2023 INSC 232

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.172 OF 2023

AJAY KUMAR RADHEYSHYAM GOENKA …APPELLANT

Versus

TOURISM FINANCE CORPORATION OF INDIA LTD. …RESPONDENT

With
Crl. A. No.170/2023
Crl.A. No.171/2023

J U D G M E N T

SANJAY KISHAN KAUL, J.

Factual Background:

1. M/s Rainbow Papers Limited (company incorporated and registered under the Companies Act, 1956), of which Ajay Kumar Radheyshyam Goenka, the Appellant before us, was the Promoter and Managing Director, sought loans from a public financial institution, Tourism Finance Corporation of India Limited, the Respondent before us, to fulfil its various

corporate requirements. The proposal of the company was considered by the Respondent and approval was granted for a Term Loan of Rs. 30.00 crores. In pursuance to the approval, a Loan Agreement was executed on 27.03.2012 in New Delhi.

2. In order to satisfy its obligations under the Agreement, the Accused company issued post-dated cheque of Rs. 25,47,945/- bearing cheque number 090656 dated 15.02.2016, drawn on Indian Overseas Bank, Kalupur Circle Branch, Railway Pura, Ahmedabad, towards the payment of one of the instalments. On the cheque being presented to the bankers of the Respondent i.e., HDFC Bank Limited, Nehru Place Branch, New Delhi, the cheque was returned vide Memo dated 07.04.2016 for the reason "*Account Closed*".

3. On 19.04.2016, a demand-cum-legal notice under Section 138 of Negotiable Instruments Act, 1881, (hereinafter referred to as '*the NI Act*') was issued on behalf of the Respondent calling upon the company as Accused no.1 and the Appellant herein as Accused no. 2 to settle the debt advanced by way of corporate loan dated 27.03.2012. The Accused acknowledged their liability to pay the loan amount vide reply dated 28.04.2016. The amount was not paid and, thus, on 16.05.2016, Criminal Complaint No. 632982/2016 was filed in the Court of Chief Metropolitan

Magistrate, Saket Courts, New Delhi, under Section 190 of the Code of Criminal Procedure, 1973, read with Section 138[1], Section 141[2] and Section 142[3] of the NI Act. The complaint was signed and verified by Mr. N. Ramachandran, Deputy General Manager (Law) of the Respondent company. An endeavor for mediation was made but was not successful and, thus, the next date was scheduled before the Magistrate for 15.01.2018. In the meantime, a development, which took place, was that in 2017 M/s Neeraj Paper Agencies Limited, styling itself as 'Operational Creditor', filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as '*IBC*') read with Rule 6 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, (hereinafter referred to as '*IB Rules, 2016*') with the request to initiate Corporate Insolvency Resolution Process against the Accused company, treating it as the 'Corporate Debtor'. The National Company Law Tribunal vide order dated 12.09.2017 admitted the aforesaid insolvency application.

4. The Respondent herein filed its claim qua the debt, which was the subject matter of the N.I. Act proceedings, on 13.10.2017. In terms of the Resolution Plan dated 26.05.2018, the Resolution Applicant (Kushal Limited) filed the Resolution Plan and during the course of meeting the

[1]Dishonour of cheque for insufficiency, etc., of funds in the account.
[2]Offences by companies.
[3]Cognizance of offences.

Committee of Creditors on 05.06.2018, it was informed that the respondent herein could not be considered as a Secured Financial Creditor as per definitions contained in Section 3(30) and Section 3(31) of the IBC. In effect, on legal advice, the Respondent was opined as an Unsecured Financial Creditor. This resulted in the Respondent filing applications, in the form of objections, before the NCLAT where the status was sought to be changed from the Unsecured to Secured Financial Creditor.

5. Now turning back to the NIA proceedings, the Metropolitan Magistrate passed an interim order dated 12.11.2018 dismissing the application of the Appellant for exemption from personal appearance. This, in turn, was predicated on the observations of NCLAT in ***Shah Brothers Ispat Pvt. Ltd. Vs P. Mohan Raj &Ors, Company Appeal (AT) Insolvency No.306 of 2018***, opining that Section 138 of NI Act is a penal provision, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceedings or any judgment or decree of money claim. Thus, it would not come within the purview of Section 14 of the IBC and, thus, the proceedings under Section 138 of the NI Act, 1881 could continue simultaneously.

6. The Appellant, thus, filed an application for discharge of the Complaint Case in question herein in the present case, which was dismissed

by the Metropolitan Magistrate vide order dated 01.11.2019. The Criminal Revision Petition preferred by the Appellant bearing Criminal Revision Petition No. 784 of 2019 also met with a similar fate before the High Court and was dismissed with cost of Rs. 20,000/- to be paid by the Appellant to the Respondent. It is this order, which is now, sought to be assailed before us.

