IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 21st OF MAY, 2024

MISC. CRIMINAL CASE No. 17782 of 2024

BETWEEN:-

ANURODH MITTAL S/O RAMDHARI MITTAL, AGED ABOUT 46 YEARS, ADDRESS HOUSE NO.19/20, WARD NO.42, VIJAYNAGAR, RUIKR WARD, LALBAGH BURHANPUR (MADHYA PRADESH)

.....APPLICANT

(BY SHRI AKSHAT AGRAWAL – ADVOCATE AND SHRI HIMANSHU AGRAWAL - ADVOCATE)

AND

1. **REHAT TRADING COMPANY THROUGH ITS PARTNER MANMOHAN SINGH S/O GURUCHARAN SINGH, ADDRESS BURHANPUR (MADHYA PRADESH)**

2. **STATE OF MADHYA PRADESH, THROUGH PUBLIC PROSECUTOR BURHANPUR (MADHYA PRADESH)**

.....RESPONDENTS

(SHRI DILIP PARIHAR – PANEL LAWYER FOR RESPONDENT NO.2/STATE)

This application coming on for admission this day, the court passed the following:

ORDER

This application under Section 482 of Cr.P.C. has been filed seeking the following reliefs:

> "i. This Hon'ble Court may be pleased to call for the records of the CRA/102/2024 pending before II Additional Session Judge, Burhanpur below and examine the proceedings to see if the case mentioned against the Petitioner are present therein;

ii. This Hon'ble Court be pleased to quash the condition to deposit Rs.13,73,890/- imposed in impugned order dated 16/04/2024 against the Petitioner in the application under Section 389 CrPC seeking suspension of the execution of sentence (including the order to pay compensation) during the pendency of appeal on account of effect of interim moratorium as per Section 96 of Insolvency and Bankruptcy Code, 2016 as imposed by Hon'ble National Company Law Tribunal, Indore Bench, for initiating/undergoing the insolvency resolution process, vide Company Petition(IB)/74(MP)2022, with effect from 14/10/2022;

iii. Such other and further orders that to this Hon'ble Court may deem fit, be passed."

2. It is submitted by counsel for applicant that by judgment dated 13.03.2024 passed by J.M.F.C., Burhanpur in SC-NIA/723/2019, applicant has been convicted under Section 138 of Negotiable Instruments Act and has been directed to undergo the jail sentence of 6 months with compensation amount of Rs.68,69,457.24/-.

3. Being aggrieved by said judgment of conviction, applicant filed an appeal alongwith an application under Section 389 of Cr.P.C.

4. It is submitted by counsel for applicant that applicant was the Guarantor of M/s Shree Geeta Textiles Private Limited, who has committed a default due to non-payment of borrowed debts. Accordingly, borrower moved an application under Section 94 of Insolvency Resolution Process of the Insolvency Bankruptcy Code, 2016 (hereinafter referred to as **"Code, 2016"**) before National Company Law Tribunal, Indore Bench for initiating/undergoing the insolvency resolution process vide Company Petition(IB)/74(MP)2022. It is submitted that as per Section 96 of Code, 2016, interim moratorium starts from the date of filing qua personal insolvency w.e.f. 14.10.2022

and therefore, interim moratorium was effective as on the date of judgment of conviction dated 13.03.2024 and it is still in operation as on the date of filing of appeal and thus, the conviction as well as direction to pay compensation as a condition precedent for suspension of sentence is contrary to Section 96 of Code, 2016.

5. To buttress his contentions, counsel for petitioner has relied upon the judgment passed by Supreme Court in the case of **P. Mohanraj and others v. Shah Brothers Ispat Private Limited**, reported in **(2021) 6 SCC 258** and also the judgment passed by Punjab and Haryana High Court in the case of **Vijay Kumar Ghai vs. Pritpal Singh Babbar** reported in **2022 SCC OnLine P&H 1672**.

6. Considered the submissions made by counsel for applicant.

7. In order to challenge the condition of deposit of an amount of Rs. 13,73,890/- for suspension of sentence, the only contention of counsel for applicant is that since borrower has initiated the proceedings for insolvency under the Code, 2016, therefore, in the light of Section 96 of Code, 2016, the debt cannot be recovered.

8. The aforementioned submission made by counsel for applicant is no more *res integra*.

9. The Supreme Court after taking note of judgment passed in the case of **P. Mohanraj (supra)** has held in the case of **Ajay Kumar Radheyshyam Goenka v. Tourism Finance Corporation of India Limited**, reported in **(2023) 10 SCC 545** as under:

> **"16.** The issue whether the respondent is a secured financial creditor or an unsecured financial creditor within the meaning of the said Code is not something we can deal with as that is the matter of the proceedings under the said Code or any appeal preferred therefrom. The only issue with which we are concerned with is whether during the pendency of

the proceedings under the said Code which have been admitted, the present proceedings under the NI Act can continue simultaneously or not.

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 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.

19. We are unable to accept the plea that if proceedings against the Company come to an end then the appellant as the Managing Director cannot be proceeded against. We are unable to accept the plea that Section 138 of the NI Act proceedings are primarily compensatory in nature and that the punitive element is incorporated only at enforcing the compensatory proceedings. The criminal liability and the fines are built on the principle of not honouring a negotiable instrument, which affects trade. This is apart from the principle of financial liability per se. To say that under a scheme which may be approved, a part amount will be recovered or if there is no scheme a person may stand in a queue to recover debt would absolve the consequences under Section 138 of the NI Act, is unacceptable.

****

74. What follows from the aforesaid is that for difficulty in prosecuting the corporate debtor under Section 138 of the NI Act after the approval of the resolution plan under IBC, we need not let the natural persons i.e. the signatories to the cheques/Directors of the corporate debtor escape prosecution. How can one allow the natural persons to escape liability on such specious plea? In such a situation the Latin maxim *lex non cogit ad impossibilia* is attracted which means law does not compel a man to do which he cannot possibly perform. *Broom's Legal Maxims* contains several illustrative cases in support of the maxim. This maxim has been referred to with approval by this Court in *State of Rajasthan* v. *Shamsher Singh* [*State of Rajasthan* v. *Shamsher Singh*, 1985 Supp SCC 416 : 1985 SCC (Cri) 421].

75. Thus, where the proceedings under Section 138 of the NI Act had already commenced and during the pendency the plan is approved or the company gets dissolved, the Directors and the other accused cannot escape from their liability 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. They will have to continue to face the prosecution in view of the law laid down in *Aneeta Hada* [*Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.*, (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] . 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."

10. Considering the totality of facts and circumstances of the case and in view of the fact that merely because of initiation of proceedings under the Code, 2016 the signatory of the cheque cannot escape from his liability, it is held that conviction recorded by Trial Court was not bad on account of initiation of proceedings under the Code, 2016.

11. For the similar reason, Appellate Court did not commit any mistake by directing the applicant to deposit an amount of Rs.13,73,890/- as a condition precedent for suspension of sentence.

12. Accordingly, no case is made out warranting interference.

13. The application fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

vc

VARSHA CHOURASIYA