IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.12.2019

Pronounced on : 09.01.2020

CORAM

The Hon`ble Mr.Justice G.R.SWAMINATHAN

CRL.OP Nos.34996, 35007, 35011, 35013, 35016 and 35020 of 2019
and
Crl MP Nos.19302, 19303, 19305, 19307, 19308 to 19313 &
19314, 19315 of 2019

Crl OP(MD)No.34996 of 2019 :

Mr.Ajay Kumar Bishnoi
Former Managing Director
M/s.Tecpro Systems Ltd., ... Petitioner/2nd Accused

Vs.

M/s.Tap Engineering,
Rep.by Mr.Jawahar ... Respondent/Complainant

Prayer : This criminal original petition is filed under Section 482 of the Criminal Procedure Code, to call for the records in C.C No.160 of 2017 dated 21.05.2014 initiated by the respondent under Section 138 of the Negotiable Instruments Act, 1881 pending before the Fast Track Court -IV Magistrate at Ambattur and quash the same as illegal, invalid and non est in the eyes of law and consequently direct the respondent/complainant to pursue their remedies as per the provision of Insolvency and Bankruptcy Code, 2016.

For Petitioner in all Crl.Ops. : Mr.Nithyaesh and Vaibhav

COMMON ORDER

These petitions have been filled under Section 482 of the Criminal Procedure Code by the former Managing Director of M/s.Tecpro Systems Limited. The prayer in these criminal original petitions is for quashing the complaints instituted by M/s.Tap Engineering under Section 138 r/w.141 of the Negotiable Instruments Act, 1881. The complainant is a proprietary concern. It is engaged in the business of manufacturing and sale of pumps, motors and accessories. It had business transactions with M/s.Tecpro Systems Limited. The supply of goods used to be based on the purchase orders placed by the Tecpro Systems Limited. The case of the complainant is that even though goods were supplied, payments were not made. Following persistent requests, Tecpro Systems Limited issued eight post dated DBS bank cheques to the complainant towards discharge of their liability. The cheques were presented. They were, however, returned for the reason “insufficient funds”. The returned cheques were re-presented. Again, they were dishonoured. Thereupon, Tap Engineering issued legal notices. Though a partial payment was made in respect of one dishonoured cheque, Tecpro Systems Limited failed to make payments with regard to the other cheques.

2.In view of the non compliance of the demand set out in the legal notices, Tap Engineering represented by its Proprietor filed C.C Nos.160, 161, 162, 163, 164, 165 and 166 of 2014 before the jurisdictional Magistrate court. Cognizance of the offence under Section 138 r/w 141 of the Negotiable Instruments Act, 1881 was taken and summons were issued. Tecpro Systems Limited was shown as the first accused. The petitioner herein was shown as the second accused in each of the complaints.

3.During the pendency of these complaints, Tecpro Systems Limited came under Corporate Insolvency Resolution Process. One of its financial creditors filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, New Delhi. The application was admitted and by order dated 07.08.2017, an Interim Resolution Professional was appointed and moratorium in terms of Section 14 of the Code was declared. The resolution plan submitted by Kridhan Infrastructures Private Limited was accepted. By order dated 15.05.2019, the Principal Bench of the National Company Law Tribunal, New Delhi declared that the resolution plan is binding on the corporate debtor, members, employees of the corporate debtor, creditors of the corporate

debtor and other stakeholders involved in the resolution plan. It is seen from the Annexure that Tap Engineering has been recognised as one of the operational creditors of the Tecpro Systems Limited and its claim as on 21.10.2017 was Rs.1,06,91,645/-. The resolution plan provided for change in the management. The control of the corporate debtor was to vest with the resolution applicant-KIPL.