Appellant's submissions:

7. Mr. Nikhil Goel, learned counsel, sought to urge on behalf of the appellant that the trigger of Section 138 of the NI Act, is the non-payment of legally enforceable debt. Once the debt is itself extinguished, either under Section 31 or in process from Sections 38 to 41 and 54 of IBC, the basis of Section 138 of the NI Act disappears. We may note that these provisions fall under Chapter III[4] of the IBC.

8. The term 'Debt' would mean 'legally enforceable debt' under the Explanation to Section 138 of the NI Act and this may be read with Sections 2(6) and 2(8) of the IBC.

9. It was submitted that the nature of the proceedings under Section 138 of the NI Act is primarily compensatory in nature and the punitive element is incorporated at enforcing the compensatory provisions. Therefore, once

[4] Liquidation Process

recovery is made partly by the receipt of money and partly by waiver, Section 138 of the NI Act should not be permitted to be continued.

10. It was lastly urged that if the debt of the company is resolved then the payment would be governed under the Resolution Plan. If the debts are not resolved, then the assets of the company are to be distributed in terms of Section 53 of the IBC.

Plea of the Respondent:

11. On behalf of the Respondent, it was urged that the cheque was given for repayment of the aforementioned loan amount of Rs.30 crore for which the accused company agreed to repay the principal amount in two installments with first installment of Rs.10 crore payable on 31.03.2015 and the second installment of Rs.20 crore payable on 31.03.2016. The accused company had to pay interest @ 15 per cent per annum on the said principal amount of loan and such interest was payable monthly on the 15th day of every month, which was in consonance with the dates and the cheque amount.

12. It was urged that the accused company along with the Appellant deliberately and with the *mala fide* intention gave the cheque to defraud the Respondent to take loan from it and subsequently to usurp the loan

amount and hence had closed the bank account. The Appellant being the signatory was directly liable along with the accused company. The Appellant was actively involved in the day to day affairs of the company as can be inferred from the aforementioned loan agreement signed by him as well.

Our View:

13. We may note that on 20.09.2022 with some of the SLPs being withdrawn, in respect of the SLPs in question, the interim order was made absolute with the direction for urgent listing as criminal proceedings had been stayed. Learned counsel for the parties stated that they will file short synopsis not running into more than three pages each and will not take more than 15-20 minutes each for their respective submissions. On the conspectus of the aforesaid we heard the arguments on 17.01.2023 when we granted leave and reserved the judgment.

14. The Appellant had submitted the synopsis in advance. The Respondent however, despite assuring that they would submit the synopsis has not cared to do so and we have gone on the basis of the record. This position is prevalent right till 12.03.2023 and we do not consider it appropriate to wait any more. We assume that the Respondent

is not interested in rendering any further assistance to the Court by filing synopsis. Fortunately for them, for the reasons to be recorded hereinafter, they have not really suffered the consequences thereof.

15. 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 N.I. Act can continue simultaneously or not.

16. We have no hesitation in coming to the conclusion that the scope of nature of proceedings under the two Acts and quite different and would not intercede each other. In fact, a bare reading of Section 14 of the 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 N.I. Act. We are unable to appreciate the plea of the learned counsel for the Appellant that because Section 138 of the N.I. 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 N.I. Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of the N.I. 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.

17. It cannot be said that the process under the 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 the IBC there are sacrifices to be made by parties to settle the debts, the company being liquidated or revitalized. 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.

18. 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 N.I. 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 N.I. Act, is unacceptable.

19. We are, thus, conclusively of the view that the impugned order takes the correct view in law and cannot be assailed before us.

Conclusion:

20. The appeals are accordingly dismissed but without costs before us on account of what we have recorded in para 14.

...J.
[Sanjay Kishan Kaul]

...J.
[Abhay S. Oka]

New Delhi.
March 15, 2023.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 170 OF 2023
(@SLP(CRL) NO. 417 OF 2020)

AJAY KUMAR RADHESHYAM GOENKA ……APPELLANT(S)

VERSUS

TOURISM FINANCE CORPORATION OF INDIA LTD. ......RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 172 OF 2023
(@SLP(CRL) NO. 482 OF 2020)

&

CRIMINAL APPEAL NO. 171 OF 2023
(@SLP (CRL) 446 OF 2020)

J U D G M E N T

J.B. PARDIWALA, J. :

1. I have carefully, gone through the perspicuous opinion of my esteemed brother Sanjay Kishan Kaul, J. I am entirely in agreement with the discussion contained in the said judgment on all the cardinal issues that have arisen for consideration in these proceedings. At the same time, having regard to the fact that the issues involved are of seminal importance, I am also inclined to pen down my thoughts.

2. For the sake of convenience, the Criminal Appeal No. 170 of 2023 (@ SLP (Crl) No. 417 of 2020) is treated as the lead matter.

