IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.589 OF 2019
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Nizar Noorali Rangara and Another ...Applicants
vs.
State of Maharashtra and Others ...Respondents

Mr. Ramprakash Pandey, for the applicants.
Ms. Anamika Malhotra, APP for the State/Respondent No.1.
Mr. Jatin Premji Shah a/w. Ms. Snehankita Munj, Mr. Tushar B. Patel and Ms. Shraddha Kamble, for the Respondent No. 3.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 28th APRIL, 2022
PRONOUNCED ON : 19th AUGUST, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith and, with the consent of the counsels for the parties, heard finally.

2. These applications under section 482 of the Code of Criminal Procedure, 1973 (the Code) assail the orders of issue of process against the applicants for an offence punishable under section 138 read with 141 of the Negotiable Instruments Act, 1881 (the Act,

1881) passed by the learned Metropolitan Magistrate, 28th Court, Esplande, Mumbai.

3. The background facts leading to these applications can be stated in brief as under:-

a] M/s. Rangara Industries Private Limited (accused No.1) (hereinafter referred "M/s. Rangara") is a company in liquidation. The applicant Nos. 1 and 2 were the Directors of M/s. Rangara. The later owed a certain liability towards M/s. Surajbhan Rajkumar Private Limited (M/s. Surajbhan), a company incorporated under the Companies Act, 1956. Alleging that M/s. Rangara was not in a position to discharge its debt, the complainant instituted a Company Petition No. 207 of 2013 under section 439 of the Companies Act, 1956 for winding up of M/s. Rangara.

b] By an order dated 24th November, 2014 the said Company Petition was admitted. Subsequently consent terms were executed in the said Company Petition between M/s. Surajbhan and M/s. Rangara, whereunder M/s. Rangara undertook to deposit an amount of Rs. 1,50,00,000/- with the Prothonotary and Senior Master of this Court. Upon the said deposit, the parties agreed, the claims of M/s. Surajbhan be referred to arbitration by a sole arbitrator. Recording the consent terms and undertakings therein,

the Company Petition came to be disposed of by an order dated 30th January, 2015.

c] On 27th February, 2015 a joint motion was made before the learned Company Judge. The Court was informed that the parties resolved the dispute by entering into consent terms dated 26th February, 2015. In accordance with the consent terms and the undertakings therein, above referred order dated 30th January, 2015 was set aside and the Company Petition came to be disposed.

d] Under the consent terms it was, inter alia, agreed that M/s. Rangara would pay to M/s. Surajbhan a sum of Rs. 4,50,00,000/- towards full and final settlement of the claim of M/s. Surajbhan and its sister concern M/s. Shree Durga Iron & Steel Co. Ltd. A schedule of payment was agreed by and between the parties. After initial payment of 60 lakhs in two installments, the balance sum of Rs. 3,90,00,000/- was agreed to be paid in 30 monthly installments of Rs. 13 lakhs during the period from 15th June, 2015 to 15th November, 2017. Upon payment, the consent terms provided for withdrawal of prosecution and giving consent for allowing the appeal preferred by M/s. Rangara. In case of default in payment, the parties agreed, that the Company Petition would stands allowed in terms of prayer clause (a) and (b).

e] Asserting that M/s. Rangara committed default in payment of

the amount in accordance with the consent terms and thus the complainant M/s. Surajbhan was constrained to deposit the cheques, and consequent to the dishonour of the cheques M/s. Rangara failed to comply with the demand in the statutory notices, M/s. Surajbhan, the complainant, has lodged five complaints for the offences punishable under section 138 read with 141 of the Act, 1881.

f] Cheque Nos.089447, 089448 and 089449 drawn for Rs. 13 lakhs each payable on 15th October, 2015, 15th November, 2015 and 15th December, 2015, respectively, are the subject matters of Complaint Case No. 645/SS/2016.

Cheque Nos. 089450, 089451 and 089452 drawn for Rs. 13 lakhs each payable on 15th January, 2016, 15th February, 2016 and 15th March, 2016, respectively, are the subject matters of Complaint Case No. 1629/SS/2016.