4.The petitioner's contention is that in view of the acceptance of the resolution plan by the Tribunal and the change in management, the impugned prosecution against the petitioner under Section 138 of the Negotiable Instruments Act, 1881 is liable to be quashed. The petitioner's counsel points out that the resolution plan clearly states that all the outstanding negotiable instruments issued by the company or by any persons/entities on behalf of the company prior to the insolvency commencement date including demand promissory notes, cheques and letters of credit, shall stand terminated and the liability of the company and its current employees under such instruments shall stand extinguished and all the legal proceedings relating thereto shall stand irrevocably and unconditionally abated. His pointed contention is that on 07.03.2019, the resolution applicant Kridhan Infrastructure Private Limited had submitted its

resolution plan before the Interim Resolution Professional and the same has been approved and vide order dated 15.05.2019, KIPL has taken over the entire management of Tecpro Systems Limited coupled with assets and liabilities. The petitioner is therefore crippled by law. He cannot defend himself or conduct the case before the trial Court as he does not have access to any of the company records. The cheques in question were not issued in the personal individual capacity of the petitioner. In fact, the cheques were issued by the authorized signatory. Therefore, no penal liability can be fastened on the petitioner herein. He also contended that the Insolvency and Bankruptcy Code, 2016 is a self contained enactment which has an overriding effect over other laws. Therefore, continuation of the impugned prosecution would only amount to an abuse of legal process. He, therefore, called upon this Court to quash the impugned proceedings.

5.I am unable to agree with any of the contentions advanced by the learned counsel appearing for the petitioner. Section 14 of the Insolvency and Bankruptcy Code, 2016 contemplates declaration of moratorium. 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 is prohibited.

Question arose before various judicial fora as to whether the expression "proceedings" will include criminal prosecution.

6.The High Court of Calcutta in C.R.R No.3455 of 2018 vide judgment dated 16.04.2019, declined to quash the complaint under Section 138 of the Negotiable Instruments Act, 1881 merely on account of the declaration of moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016. The learned Judge held that declaration of moratorium under Section 14 of the Code, does not create any bar for continuation of criminal proceedings initiated under Section 138/141 of the Negotiable Instruments Act, 1881. The learned Judge placed reliance on ***Indorama Synthetics (I) Ltd. Nagpur Vs. State of Maharashtra and others*** reported in ***2016 (4) Mh.L.J.249.*** The question that arose in *Indorama* was whether the expression "suit or other proceedings" mentioned in Section 446(1) of the Companies Act, 1956 would include criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881. In ***Indorama Synthetics,*** it was answered in the negative after observing that the main object of Section 138 of the Negotiable Instruments Act 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.

7.A learned Judge of this Court (Mr.Justice G.K.Ilanthiraiyan) vide order dated 02.04.2019 in Crl OP No.8869 of 2018 (***M/S.Nag Leathers Pvt Ltd vs J.L.Sobhana),*** held that Section 138 of Negotiable Instruments Act is not a civil proceeding and that even fine imposed by the criminal court cannot be held to be a money claim or recovery against corporate debtor and that it is not covered under the prohibition set out in Section 14 of the Insolvency and Bankruptcy Code, 2016.

8.The National Company Law Tribunal vide order dated 31.07.2018 in (AT) (Insolvency) No.306 of 2018 (Shah Brothers Ispat Pvt. Ltd. vs. P.Mohanraj & Ors.), also held that Section 14 of the Insolvency and Bankruptcy Code, 2016 relating to moratorium will not cover criminal proceedings under Section 138 of the Negotiable Instruments Act, 1881.

9.While respectfully concurring with the ratio laid down in the aforesaid decisions, I may also reinforce the reasoning. Section 233 of Insolvency and Bankruptcy Code, 2016 which protects action taken in good faith under the Code or the Rules or Regulations made thereunder employs the expression “no suit, prosecution or other legal proceeding”. But, in Section 14 the expression “suits or proceedings” alone is found. The expression

"prosecution" is conspicuously absent in Section 14. When the legislature consciously included the expression "prosecution" elsewhere in the Code and omits it in Section 14 of the Code, I can only come to the conclusion that the omission is deliberate and intentional. The legislature did not intend to bar criminal prosecution even though moratorium has been declared.