3. This appeal by special leave is at the instance of the original accused No. 2 in a complaint lodged by the respondent herein (original complainant) for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short, 'the NI Act') and is directed against the order passed by the Additional Sessions Judge-02

South East District, Saket Court, New Delhi dated 23.11.2019 in the Criminal Revision Application No. 593 of 2019 by which the Additional Sessions Judge affirmed the order passed by the Metropolitan Magistrate – 09, SED dated 01.11.2019 rejecting the application filed by the appellant herein seeking discharge from the criminal proceedings i.e. Complaint Case No. 632984 of 2016 instituted by the respondent-complainant under Section 138 of the NI Act.

4. It is necessary to clarify why the appellant challenged the impugned order passed by the Additional Sessions Judge directly before this Court invoking Article 136 of the Constitution of India. In this regard, the following averments made in the synopsis are reproduced hereinbelow:

> *"The petitioner is directly approaching this Hon'ble Court, because the first two facets are already being considered by this Hon'ble Court, in which view, the Hon'ble High Court is not likely to entertain a quashing petition. This apart, a petition before any other court is likely to result in conflicting orders and would be an exercise in futility. The earlier matters pending before this Hon'ble Court also arose directly out of the summons issued by the concerned Learned Magistrate."*

FACTUAL MATRIX

5. The respondent herein, namely, the "Tourism Finance Corporation of India Limited" (hereinafter shall be referred to as, 'the complainant'), had advanced a sum of Rs. 30,00,00,000/- (thirty crore) as a corporate loan to the Rainbow Papers Limited (Original Accused No. 1/corporate debtor). The appellant herein at the relevant point of time was the Managing Director of the company i.e. the corporate debtor. The transaction between the parties took place on 31.03.2012. It appears that an amount of Rs. 10.88 crore came to be repaid before the disputes arose between the parties. Sometime in 2016, the complainant issued a notice to the corporate debtor to settle the balance amount. On 16.05.2016, a complaint was lodged under Section 138 of the NI Act by the complainant against the corporate debtor and the appellant herein (Managing Director of the Corporate Debtor) for dishonour of the three cheques issued by the appellant herein for discharge of the debt in part to the tune of Rs. 57,00,000/-

(fifty-seven lakhs).

6. The aforesaid complaint under Section 138 of the NI Act was registered in the Court of the Chief Metropolitan Magistrate, Saket Court, New Delhi.

7. In 2017, one of the operational creditors filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC' or 'the IBC, 2016') before the NCLT, Ahmedabad, seeking to initiate Corporate Insolvency Resolution Process (for short, 'the CIRP') with respect to the corporate debtor.

8. The Insolvency application came to be admitted by the NCLT on 12.09.2017.

9. On 3.10.2017, the complainant filed its claim of Rs. 22,50,00,000/- crore (approximately) before the Interim Resolution Professional (for short, 'the IRP').

10. On 26.05.2018, the resolution applicant filed its resolution plan under the terms of which, the payment to the complainant was in full and final settlement of all its claims against the corporate debtor.

11. On 05.06.2018, the Committee of Creditors (for short, 'the CoC') approved the resolution plan proposed by the resolution applicant. The complainant was one of the members of the CoC.

12. On 23.07.2018, the complainant lodged his objections before the NCLT to the resolution plan in so far as it changed its status from secured to unsecured creditor.

13. It appears that in the meantime, the appellant preferred an application before the trial court seeking exemption from his personal appearance invoking a moratorium under Section 14 of the IBC. The Magistrate *vide* order dated 12.11.2018 rejected the said application on the ground that the criminal proceedings under the NI Act had nothing to do with the proceedings under the IBC.

14. On 27.02.2019, the NCLT approved the resolution plan so far as the corporate debtor is concerned.

15. As the resolution plan came to be approved by the NCLT, the appellant herein filed an application dated 20.07.2019 before the trial court, praying that he be discharged from the criminal proceedings. The case of the appellant herein before the Magistrate was that as the debt stood settled in the proceedings under the IBC, the criminal proceedings would not survive.

16. The trial court *vide* order dated 01.11.2019 rejected the aforesaid application

essentially on the ground that it had no jurisdiction to discharge an accused in a summons triable case.

17. In view of the aforesaid, the appellant herein filed the Criminal Revision Application No. 593 of 2019 before the Additional Sessions Court, challenging the order passed by the Magistrate dated 01.11.2019 referred to above. The appellant contended before the revisional court that as the debt in connection with which the criminal proceedings had been initiated, formed part of the approved resolution plan the outstanding debt under the NI Act could be said to have stood settled.

18. The Additional Judge *vide* the impugned order dated 23.11.2019 rejected the Revision Application.

19. In such circumstances, referred to above, the appellant is here before this Court with the present appeal.

THE SUBMISSIONS ON BEHALF OF THE APPELLANT

20. Mr. Nikhil Goel, the learned counsel appearing for the appellant made the following submissions:

A. The trigger of Section 138 of the NI Act, is the non-payment of legally enforceable debt. Once the debt itself gets extinguished either under Section 31 of the IBC or in the process from Sections 38 to 41 and 54 resply of the IBC, the basis of Section 138 of the NI Act no longer remains. The term debt would mean the 'legally enforceable debt' under the explanation to Section 138 of the NI Act. This may be read with Section 2(6) & 2(8) resply of the IBC.