Complaint Case No. 5872/SS/2016 pertains to cheque Nos. 089453, 089454 and 089455 drawn for Rs. 13 lakhs each payable on 15th April, 2016, 15th May, 2016 and 15th June, 2016 respectively.

Whereas, Complaint Case No.893/SS/2017 is in respect of cheques Nos. 089459, 089460 and 089461 drawn for Rs. 13 lakhs each payable on 15th October, 2016, 15th November, 2016 and 15th December, 2016, respectively.

Cheque Nos. 089456, 089457 and 089458 drawn for Rs. 13 lakhs each payable on 15th July, 2016, 15th August, 2016 and 15th September, 2016 respectively are the subject matters of Complaint Case No. 897/SS/2017.

g] Post recording of verification of the complainant, process came to be issued in each of the complaints for the offence punishable under section 138 read with 141 of the Act, 1881.

4. The applicants have approached this Court under section 482 of the Code with the assertion that the complaints suffer from the vice of s*uppressio veri and suggestio falsi*. The complainant has not approached the Court with clean hands. The fact that in accordance with the consent terms, executed on 26th February, 2015, consequent to the default M/s. Rangara automatically stood wound up was deliberately suppressed by the complainant. In the circumstances, after M/s. Rangara was ordered to be wound up, there was no cause or occasion for the complainant to present the cheques for encashment. In any event, with the winding up of M/s. Rangara, the company in liquidation and/or the applicants who are Ex-Directors of M/s. Rangara could not have complied with the demand of payment of the amount covered by the subject cheques.

5. Laying emphasis on the fact that the Official Liquidator took possession of the assets of the complainant vide communication dated 13th May, 2016, the applicants assert that the entire exercise commencing from the presentment of the cheques to the lodging of the complaint was mala fide. Thus, the learned Magistrate committed a grave error in ordering issue of process against the accused. Hence, these applications.

6. The applications are resisted by respondent No.3/ complainant.

7. I have heard Mr. Ramprakash Pandey, learned counsel for the applicants, Ms. Anamika Malhotra, learned APP for the State /Respondent No.1 and Mr. Jatin Shah, learned counsel for respondent No. 3 at some length. The learned counsels took the Court through the pleadings and the record of the previous proceedings between the parties.

8. Mr. Pandey, learned counsel for the applicants would urge that the complainant in spite of having been fully aware of the fact that with the default in compliance with the consent terms, M/s. Rangara stood wound up automatically, pursuant to the order dated

27th February, 2017, could not have presented the cheques for encashment. A strenuous effort was made by Mr. Pandey to draw home the point that once a company is wound up, a prosecution for offence punishable under section 138 of the Act, 1881 against such company (in liquidation) is legally untenable, though the cheques might have been delivered before the company was wound up. In the case at hand, according to Mr. Pandey, there is no dispute over the fact that the company stood wound up with the very first default in payment of the amount. Thus, continuation of the prosecution in such circumstances, would constitute a sheer abuse of the process of the Court.

9. In addition, in Application No. 589 of 2019, arising out of Complaint Case No. 645/SS/2016, there is a serious procedural irregularity as the process has been issued much before recording of the verification statement of the complainant. Inviting attention of the Court to the verification statement of the complainant which seems to have been recorded on 23rd March, 2016, and the order of issue of process, which was purportedly passed on 22nd March, 2016, it was submitted that the learned Magistrate ordered issue of process even before recording verification statement and this betrays a clear non application of mind.

10. As regards the last submission which pertains to CC No. 645/ SS/2016, the subject matter of Application No. 589 of 2019, in all fairness to Mr. Pandey, it is necessary to note that the submission is not borne out by the facts. Indeed the verification statement seems to have been recorded on 23rd March, 2016. However, there seems to be an inadvertent mistake in recording the date of the order. This become evident from the record of proceedings (Roznama) tendered by the learned counsel for the respondent No. 3. It shows that the verification statement was recorded on 23rd March, 2016 and on the very day process was ordered to be issued. The alleged irregularity sought to be highlighted seems to be non-existent.