10.Realizing this position, the learned counsel for the petitioner went on to argue that he is not anchoring his contention on Section 14 of the Code. He drew my attention to Section 31 of the Code which states that after the resolution plan is approved, moratorium order passed by the adjudicating authority under Section 14 of the Code, shall cease to have effect. The petitioner's counsel wanted me to focus my attention on Section 31(1) of the Code which states that the order of the adjudicating authority approving the resolution plan shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

11.Of course, no exception can be taken to this contention. But, the question that arises for consideration is whether the statutory effect of Section 31(1) of the Insolvency and Bankruptcy Code, 2016 is the extinguishment of the criminal prosecution instituted by one of the

operational creditors under Section 138 r/w.141 of the Negotiable Instruments Act, 1881.

12.The very object of the Insolvency and Bankruptcy Code, 2016 is to provide for Insolvency resolution in a time bound manner for maximization of value of assets. It has not been enacted to provide succor to those who by their misconduct contributed to defaults of the corporate debtor. In ***State Bank of India Vs. V. Ramakrishnan and Ors., [(2018) 17 SCC 394]***, the question that arose was whether Section 14 of the Insolvency and Bankruptcy Code, 2016 which provides for moratorium for the limited period mentioned in the Code on admission of an insolvency petition would apply to a personal guarantor of a corporate debtor. The first respondent in that case was the Managing Director of the corporate debtor as well its personal guarantor. The company did not pay its debts in time. It was classified as a non performing asset. The creditor bank issued notice under SARFAESI Act. Thereafter, the debtor filed a petition under Section 10 of the Code to initiate Corporate Insolvency Resolution process against itself. The petition was admitted followed by a moratorium that is imposed statutorily by Section 14 of the Code. During its pendency, an interim application was filed by the erstwhile managing director as personal guarantor of the corporate debtor

claiming that the moratorium would apply to him also and prayed for stay of the proceedings against him and his property.

13.The National Company Law Tribunal held that since under Section 31 of the Code, a Resolution Plan made thereunder would bind the personal guarantor as well, and since, after the debtor is proceeded against, the guarantor stands in the shoes of the creditor, Section 14 would apply in favour of the personal guarantor as well. The interim application filed by the first respondent was allowed and the creditor bank was restrained from moving against him. The Tribunal's order was confirmed by the appellate Tribunal also. The creditor bank challenged the orders of the Tribunal before the Hon'ble Supreme Court. The appeal filed by the creditor was allowed and the orders of the Tribunal and the appellate body were set aside. The Hon'ble Supreme Court held as follows :

> *25.Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, Under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the*

surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the Resolution Plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.

26.....

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."

14.Section 141 of the Negotiable Instruments Act states that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The expression "as well" is occurring in Section 141 of the Act. This expression means "on par". Therefore, the liability of such persons in charge of and responsible to the company for the conduct of its business is thus co-extensive.

15.The offence under Section 138 of the Negotiable Instruments Act, 1881 is committed, after the conditions set out therein are fulfilled. Thereafter, the payee of the cheque has the option of prosecuting the drawer of the cheque by instituting a complaint under Section 200 of Cr.PC before the jurisdictional criminal court. After cognizance of the offence is taken, the criminal court is seized of the matter. The case will have to be disposed of in terms of the provisions set out in Cr.PC. If the complainant fails to turn up on any hearing date, the Magistrate can invoke Section 256 of Cr.Pc and

acquit the accused. Under Section 257 of Cr.Pc, the complaint can be withdrawn at any point of time before the final order is passed. Under Section 147 of the Negotiable Instruments Act, 1881 the offence can be compounded. The case can end in acquittal or conviction on conclusion of the trial.

