PETITIONER EXHIBITS

- Exhibit P1 A TRUE COPY OF THE COMPLAINT NUMBERED AS C.C.NO.996/2021 DATED FILED BY THE RESPONDENT AGAINST THE PETITIONER BEFORE THE JUDICIAL FIRST-CLASS MAGISTRATE'S COURT-XII, THIRUVANANTHAPURAM.
- Exhibit P2 A TRUE COPY OF THE ORDER DATED 22/03/2024 PASSED BY THE NATIONAL COMPANY LAW TRIBUNAL, INDORE BENCH IN CP(IB)/81/MP/2022.
- Exhibit P3 A TRUE COPY OF THE APPLICATION NUMBERED AS C. M. P. NO.4843/2024 DATED 31/07/2024 FILED BY THE PETITIONER AGAINST THE RESPONDENT IN THE COMPLAINT BEFORE THE TRIAL COURT.
- Exhibit P4 A TRUE COPY OF THE OBJECTION DATED 07/08/2024 FILED BY THE RESPONDENT AGAINST THE PETITIONER AS REGARDS EXT.P3.
- Exhibit P5 A TRUE COPY OF THE ORDER DATED 10/09/2024 PASSED BY THE TRIAL COURT IN C. M. P. NO. 4843/2024 IN C. C. NO. 996/2021.

TKS