11. Before adverting to the contentious issues, it may be apposite to note few un-controverted facts. Institution of the Company Petition No. 207 of 2013 and the passing of the orders therein are not much in contest. The Company Petition was admitted on 24th November, 2014. Initially, by an order dated 30th January, 2015, upon an undertaking to deposit a sum of Rs. 1,50,00,000/- in this Court and with the consent of the parties, the Company Petition was disposed of and the parties were referred to arbitration. Subsequently, on 27th February, 2015, upon a joint motion having been made by the parties, the learned Company Judge was

persuaded to recall the order dated 30th January, 2015 and dispose of the Company Petition in accordance with the consent terms. It may be expedient to extract the relevant clauses of the consent terms which bear upon the controversy at hand.

12. Paragraph Nos. 2 to 4 of the consent terms, read as under:-

> 2] The respondent have confirmed and admitted the claim of the petitioner. The respondent have expressed their inability to repay the entire outstanding dues along with interest till date and has agreed to settle their dues by paying Rs. 4,50,00,000/- towards full and final settlement (hereinafter "settlement amount").
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> 3] The respondent shall pay to the petitioner a sum of Rs. 4,50,00,000/- towards full and final settlement of all claims of the petitioner and their sister concerns M/s. Shree Durga Iron & Steel Co. Ltd. against the respondent as per the following schedule of payment.
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> a) The respondent shall pay a sum of Rs. 30,00,000/- by cheque bearing No. 089441 dated 05.04.2015 drawn on ICICI Bank Limited, Bhat Bazaar Branch, in favour of petitioner.
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> b) The respondent shall pay a sum of Rs. 30,00,000/- by cheque bearing No. 089442 dated 05.05.2015 drawn on ICICI Bank Limited, Bhat Bazaar Branch, in favour of the petitioner.
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> c) The respondent shall pay balance sum of Rs. 3,90,00,000/- in 30 monthly installments of Rs. 13,00,000/- each by post dated cheques drawn on ICICI Bank Limited, Bhat Bazaar Branch duly signed by director of the respondent company dated 15th day of each calender month starting from 15.06.2015 ending on 15.11.2017 towards full and final settlement of petitioners claim in the above petition and their sister concern M/s. Shree Durga Iron & Steel Co. Ltd.

> d) If the 15th day in any of the above referred period falls bank holiday, then due date for that relevant month will be following working day. The details of the amount payable to the petitioner towards installments as aforesaid is being annexed and marked as Annexure -A.
>
> 4] The respondent company undertakes to clear all the installments on time and also it is hereby agreed that in case of any default in making payment of any one of the above installments, the respondent shall make payment of the said defaulted installment with in further grace period of 15 days failing which this concession stands withdrawn and the entire dues as claimed in the petition stands admitted and the petition shall stand revived without any further reference to Court, and in that event the petition stands absolute in terms of prayers (a) and (b) of the petition without any further reference to this Court.

13. It appears that on 13th May, 2016 a notice was issued by Official Liquidator that pursuant to the order dated 27th February, 2015 the Official Liquidator attached to High Court came to be appointed as a Liquidator of M/s. Rangara, and took possession of the assets of the said company.

14. Mr. Pandey urged, with a degree of vehemence, that consequent to default on the part of M/s. Rangara, the later part of Clause 4 (extracted above) kicked in and M/s. Rangara stood wound up as the Company Petition stood allowed in terms of prayer clause (a) and (b). After the company stood so wound up, according to Mr. Pandey, the complainant could not have proceeded to present the

cheques for encashment and institute the complaints. Secondly, without impleading the Official Liquidator, the complaint under section 138 read with 141 of the Act, 1881 could not have been entertained and proceeded with.

15. Mr. Jatin Shah, learned counsel for respondent No. 3 joined the issue by canvassing a submission that none of the aforesaid submission is worthy of acceptance. Neither is it the requirement of law that while instituting a complaint for the offence punishable under section 138 of the Act, 1881, where it is alleged that the company has committed an offence, leave of the Company Court under section 446 of the Companies Act, 1956 is necessary. Nor the company and its directors are absolved of the liability in respect of the cheques which were drawn in discharge of legally enforceable debt incurred before the company stood wound up.