16.Now, the question is whether by operation of the provisions of Insolvency and Bankruptcy Code, 2016, the criminal prosecution initiated under Section 138 r/w.141 of the Negotiable Instruments Act, 1881 r/w. 200 of Cr.Pc, can be terminated. The categorical answer is "No". In ***JIK Industries Limited vs. Amarlal V.Jumani (2012) 3 SCC 255***, the Hon'ble Supreme Court held that sanction of a scheme under Section 391 of the Companies Act, 1956 will not lead to any automatic compounding of offence under Section 138 of the Act without the consent of the complainant. Neither Section 14 nor Section 31 of the Code can produce such a result. The binding effect contemplated by Section 31 of the Code is in respect of the assets and management of the corporate debtor. No clause in the Corporate Insolvency Resolution Plan even if accepted by the adjudicating authority/appellate Tribunal can take away the power and jurisdiction of the criminal court to conduct and dispose of the proceedings before it in

accordance with the provisions of the Code of Criminal Procedure.

17.It is true that by virtue of Section 238 of the Insolvency and Bankruptcy Code, 2016. the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. But, no provision of the Insolvency and Bankruptcy Code bars the continuation of the criminal prosecution initiated against the corporate debtor or its directors and officials.

18.Of course, once the corporate debtor comes under the resolution process, its erstwhile managing director or directors cannot continue to represent the company. Section 305(2) of Cr.PC states that where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation. Therefore, it is only the Resolution Professional who can represent the accused company during the pendency of the proceedings under Insolvency and Bankruptcy Code. After the proceedings are over, either the corporate entity may be dissolved or it can be taken over by a new management in

which event the company will continue to exist. When a new management takes over, it will have to make arrangements for representing the company. If the company is dissolved as a result of the resolution process, obviously proceedings against it will have to be terminated. But even then, its erstwhile directors may not be able to take advantage of the situation. This is because, the Hon'ble Supreme Court in ***Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661***, even while overruling the decision in ***Anil Hada v. Indian Acrylic Ltd (2000) 1 SCC 1***, as not laying down the correct law in so far as it states that the director or any other officer can be prosecuted without impleadment of the company, proceeded to hold that the matter would stand on a different footing where there is some legal impediment as the doctrine of *lex non cogit ad impossibilia* gets attracted. It was specifically observed that the decision in *Anil Hada* is overruled with the qualifier as stated in para 51.

19.Thus, where the proceedings under Section 138 of the Act had already commenced and during the pendency, the company gets dissolved, the directors and the other accused cannot escape 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 Negotiable Instruments Act, 1881.

They will have to continue to face the prosecution in view the law laid down in *Aneeta Hada* case. Where the company continues to remain even at the end of the resolution process, the only consequence is that the erstwhile directors can no longer represent it.

20.In the case on hand, the accused company had not been dissolved. Its management has been taken over. Therefore, there is absolutely no difficulty in coming to the conclusion that the impugned prosecution against Tecpro Systems can also continue. The petitioner contends that his right to fair trial has been seriously infringed. He claims that the principles of natural justice stand violated as at the stage of evidence, he cannot lead any documentary evidence at all. According to him, that would be the resultant position since he has been totally deprived of any access to any of the company records.

21.This contention is without any merit. Section 247 of Cr.PC states that when the accused is called upon to enter upon his defence and produce his evidence, the provisions of Section 243 shall apply to the case. Section 243 of Cr.Pc reads as follows :

> 243. Evidence for defence.—(1) The accused shall then

be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3) The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court."

22.Therefore, it is always open to the petitioner to file an application for causing production of any document or examination of any witness. Merely because a new management has taken over the company which he earlier headed, the petitioner cannot be deprived of access to any relevant

document that may bolster or reinforce his defence. Section 243 r/w. 247 of Cr.Pc completely redress the apprehension expressed by the petitioner.