B. The liability is primarily of the company and prosecution of natural persons under Section 141 of the NI Act is vicarious to the prosecution of the company. It is for this reason that a director cannot be prosecuted without making the company as an accused. [See ***Ajit Balse v. Ranga Karkere: (2015) 15 SCC 748***.]

C. The nature of proceedings under Section 138 of the NI Act is primarily compensatory and the punitive element is incorporated at enforcing the compensatory provisions. (paras 53 & 63 resply in ***P. Mohanraj and Others v.***

Shah Brothers Ispat Private Limited reported in (2021) 6 SCC 258). Therefore, once recovery is made, partly by receipt of money and partly by waiver, Section 138 of the NI Act should not be permitted to be continued.

D. If the debt of the company is resolved then payments would be governed under the resolution plan. If the debts are not resolved then the assets of the company are to be distributed in terms of Section 53 of the IBC. Permitting two proceedings to continue would therefore defeat either Section 31 or Section 53 of the IBC, as the case may be.

E. Mr. Goel submitted that this Court in ***P. Mohanraj*** (supra) considered the position of law as regards the continuation of the criminal proceedings under Section 138 of the NI Act vis-a-vis the proceedings under the IBC and answered the same in para 102 of the judgment. It was pointed out by Mr. Goel that this Court drew a fine distinction between the corporate debtor and natural persons & ultimately held that while a corporate debtor would be protected from Section 138 proceedings during the period of moratorium, the natural persons would not enjoy such protection and Section 138 proceedings would continue against the natural persons. However, according to Mr. Goel, this Court may not go in the correctness of such bifurcation as in the case on hand, the proceedings are beyond the period of moratorium. Mr. Goel pointed out that the question framed in para 6 of the decision in ***P. Mohanraj*** (supra) is restricted only to the applicability of Section 14 of the IBC to the proceedings under Section 138 of the NI Act.

F. The principal argument of Mr. Goel is that if the IBC proceedings have travelled beyond Section 14, the process would either lead to acceptance of a resolution plan under Section 31 of the IBC or liquidation of the company after determination of the claims under Chapter III of the IBC. According to Mr. Goel, Section 31 of the IBC is applicable to the present litigation.

21. In such circumstances referred to above, Mr. Goel prays that there being merit in his appeal, the same may be allowed and the appellant may be discharged from the criminal liability under Section 138 of the NI Act.

THE SUBMISSIONS ON BEHALF OF THE RESPONDENT (COMPLAINANT)

22. On the other hand, this appeal has been vehemently opposed by Mr. Rajiv Ranjan Dwivedi, the learned counsel appearing for the complainant by submitting that in the case on hand, the criminal proceedings under the NI Act were initiated much before the proceedings under the IBC came to be initiated. In other words, cognizance was taken by the learned Magistrate upon the complaint filed under Section 138 of the NI Act much before the scheme came to be approved under the IBC. He would submit that the offence alleged to have been committed by the appellant herein prior to the scheme would not get automatically compounded only as a result of the said scheme. He would further submit that none of the provisions of the IBC bars the continuation of the criminal prosecution initiated against the corporate debtor or its directors or officials. According to the learned counsel, if the company is dissolved as a result of the resolution process, the criminal proceedings against it would stand terminated, however, the signatory to the cheque or its erstwhile directors are not entitled in law to take advantage of such a situation created by operation of law.

23. The learned counsel appearing for the complainant, laid much stress on Section 32A of the IBC, which states that every person who was a 'designated partner' or an 'officer who is in default' or was in any manner in charge of/responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence in accordance with the report submitted or complaint filed by the investigating authority shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under the provision of Section 32A of the IBC.

24. In such circumstances, referred to above, the learned counsel prays that there being no merit in the present appeal, the same may be dismissed.

ANALYSIS

25. Having heard the learned counsel appearing for the parties and having gone

through the materials on record, the seminal question of law that falls for the consideration of this Court may be formulated as under:

Whether in light of:

(i) the complainant having participated in the proceedings under the IBC, 2016 by putting forward its claim and consenting to accept some share as a creditor; coupled with

(ii) the approval of the resolution plan under Section 31 of the IBC, 2016; the signatory/director in charge of the day-to-day affairs would stand discharged/relieved from the penal liability under Section 138 of the NI Act?

26. Before adverting to the rival submissions canvassed on either side, it is necessary to look into few relevant provisions of the NI Act as well as IBC, 2016.

27. Section 138 of the NI Act reads thus:

> ***"138. Dishonour of cheque for insufficiency, etc., of funds in the account.—***
> *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*

(c) 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.

Explanation.— For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability."