16. Mr. Shah, would further urge that the stage of the proceedings before the trial Court cannot be lost sight of. Plea of the accused has been recorded. Evidence of the complainant has also been recorded. The applicants had, in fact, sought recall of the complainant's witnesses for cross examination and, at that stage, the applicants have moved these applications which are nothing but abuse of the

process of the Court. The element of delay and latches, in the circumstances, also becomes relevant and on that count alone the applications deserve to be dismissed summarily, urged Mr. Shah.

17. I am inclined to deal with the second challenge first.

18. From a meaningful reading of the consent terms, it becomes abundantly clear that the parties had agreed that in the event of default, the Company Petition would stand allowed and M/s. Rangara wound up. In fact, the Official Liquidator vide notice dated 13th May, 2016 seems to have entered into liquidation. In this backdrop, the moot question that crops up consideration is, whether the impleadment of Official Liquidator is necessary in a complaint for the offence punishable under section 138 of the Act, 1881, where it is alleged that the company in liquidation has committed the said offence ? In other words, whether the leave of the Court under section 446 of the Companies Act is peremptory ?

19. A learned single Judge of this Court in the case of **Firth (India) Steel Co. Ltd. vs. Bombay Leasing Company Private Limited**[1] held that:

> "The expression legal proceedings or other legal

1 1999 (4) Bom. C.R. 748.

> proceedings for the purpose of sections 442 and 446 must be read ejusdem generis with the expression 'suit' and can mean only civil proceedings which have a bearing so far as the winding up is concerned namely realisation of the assets and discharge of liabilities of the company.

20. The learned Judge repelled the contention that the expression 'legal proceedings' would include criminal complaint under section 138 of the Negotiable Instruments Act, 1881.

21. In **Suresh K. Jasnani vs. Mrinal Dyeing and Manufacturing Co. Ltd. And Ors.**[2] another learned single Jude of this Court took the view that section 446(1) of the Companies Act applied to the proceedings under section 138 of the Act, 1881 as well.

22. A reference was thus made to a Division Bench in **Indorama Synthetics (I) Limited vs. State of Maharashtra**[3]**.** The Division Bench considered the following question:-

> "Whether the expression 'suit or other proceedings' in section 446(1) and the expression 'suit or proceedings' in section 442, under chapter II of part VII of the Companies Act, 1956, include criminal complaints filed under section 138 of the Negotiable Instruments Act, 1881 ? "

23. The Division Bench, after adverting to the judgment of the Supreme Court in the case of **S.V. Kondaskar, Official Liquidator and**

2 Cri. Revn. Appln. No. 245 of 1997.
3 2016 ALL MR (CRI) 3458.

Liquidator of the Colaba Land and Mills Co. Ltd. (In Liqn.) vs. V.M. Deshpande, Income Tax Officer, Companies Circle I (8), Bombay and Another[4] and Division Bench judgment of this Court in the case of **Orkay Industries Limited and Ors. vs. State of Maharashtra and Others**[5] concurred with the view recorded in the case of **Firth (India)** (supra) and answered the reference as under:-

> "The expression "suit or other proceedings" in section 446(1) under Chapter II of Part VII of Companies Act, 1956, does not include criminal complaints filed under section 138 of the Negotiable Instruments Act, 1881".

