

Ashmi Vs. Ahuja

IN THE COURT OF METROPOLITAN MAGISTRATE
20TH COURT, MAZGAON, MUMBAI

C.C. No.3213/SC/2022

ORDER BELOW AN APPLICATION EXH. 78 DATED 03.06.2023

This application has been presented on behalf of accused No. 2 Jagdish with a prayer to stay this proceeding in lieu of the moratorium in view of the order passed by the Hon'ble the National Company Law Tribunal (NCLT).

2 He states that the India Bulls Housing Finance Limited has approached the Hon'ble the NCLT on 10.08.2022 and the relevant petition bearing no. CP (IB)-929/MB/2022 which is captioned as India Bulls Housing Finance Limited Vs. Jagdish Ahuja u/sec. 95 of the Insolvency and Bankruptcy Code, 2016 (IBC) (Code). The relevant provisions u/secs. 95, 96 of the Code would demonstrate that on presentation of an application u/sec. 94 or 95 of the Code and interim moratorium shall commenced on the date of the application and during such interim moratorium period any pending legal action or proceeding shall be deemed to have been stayed. He has stated that the Hon'ble the Apex Court in case of **P. Mohanraj & Ors Vs. M/s. Shah Brothers Ispat Pvt Ltd**, [(2021) 6 SCC 258] such legal proposition has been explained.

3 The complainant has opposed the application. It is contended that the application has been moved for delay the proceeding. It has been observed in P Mohanraj....(cited supra) that stay

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would operate against principal debtor company and it does not have effect on the proceedings u/sec. 138 of the Negotiable Instruments Act and the directors holding responsibility for day to day affairs of such company shall be liable for prosecution under said section 138 of the Act.

The points for determination alongwith my findings are as under....

Sr. No.	Points	Findings
1	Whether this proceeding is required to be stayed, as alleged ?	As per final order.

REASONS

AS TO POINT NO. 1 :-

4 The complaint has been presented in the year 2017. The plea of this accused has been recorded on 03.05.2018. The complainant has alleged that accused no. 1 is a partnership firm which deals in the business of development and construction wherein accused nos. 2 and 3 are partners and responsible for day to day affairs of said firm. The complainant has alleged that accused nos. 2 and 3 approached the complainant for financial assistance whereupon the loan amount was advanced and in turn accused no. 2 has executed the Bill of Exchange, Demand Promissory Note in capacity as partner. The complainant has alleged that disputed cheques have been issued by accused towards discharge of their liability. The case is now pending at part heard stage and for securing presence of accused no. 3.



5 The accused has submitted the copy of order sheet dated 08.05.2023 in connection with CP (IB) 929/MB/2022. It demonstrates that the notice has been issued to accused Jagdish for hearing with reference to said petition which is presented u/sec. 95 (1) of the IBC, 2016. Thus, the accused has contended that the petition is pending for hearing. The accused has relied upon the case law **Sheetal Gupta Vs. National Spot Exchange Limited & Ors**, MANU/MH/0706/2023. Wherein, it has been observed that in view of section 101 of the IBC, during the moratorium period any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed.

7 I have come across the case-law **Ajay Kumar Radheyshyam Goenka Vs. Tourism Finance Corporation of India Ltd.**, 2023 SCC OnLine SC 266 while studying on the issue.

Wherein, it has been observed in relevant paragraphs :-

68. Thus, I am of the view that by operation of the provisions of the IBC, the criminal prosecution initiated against the natural persons u/sec. 138 r/w 141 of the N.I. Act r/w section 200 of the Cr.P.C. would not stand terminated.

73. Thus, where the proceedings u/sec. 138 of the N.I. 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 the liability by citing their dissolution. What is dissolved is only the company, not the personal penal liability of the accused covered under section 141 of the Negotiable Instrument Act. They will have to continue to face the prosecution in view of the law laid down in Aneeta Hada (supra). Where the company



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continues to remain even at the end of the resolution process, the only consequence is that the erstwhile directors can no longer represent it.

96. *As per Section 138 of the NI Act, when the cheque was dishonoured and a statutory notice demanding the cheque amount was issued, the accused shall pay the cheque amount within 15 days from the date of receipt of the said notice. The moment the said 15 days expired, the cause of action arises. In other words, the offence under Section 138 of the NI Act is complete. Once the cause of action arose for the offence committed, the complainant has to approach the criminal court within one month to take penal action under Section 138 of the NI Act. To put it clearly, the complainant approaches the criminal court not for recovery of the legally enforceable debt, but for taking penal action under Section 138 of the NI Act for the offence already committed by the accused by not making the payment of the cheque amount despite the receipt of the statutory notice. The only question before the criminal court is whether the cheque issued by the accused towards the discharge of his liability was dishonoured and despite the service of demand notice, whether he had not paid the amount. **There is no bar contained in any of the provisions of the IBC, and the NI Act from approaching the criminal court to seek penal action under Section 138 of the NI Act.***

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8 Herein, the proceedings have already been initiated against the accused. The accused in capacity as the partner, prima facie allegedly has issued the cheque is question. Therefore, role of the accused in the present dispute cannot be termed merely as the corporate debtor. The criminal liability u/sec. 138 of the Act has independent consequences. Hence, the complaint cannot be stayed at



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this stage without following process of trial against individual member i.e. accused no. 2 in view of the proposition of law laid down in case of Ajaykumar, P. Mohanraj..... (cited supra). Hence, at the most accused no. 2 would be at liberty to place on record the status of the CP (IB) 929/MB/2022 and subject to placement of such current status further hearing and adjudication with reference to issue regarding corporate debtor can be dealt with. In result, following order is passed.

Order

The application seeking suspension or stay of this proceeding, against this accused so far as his personal capacity as director/signatory is concerned, is hereby **rejected** at this stage.



Date : 28.11.2023

(V.B. Gulve-Patil)
Metropolitan Magistrate,
20th Court, Mazgaon, Mumbai.