28. Section 139 of the NI Act raises presumption. The same reads thus:

*"**139. Presumption in favour of holder.—** It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability."*

29. Section 141 of the NI Act fastens vicarious liability upon every person, who at the time of the offence, was in charge of and was responsible to the company for the conduct of the business of the company. Section 141 reads thus:

*"**141. Offences by companies.—** (1) 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:*
Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.
(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section, —

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

30. Section 142 of the NI Act is in regard to the cognizance of offence. The same reads thus:

> "***142. Cognizance of offences.—*** *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),*
> *(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;*
>
> *(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:*
>
> *Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.*
>
> *(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.*
>
> *(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,—*
>
> *(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or*
>
> *(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.*
>
> *Explanation.— For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."*

31. Section 147 of the NI Act provides that the offence under the NI Act shall be compoundable. Section 147 reads thus:

> *"**147. Offences to be compoundable**.— Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."*

32. The offence under Section 138 of the NI Act, 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

the Code of Criminal Procedure, 1973 (for short, 'the CrPC') 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 the CrPC. If the complainant fails to turn up on any hearing date, the Magistrate can invoke Section 256 of the CrPC and acquit the accused. Under Section 257 of the CrPC, the complaint can be withdrawn at any point of time before the final order is passed. Under Section 147 of the NI Act the offence can be compounded. The case may end in acquittal or conviction at the conclusion of the trial.

33. Section 141 of the NI 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 NI 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.

SCHEME OF THE IBC, 2016

34. I shall now try to understand the scheme of the IBC.

35. It is a comprehensive Code enacted, as the Preamble states, to *"consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto"*.

36. The Statement of Objects and Reasons of the IBC indicates that the Legislature was of the opinion that the existing framework for insolvency and bankruptcy was inadequate and ineffective and resulted in undue delays in resolution. The IBC was proposed with the objective of consolidating and amending the laws relating to

reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders, including alteration in the priority of payment of Government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. The IBC provides for designating the NCLT and the Debts Recovery Tribunal (DRT) as the adjudicating authorities for corporate persons, firms and individuals for resolution of insolvency, liquidation and bankruptcy. The IBC was published in the Gazette of India dated 28.05.2016. Provisions of the IBC were, however, brought into effect from different dates in terms of the proviso to Section 1(3) of the IBC.

37. Section 7 of IBC lays down the procedure for the initiation of the corporate insolvency resolution process by the financial creditor or any other person or more financial creditors jointly. The financial creditor may file an application before the adjudicating authority along with the proof of default and the name of a resolution professional proposed to act as the interim resolution professional in respect of the corporate debtor. Once the adjudicating authority is satisfied, as to the extent of the default and is ensured that the application is complete and no disciplinary proceedings are pending against the proposed resolution professional, it shall admit the application.

38. Section 8 of the IBC provides that an operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

39. Section 9 of the IBC stipulates that after the expiry of the period of 10 days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8 if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of Section 8, it would be open for the operational creditor to file an application before the adjudicating authority for initiating a corporate insolvency resolution process.

40. After the initiation of the CIRP the following takes place:

(a) All the creditors are mandatorily required to put forward their claims before the CIRP in light of the public announcement.

(b) In the aforesaid context, I must look into Sections 13 and 15 resply of the IBC. Sections 13 and 15 resply are reproduced hereinbelow:

> ***"13. Declaration of moratorium and public announcement.—*** *(1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order—*
> *(a) declare a moratorium for the purposes referred to in section 14;*
>
> *(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and*
>
> *(c) appoint an interim resolution professional in the manner as laid down in section 16.*
>
> *(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional.*
>
> Xxx xxx xxx
>
> ***15. Public announcement of corporate insolvency resolution process.—***
> *(1) The public announcement of the corporate insolvency resolution process under the order referred to in section 13 shall contain the following information, namely:—*
> *(a) name and address of the corporate debtor under the corporate insolvency resolution process;*
> *(b) name of the authority with which the corporate debtor is incorporated or registered;*
> *(c) the last date for submission of [claims, as may be specified];*
> *(d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims;*
> *(e) penalties for false or misleading claims; and*
> *(f) the date on which the corporate insolvency resolution process shall close, which shall be the one hundred and eightieth day from the date of the admission of the application under sections 7, 9 or section 10, as the case may be.*
> *(2) The public announcement under this section shall be made in such manner as may be specified."*

(c) It is important to note that the resolution professional has no adjudicatory powers in regard to the claims unlike the liquidator. The resolution professional only collates the claims. In this regard, the decision of this Court in the case of ***Swiss Ribbons Private***

Limited and Another v. Union of India and Others reported in (2019) 4 SCC 17 assumes importance. I quote paras 88-91 of ***Swiss Ribbons*** (supra) as under:

Resolution professional has no adjudicating powers

*"**88.** It is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers. Section 18 of the Code lays down the duties of an interim resolution professional as follows:*

*"**18. Duties of interim resolution professional**.—(1) The interim resolution professional shall perform the following duties, namely—*

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15;

(c) constitute a Committee of Creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the Committee of Creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term "assets" shall not include the following, namely—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

89. *Under the CIRP Regulations, the resolution professional has to vet and verify claims made, and ultimately, determine the amount of each claim as follows:*

*"**10. Substantiation of claims**.—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.*

* * *

***12. Submission of proof of claims**.—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.*

(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.