24. The observations in paragraph Nos. 29 and 30 are material and hence extracted below:-

> 29. Learned counsel for the Petitioner in this case has also relied upon the decision of **Orkay Industries Limited & Ors. Vs. State of Maharashtra & Ors., 1998 (2) Mh.L.J. 910.** The Division Bench of this Court, while dealing with the application of Section 446(1) of the Companies Act to proceeding under Section 138 of N.I. Act, has observed that, what was directly in issue in the case filed under Section 138 of the N.I. Act was the Company being liable for prosecution on dishonour of the cheques issued by its Directors. The commission of offence under Section 138 is not dependent on winding-up of the Company, but is dependent upon dishonour of cheque and non-payment of the amount within fifteen days from the receipt of the notice. The offence under Section 138 of N.I. Act is complete after the ingredients of Section 138 are satisfied and, therefore, mere filing of Petition for winding-up of the Company would not result into staying of the said proceedings. Even when the order of winding-up is passed or the order is made appointing a provisional liquidator, it can have no effect under the proceedings

4 AIR 1972 SC 878.
5 1998 (2) Mh.L.J. 910.

> under Section 138 of N.I. Act.
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> 30. Thus, there is a long line of decisions making the position clear that the expression 'suit or legal proceedings', used in Section 446(1) of the Companies Act, can mean only those proceedings which can have a bearing on the assets of the companies in winding-up or have some relation with the issue in winding-up. It does not mean each and every civil proceedings, which has no bearing on the winding-up proceedings, or criminal offences where the Director of the Company is presently liable for penal action.
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> (emphasis supplied)

25. In view of the aforesaid enunciation of the legal position, the controversy sought to be raised on behalf of the applicants that the complaints for the offence punishable under section 138 of Negotiable Instruments Act, 1881 sans permission of the Company Court under section 446(1) of the Companies Act, 1956 are not tenable, does not merit countenance.

26. This takes me to a more substantive challenge on behalf of the applicants that with the order of automatic winding up of the company, consequent to the default in accordance with the consent terms, the company could not have been prosecuted for the offence punishable under section 138 of the Act, 1881. To appreciate this challenge, in a proper perspective, a re-visit to the facts becomes necessary, especially the time line.

27. The consent terms were accepted on 27th February, 2015 and

the Company Petition stood disposed. The cheques in question were purportedly drawn in accordance with Clause (c) of paragraph 3 of the consent terms (extracted above). All the cheques were drawn for Rs. 13 lakhs. The cheques in Complaint No. 645/SS/2016 were presented for encashment and were returned un-encashed on 19th December, 2015 with the remarks "account blocked". The statutory notice was addressed on 8th January, 2016.

In Complaint No.1629/SS/2016 the cheques were returned un-encashed on 19th March, 2016 and demand notice was issued on 7th February, 2016.

In Complaint No.5872/SS/2016 the cheques were returned un-encahsed on 7th July, 2016, followed by a demand notice dated 12th July, 2016.

In Complaint No. 893/SS/2017 the cheques were returned un-encashed on 17th January, 2017 and the demand notice was issued on 20th January, 2017.

In Complaint No. 897/SS/2017 the cheques were dishonoured on 14th October, 2016 and the demand notice was issued on 27th October, 2017.

28. As indicated above, on 13th May, 2016 the Official Liquidator gave notice of having entered into liquidation. Evidently in two of

the complaints i.e. Complaint No. 645/SS/2016 and Complaint No.1629/SS/2016 the cheques were presented and dishonoured and the demand notices were issued before the Official Liquidator gave notice dated 13th May, 2016. The cheques, in rest of the complaints, appear to have been presented after the said notice by the Official Liquidator.

29. With the aforesaid clarity on facts, the submissions advanced on behalf of the parties now fall for consideration.

30. Mr. Pandey, would urge that the instant complaint, in the face of the aforesaid incontrovertible facts, do not pertain to a legally enforceable debt. Once the complainant and M/s. Rangara entered into the settlement, evidenced by the consent terms, the liability came to an end. Consequent to non-compliance with the consent terms, the only remedy which the complainant could avail was the one which flowed from Company Petition having been made absolute. Institution of the complaint on the basis of the cheques which were issued under the consent terms, therefore, cannot be said to be for the enforcement of a legal liability.