23.The resolution plan approved by the super majority in this case provides for payment of 5.79% of the amount claimed by the secured financial creditors. The operational creditors will get 0.22%. We know that the creditors in any Corporate Insolvency Resolution Process must be ready for a "hair cut". But, in the case on hand, it appears to be a clean shave and complete tonsure.

24.Section 138 of the Negotiable Instruments Act, provides not only for punishment but also for payment of fine/compensation. The person found guilty of having committed the offence under Section 138 can be punished with imprisonment for a term which may extend to two years or with fine which may extend to twice the amount of the cheque or with both. Section 357 of Cr.PC provides for compensating the victim/complainant. Of course, the juristic entity cannot be imprisoned. But then, the person in charge of the entity as per Section 141 of the Negotiable Instruments Act can be imprisoned. The amount of fine/compensation can also be recovered from the assets of the corporate entity or that of its directors and officials who have

been found guilty and vicariously liable in the same trial. The Code of Criminal Procedure provides the mode of recovery in Section 421. It reads as follows :

> "421. Warrant for levy of fine.—(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—
>
> (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
>
> (b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:
>
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.
>
> (2) The State Government may make rules regulating the manner in which warrants under clause (a) of subsection (1) are to be executed, and for the summary determination of any

claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

Now, the question is whether Section 421 of Cr.Pc can prevail over the provisions of the Insolvency and Bankruptcy Code, 2016. Obviously, they cannot, in view of Section 238 of the Insolvency and Bankruptcy Code, 2016 which reads as under :

"238.The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Insolvency and Bankruptcy Code, 2016 is both a parliamentary as well as a subsequent enactment. The Hon'ble Supreme Court in ***Principal Commissioner of Income Tax vs. Monnet Ispat and Energy Limited (2018) 18 SCC 786*** held as follows :

"2.Given Section 238 of the Insolvency and

> *Bankruptcy Code, 2016, it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income Tax Act. We may also refer in this connection to Dena Bank v. Bhikhabhai Prabhudas Parekh and Co. and its progeny, making it clear that income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons."*

Though it has been held in more than one case that the fine imposed by the criminal court cannot be held to be a money claim or recovery against corporate debtor, I am of the view that post conviction, the process of recovery of the fine/compensation from the assets of the corporate debtor will have to be only in terms of the provisions of the Insolvency and Bankruptcy Code, 2016.

25.The prayer made by the petitioner in these criminal original petitions is for quashing the criminal complaint filed by the respondent herein. In the complaint, the petitioner herein is figuring as the second accused. Tecpro Systems Limited is the first accused. The petitioner is asking for quashing of the entire prosecution. But then, as held by the Hon'ble Supreme Court in ***Innoventive Industries Limited vs. ICICI Bank and another (2018) 1 SCC***

407, once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. This petition has been filed only by the erstwhile managing director. He cannot maintain a prayer for quashing the entire prosecution. At best, he can confine the relief to himself. But, as already held, the approval of the resolution plan is of no avail to the erstwhile director of the corporate debtor. The kavacham fashioned by IBC is custom made. It will fit the corporate debtor alone. The protective shield will not fit the erstwhile director at all. It was never designed for him.

26.I am, of course, conscious that these petitions have been filed under Section 482 of Cr.PC. The inherent powers of this Court are meant to be exercised only to prevent the abuse of process of law or to secure the ends of justice. The facts appearing on record and the contentions put forth by the learned counsel for the petitioner do not persuade me to come to the conclusion that continuation of the impugned prosecution would constitute an abuse of legal process. I, therefore, decline to invoke the inherent powers of this Court under Section 482 of Cr.PC in favour of the petitioner.

27.In the result, all these criminal original petitions stand dismissed.

Consequently, connected miscellaneous petitions are also dismissed.

09.01.2020

Index : Yes / No
Internet : Yes / No

Skm

G.R.SWAMINATHAN, J.

Skm

COMMON ORDER
IN
CRL.OP Nos.34996, 35007, 35011,
35013, 35016 and 35020 of 2019

09.01.2020