(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim:

Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

***13. Verification of claims**.—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.*

(2) The list of creditors shall be—

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, Directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(d) filed with the adjudicating authority; and

(e) presented at the first meeting of the committee.

***14. Determination of amount of claim**.—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.*

(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

It is clear from a reading of these Regulations that the resolution professional is given administrative as opposed to quasi-judicial powers. In fact, even when the resolution professional is to make a "determination" under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination made as follows:

*"**35-A. Preferential and other transactions**.—(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under Sections 43, 45, 50 or 66.*

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under Sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the adjudicating authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date."

***90.** As opposed to this, the liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Sections 38 to 40 of the Code. Sections 41 and 42, by way of contrast between the powers of the liquidator and that of the resolution professional, are set out hereinbelow:*

*"**41. Determination of valuation of claims**.—The liquidator shall determine the value of claims admitted under Section 40 in such manner as may be specified by the Board.*

***42. Appeal against the decision of liquidator**.—A creditor may appeal to the adjudicating authority against the decision of the liquidator accepting or rejecting the claims within fourteen days of the receipt of such decision."*

It is clear from these sections that when the liquidator "determines" the value of claims admitted under Section 40, such determination is a "decision", which is quasi-judicial in nature, and which can be appealed against to the adjudicating authority under Section 42 of the Code.

91. *Unlike the liquidator, the resolution professional cannot act in a number of matters without the approval of the Committee of Creditors under Section 28 of the Code, which can, by a two-thirds majority, replace one resolution professional with another, in case they are unhappy with his performance. Thus, the resolution professional is really a facilitator of the resolution process, whose administrative functions are overseen by the Committee of Creditors and by the adjudicating authority."*

(d) Section 29 of the IBC deals with the information memorandum on the basis of which the resolution plan would be submitted. In this regard, Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, assumes importance wherein Regulation 36(2)(d) covers the claims of different kinds of creditors. Regulation 36(2)(d) reads thus:

*"**36. Information memorandum.-(1)** Subject to sub-regulation (4), the resolution professional shall submit the information memorandum in electronic form to each member of the committee within two weeks of his appointment, but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier.*
(2) The information memorandum shall contain the following details of the corporate debtor-
(a) xxxx
Xx xx xx
(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;….."

(e) In the aforesaid context, I may look into the decision of this Court in the case of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others*** reported in (2020) 8 SCC 531, more particularly, paras 42-45 which read thus:

"42. *Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution applicant. Under Section 30 of the Code, the resolution applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its*

approval, such resolution plans which conform to the conditions referred to in Section 30(2) of the Code — see Section 30(3) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority — see Section 30(6) of the Code.

***43.** The aforesaid provisions of the Code are then fleshed out in the 2016 Regulations. Under Chapter IV of the aforesaid Regulations, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof — see Regulations 7 to 12. Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list — see Regulation 13(1).*

***44.** Chapter X of the Regulations then deals with resolution plans that are submitted. Under Regulation 35, "fair value" as defined by Regulation 2(1)(hb) [Under Regulation 2(1)(hb), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:"**2. (1)(hb) "fair value"** means the estimated realisable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion;"] and "liquidation value" as defined by Regulation 2(1)(k) [Id. Under Regulation 2(1)(k):"**2. (1)(k) "liquidation value"** means the estimated realisable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date;"] shall be determined by two registered valuers appointed under Regulation 27, which shall be handed over to the resolution professional.*

***45.** After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors — see Regulation 35(2). Regulation 36 is important as it forms the basis for the submission of a resolution plan. The information memorandum, spoken of by this regulation, must contain the following:*

> *"**36.(2)(a)** assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.*
>
> *Explanation.—"Description" includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.*

(b) *the latest annual financial statements;*

(c) *audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;*

(d) *a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;*

(e) *particulars of a debt due from or to the corporate debtor with respect to related parties;*

(f) *details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;*

(g) *the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;*

(h) *details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;*

(i) *the number of workers and employees and liabilities of the corporate debtor towards them;*

(j)-(k)*****

(l) *other information, which the resolution professional deems relevant to the committee.""*

(f) On the basis of the information memorandum, the resolution plan is submitted under Section 30(1) of the IBC.

(g) It is important to note that the operational creditors are mandatorily entitled to the liquidation value or the amount that the plan entitles them if distributed in accordance with the waterfall mechanism under Section 53 whichever is higher. (See Section 30 (2)(b))

(h) For dissenting financial creditors, they are mandatorily entitled to the amount under Section 53 in the event of liquidation.

(i) The constitutional validity of the said provision was upheld by this Court in the decision of ***Essar Steel India Limited*** (supra). (See paras 128-131)

(j) If the plan fails to comply with the above, the resolution plan is liable to be mandatorily rejected.