31. To bolster up this submission, Mr. Pandey placed reliance on

a judgment of the Supreme Court in the case of **Lalitkumar Sharma and Another vs. State of Uttar Pradesh and Another**[6]**.** In the said case, during the pendency of the first complaint, the parties entered into a compromise and in terms thereof, one of the accused had drawn a cheque. Upon dishonour of the said cheque, a fresh complaint for the offence punishable under section 138 of the Act came to be lodged. In that context, the Supreme Court held that, "*since the cheque was issued in terms of the compromise, it did not create a new liability. Since the compromise did not fructify, the same cannot be said to have been issued towards payment of debt.*"

32. I am afraid the aforesaid pronouncement advances the cause of the applicants. The reason is not far to seek. In the said case, in the first complaint, for the compounding of which the second cheque was drawn, the accused were already convicted and punished. In that context, the Supreme Court observed that the second cheque drawn in terms of the compromise did not create a fresh liability. That does not seem to be the case at hand. It is nobodies case that M/s. Rangara or the applicants discharged the liability for which the Company Petition was filed.

33. To bolster up the submission that the complaint under section

6 (2008) 5 Supreme Court Cases 638.

138 of the Act, 1881 cannot be filed after the winding up order of the company, Mr. Pande placed a very strong reliance on the judgment of a learned single Judge of Delhi High Court **M.L. Gupta and Another vs. Ceat Financial Services Limited**[7] . In the said case, the Delhi High Court considered the said question in the context of the undisputed facts therein that as on the date of presentment and filing of complaint the company was in liquidation and held that :

> "When the company goes into liquidation and the cheque is presented thereafter, it cannot be said that the company has committed the offence as it is because of legal bar that it is precluded from making the payment. Once dishonour of the cheque by the Bank and failure to make payment of amount by the company is beyond its control, the Directors (who are in fact ex-Directors) can also not be held liable.

34. Holding thus, the Delhi High Court concluded that a complaint under section 138 of the Act cannot be filed as on the date of presentation of the cheque the company was in liquidation and cannot be stated to have committed any offence.

35. Mr. Pandey also placed reliance on two judgments of this Court. First, in the case of **NRC Limited and Others vs. Fuel Corporation of India and Others**[8] and, second **Rajeev Raj Kumar vs. State of Maharashtra**[9].

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7 2006 SCC OnLine Del 1448.
8 2019 SCC OnLine Bom 1222.
9 2018 SCC OnLine Bom 2352.

36. The judgment in the case of **NRC Limited** (supra) turned on its peculiar facts as in the said case the question arose in the context of direction under section 22A of the Sick Industrial Companies (Special Provisions) Act, 1985 restraining the company from disposing of the assets of the company.

37. In the case of **Rajeev Kumar** (supra) though the contention regarding the company having been ordered to be wound up was raised, this Court was persuaded to quash the proceedings against the Directors of the company on the ground that in the absence of specific averments to bring the acts and conduct of the Directors within the ambit of section 141 of the Act, 1881, the order of issue of process was legally infirm.

38. Per contra, Mr. Shah, learned counsel for the applicants commended me to accept the proposition enunciated by Division Bench of Kelra, High Court in the case of **Jose Antony Kakkad vs. Official Liquidator**[10] wherein it was in terms observed that the Parliament had introduced Chapter XVII of the Negotiable Instruments Act, 1881 despite being fully aware of the provisions contained in section 446 of the Companies Act, 1956 and, therefore, there was no bar to prosecute a company, which is under

10 2000 (1) K.L.J. 757.

liquidation, for an offence punishable under section 138 of the Act.

39. The judgment of the Supreme Court in the case of **Kusum Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. and Others**[11] rendered in the context of section 22A of the SICA delineates the approach to be adopted by the Court. The observations of the Supreme Court in paragraph 19 are instructive and hence extracted below:

> 19] The question that remains to be considered is whether section 22 A of SICA affects a criminal case for an offence under section 138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme under section 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court. This exercise of the power by the Board is condi- tioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which the BIFR has submitted its report declaring a company as 'sick' and has also issued a direction under section 22-A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under section 138 NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case.

11 (2000) 2 Supreme Court Cases 745.

> Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of the BIFR under Section 22-A was passed against the company then it cannot be said that the offence under section 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by the BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.
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> (emphasis supplied)

40. The Supreme Court has in terms observed that the contention that the criminal case for the alleged offence under section 138 of the Act, 1881 cannot be instituted during the period in which restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend upon the facts and circumstances of a given case. Though the observations were made in the context of the direction under section 22A of the SICA restraining disposition of the assets of sick company, yet, inquiry on facts in the face of such directives was held to be not impermissible to assess the scope and amplitude of the interdict against institution and continuation of the proceedings.

41. At this stage, it would be appropriate to refer to the pronouncement of the Supreme Court in the case of **Pankaj Mehra and Another vs. State of Maharashtra and Others**[12]. In the said case, the Supreme court was confronted with the following question:

> "Can a company escape from penal liability under Section 138 of the Negotiable Instruments Act on the premise that a petition for winding up of the company has been presented and was pending during the relevant time ?"

42. The aforesaid question arose as the Division Bench of this Court had held that the company can not avert its liability on the mere ground that winding up petition was presented prior to the company being called upon by a notice to pay the amount of the cheque. The Supreme Court, after an analysis of the previous precedents, enunciated the law as under:

> 20] It is difficult to lay down that all dispositions of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralysed, for, the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and other employees and meet urgent contingencies. An interpretation which could lead to such a catastrophic situation should be averted. That apart, if any such view is adopted, a fraudulent company can deceive any bona fide person transact-ing business with the company by stage-managing a petition to be presented for winding up in order to defeat such bona fide customers. This conse-quence has been correctly voiced by the Division Bench in the impugned judgment.

12 (2000) 2 SCC 756.

> 21] If the payment is not ab initio void the company cannot contend that it is legally forbidden from making payment of the cheque amount when notice was issued by the payee regarding dishonour of the cheque. To circumvent this hurdle an endeavour was made by some of the appellants' counsel to show that the very issuance of a cheque would amount to disposition of property. We are unable to accept the said contention particularly in view of the definition of "cheque" in the NI Act. "A Cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

43. The Supreme Court further postulated that the special provisions contained in the Companies Act, 1956, regarding the debts and liabilities of the company do not render the debt unenforceable. The Supreme Court went on to expound the position on the assumption that the disposition of the property made by a company after commencement of the winding up proceeding is null and void. The observations of the Supreme Court in paragraph Nos. 25 to 30 are material and hence extracted below:

> 25] There is no provision in the Companies Act which prohibits enfor-cement of the debt due from a company. When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. But that does not mean that the debt has become unenforceable altogether. Perhaps due to want of sufficient assets for the company the realisation of a debt would be difficult. But that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not to be tested on the touchstone of the modality or the procedure provided for its realisation or recovery. Hence the contention that the special provision incorporated in the Companies Act regarding the debts and liabilities due from the

company will render the debt unenforceable, cannot be accepted.

26] The alternative approach is this : Even assuming that any disposition of the property made by a company after commencement of the winding up proceedings is null and void, how that is an escape ground from the offence under Section 138 of the NI Act? That section created a statutory offence which on the confluence of the various factors enumerated therein, commencing with the drawing of the cheque and ending with the failure of the drawer of the cheque to pay the amount covered by it within the time stipulated, ripens into a penal liability.

27] The last factor for constituting the offence under Section 138 of the NI Act is formulated in clause c of the proviso to the Section which reads thus : "the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

28] The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but individual who has become so pauper or so sick as he cannot raise the money to pay the demanded sum. Can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? The answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

29] We therefore feel that legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause for such failure.

30] The drawer of the cheque can have different explanations for the failure to pay the amount covered by the cheque. But no such explanations would be sufficient to extricate him from the tentacles of the offence contemplated in the Section. Perhaps same

> kind of explanations would be sufficient to alleviate the rigor of the offence which may be useful to mitigate the quantum of sentence to be imposed. But that is no ground for consideration at this stage.
>
> (emphasis supplied)

44. Undoubtedly the aforesaid pronouncement primarily deals with the question as to whether a company can escape from penal liability on the ground that a petition for winding up of the company had been presented and was pending during the time, the offence under section 138 of the Act was allegedly committed. Nonetheless, the aforesaid observations lay emphasis on the fact that the Parliament has advisedly used the word “fails” so as to fasten the liability on the drawer who commits default.