(k) Section 31 of the IBC deals with the approval of the resolution plan which shall bind everyone i.e. the corporate debtor, guarantors, creditors, other stakeholders etc.

Thus, whatever amount is allotted to the creditor under the plan, the same will have to be accepted without any option.

(l) The new avatar of the corporate debtor does not have to deal with the various "hydra heads", i.e. multiple new claims popping up after the approval of the plan (para 107 of the ***Essar Steel*** (supra)

(m) The aforesaid has been accepted as a "Clean Slate Theory". (See paras 93-94 of ***Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.,*** (2021) 9 SCC 657).

(n) This Court in ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another*** reported in (2022) 2 SCC 401, has held that the resolution plan binds even the persons who have not consented. Paras 115 & 117 resply read thus:-

> ***"115.*** *While the above observations were made in the context of a scheme that has been sanctioned by the court, the resolution plan even prior to the approval of the adjudicating authority is binding inter se the CoC and the successful resolution applicant. The resolution plan cannot be construed purely as a "contract" governed by the Contract Act, in the period intervening its acceptance by the CoC and the approval of the adjudicating authority. Even at that stage, its binding effects are produced by IBC framework. The BLRC Report mentions that "[w]hen 75% of the creditors agree on a revival plan, this plan would be binding on all the remaining creditors" [3.3.1, The Report of the Bankruptcy Law Reforms Committee, Vol. I : Rationale and Design (November 2015), p. 13, available at <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf> last accessed 20-8-2021.]. The BLRC Report also mentions that, "the RP submits a binding agreement to the adjudicator before the default maximum date" [Id, p. 92.]. We have further discussed the statutory scheme of IBC in Sections I and J of this judgment to establish that a resolution plan is binding inter se the CoC and the successful resolution applicant.* ***<u>Thus, the ability of the resolution plan to bind those who have not consented to it, by way of a statutory procedure, indicates that it is not a typical contract.</u>***
>
> ***Xxx xxx xxx***
>
> ***117.*** *….. The terms of the resolution plan contain a commercial bargain between the CoC and resolution applicant. There is also an intention to create legal relations with binding effect. However, it is the structure of IBC which confers legal force on the CoC-approved resolution plan.* ***The validity of the resolution plan <u>is not premised</u> upon the agreement or consent of those bound*** *(although as a procedural step IBC requires sixty-six per cent votes of creditors),* ***but upon its compliance with the procedure***

> ***stipulated under IBC.”*** (Emphasis supplied)

41. Thus, from the aforesaid, it is evident that the creditor has no option but to join the process under the IBC. Once the plan is approved, it would bind everyone under the sun. The making of a claim and accepting whatever share is allotted could be termed as an “Involuntary Act” on behalf of the creditor. The making of a claim under the IBC and accepting the same and not making any claim, will not make any difference in light of Section 31 of the IBC. Both the situations will lead to Section 31 and the finality and binding value of the resolution plan.

42. Keeping the aforesaid discussion in mind, at best, it could be said that from the cheque amount under Section 138 of the NI Act, the amount received under the resolution plan may be deducted. (akin to what happens to the guarantors)

<u>SECTION 32A OF THE IBC</u>

43. ***P. Mohanraj*** (supra) has harmoniously construed Section 32A with Section 14 of the IBC so as to apply to Section 138 NI Act, proceedings. Section 32A(1) is very crucial and hence, is quoted below:-

> *“**32A. Liability for prior offences, etc**.—(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—*
>
> *(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or*
>
> *(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court:*
>
> *Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand*

discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section*."*

44. Section 32A of the IBC has been upheld by this Court in ***Manish Kumar v. Union of India and Another*** reported in (2021) 5 SCC 1. This Court has held that the said section does not permit the wrong-doer to get away. Thus, if the argument of allowing the signatory/director to go scot-free after the approval of the resolution plan is accepted the same would run contrary to the legislative intent of Section 32A which has been upheld by this Court as under:

> ***"326.*** *We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the*

hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.”
(Emphasis supplied)

45. In ***P. Mohanraj*** (supra), this Court in clear terms held that Section 32A only protects the corporate debtor and not the signatories/directors etc. The prosecution against the signatories/directors would continue. In ***P. Mohanraj*** (supra): **-**

a. The issue involved was whether the institution/continuation of a proceeding under Section 138/141 of the NI Act, 1881 is said to be covered by Section 14 of the IBC, 2016.
b. That Section 138 proceedings can be said to be a "civil sheep" in a "criminal wolf's" clothing.
 i. The Court relied upon ***Kaushalya Devi Massand v. Roopkishore Khore,*** (Para 59) [(2011)4 SCC 593] and ***Meters & Instruments (P) Ltd. v. Kanchan Mehta***, (Para 63) [(2018)1 SCC 560]
c. Section 138 proceedings are covered by Section 14 of the IBC, 2016. **(Para 67)**
d. Moratorium under Section 14, IBC only applies to the Corporate Debtor and does not apply to natural persons mentioned under Section 141 of NI Act, 1881. The said conclusion is reached after considering ***Aneeta Hada* v. *Godfather Travels & Tours (P) Ltd.***, (2012) 5 SCC 661. **(Para 102)**
e. I quote para 102 of ***P. Mohanraj*** (supra) as under:

*“**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 ((2012) 5 SCC 661) 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 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.”