45. In view of the enunciation of legal position in **Kusum Ingots** (supra) and **Pankaj Mehra** (supra), in my considered view, the question sought to be raised on behalf of the applicants cannot be answered in the abstract. The facts of the given case must bear upon the determination. It is true that an offence under section 138 of the Act, 1881 can be said to have been committed upon a confluence of certain facts. Each of the facts, which constitute the ingredients of the offence, is required to be established. Yet the disability which is sought to be put fourth to pay the amount covered by the dishonored cheque, post winding up order, cannot be

appreciated *de hors* the facts of the case and especially in such a fashion so as to insulate a company and its ex-directors from the rigors of law where it appears that they profess to take advantage of their own wrong.

46. In the facts of the case, if the submission on behalf of the applicants is readily acceded to, then M/s. Rangara would get a long leash to avoid the liability by taking undue advantage of its own default. M/s. Rangara, it can be fairly assumed, entered into consent terms in the Company Petition to wriggle out of the consequences which would have otherwise ensued in the Company Petition. M/s. Rangara committed default in compliance with the undertakings in the consent terms. Undoubtedly the consent terms provided for the consequence of the winding up petition being allowed in the event of any default. But that stipulation appears to be in the nature of a dyke against the default. In such a situation, to accede to the submission on behalf of the applicants, would amount to playing into the hands of a party who succeeds in avoiding the liability under the original proceedings as well as the one incurred under the consent terms.

47. In a case of this nature, a distinction is necessarily required to

be made between a winding up order passed after weighing of all the options, especially after recording satisfaction under sub section (2) of section 440 of the Companies Act, 1956 and an order of winding-up, which is invited, by executing consent terms. It is trite, an order of winding-up on merits manifests a judicial exercise upon recording a satisfaction that having regard to the interest of the creditors or contributors or both, winding-up is imperative. An order of winding-up which automatically comes into force upon a default in compliance with the consent terms executed on behalf of the company, and its directors cannot be placed on the same pedestal as an order passed on merits, especially in a case like the one at hand where it appears to be in the nature of a device to obviate the liability at that moment.

48. At this juncture, the submission on behalf of respondent No. 3 that the conduct of the applicants deserves to be taken into account, also merits consideration. Attention of the court was invited to Application No. 1155 of 2016 filed by the applicants on 21st September, 2015 on behalf of M/s. Rangara, even after the Official Liquidator came to be appointed. Thus, the applicants, according to Mr. Shah, take the ground that the company is under liquidation or the company is a running concern, to suit their

convenience, in a given case. Without delving deep into this issue, it would be suffice to note that such a proceedings appears to have been filed by the applicants on behalf of M/s. Rangara, post Liquidator entering into liquidation.

49. To add to this, the stage at which the applicants have approached this Court also assumes critical significance. In all the complaints, the process was issued in the year 2016-17. Trial has commenced. Two of the complaints are at the stage of recording the cross examination of the complainant's witnesses. At this juncture and in the light of the facts which have emerged, I am not persuaded to exercise inherent jurisdiction to indict the complaints. Thus, I am impelled to dismiss the applications. However, I deem it in the fitness of things to clarify that the defence based on the consequences of winding up of M/s. Rangara is expressly kept open for determination by the learned Magistrate.

Hence, the following order.

ORDER

1] The applications stand dismissed.

2] It is however clarified that the observations hereinabove are confined to the determination of the prayer to quash the complaints

and the learned Magistrate shall decide the complaints on their on merits and in accordance with law without being influenced by any of the aforesaid observations while considering the defences which may be raised by the applicants, including the defence of the effect of automatic winding up of M/s. Rangara, the accused No. 1 company in accordance with Clause 4 of the consent terms (extracted above).

3] No costs.

4] Rule discharged.

(N. J. JAMADAR, J.)