(Emphasis supplied)

46. While dealing with the issue of Section 14, IBC, this Court had the occasion to deal in detail with Section 32A also. The 2nd proviso to Section 32A(1) is a complete answer to the issue in question. The said provision is discussed in detail from Paras 39-43 in ***P. Mohanraj’s*** case. Paras 39 to 43 read thus:

“***39.*** *The raison d'être for the enactment of Section 32-A has been stated by the Report of the Insolvency Law Committee of February 2020, which is as follows:*

“***17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP*** *[Recommendations contained herein have been implemented pursuant to Section 10 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.]*

17.1. Section 17 of the Code provides that on commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29-A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

Liability where a Resolution Plan has been approved

17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the adjudicating authority. [SBI v. Bhushan Steel Ltd., 2018 SCC OnLine NCLT 32305, para 83(i)] Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty-bound to penalise the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced.

Xxx xxx xxx

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29-A. [For example, where the exemption under Section 240-A is applicable.]

17.7. Thus, the Committee agreed that a new section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the

commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence.

17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased." (emphasis in original and supplied)

***40.** This Court in Manish Kumar v. Union of India [(2021) 5 SCC 1], upheld the constitutional validity of this provision. This Court observed : (SCC pp. 170-71, para 326)*

"326. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision."

***41.** Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart*

of the section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that the new management may make a clean break with the past and start on a clean slate. A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also, Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.

42. *Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A(1) speaks of persons who are in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence" i.e. the offence referred to in sub-section (1), "as per the report submitted or complaint filed by the investigating authority …". The report submitted here refers to a police report under Section 173 CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints. If the language of the second proviso is taken to interpret the language of Section 32- A(1) in that the "offence committed" under Section 32-A(1) would not include offences based upon complaints under Section 2(d) CrPC, the width of the language would be cut down and the object of Section 32-A(1) would not be achieved as all prosecutions emanating from private complaints would be excluded.* ***Obviously, Section 32-A(1) cannot be read in this fashion and clearly incudes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process. Doubtless, a Section 138 proceeding would be included, and would, after the*** *moratorium period comes to an end with a resolution plan by a new management being approved by the adjudicating authority, cease to be an offence qua the corporate debtor.*

43. *A section which has been introduced by an amendment into an Act with its focus on cesser of liability for offences committed by the corporate debtor prior to the commencement of the corporate insolvency resolution process cannot be so construed so as to limit, by a sidewind as it were, the moratorium provision contained in Section 14, with which it is not at all concerned.* ***If the first proviso to Section 32-A(1) is read in the manner suggested by Shri Mehta, it will impact Section 14 by taking out of its ken Sections 138/141 proceedings, which is not the object of Section 32-A(1) at all. Assuming, therefore, that there is a clash between Section 14 IBC and the first proviso of Section 32-A(1), this clash is best resolved by applying the doctrine of harmonious construction so that the objects of both the provisions get subserved in the process, without damaging or limiting one provision at the expense of the other. If, therefore, the expression "prosecution" in the first proviso of Section 32-A(1) refers to***

> ***criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same after a new management comes in."***
>
> **(Emphasis applied)**

Thus, the heart of the matter is the second proviso appended to Section 32A(1)(b) of the IBC which provides statutory recognition of the criminal liability of the persons who are otherwise vicariously liable under Section 141 of NI Act, in the context of Section 138 offence.

46. Thus, Section 32A broadly leads to:

a. Extinguishment of the criminal liability of the corporate debtor, if the control of the corporate debtor goes in the hands of the new management which is different from the original old management.
b. The prosecution in relation to ***"every person who was a "designated partner" as defined in clause (j) of Section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an "officer who is in default", as defined in clause (60) of Section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence"*** shall be proceeded and the law will take it's own course. Only the corporate debtor (with new management) as held in Para 42 of ***P. Mohanraj*** will be safeguarded.
c. **If the old management takes over the corporate debtor** (for MSME Section 29A does not apply (see 240A), hence for MSME old management can takeover) **the corporate debtor itself is also not safeguarded from prosecution under Section 138 or any other offences.**

47. Thus, I am of the view that by operation of the provisions of the IBC, the criminal prosecution initiated against the natural persons under Section 138 read with 141 of the NI Act read with Section 200 of the CrPC would not stand terminated.

48. In ***JIK Industries Limited and Others*** **v.** ***Amarlal V. Jumani and Another*** reported in (2012) 3 SCC 255, this Court held that the 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 NI Act without the consent of the complainant. Neither Section 14 nor Section 31 of the IBC can produce such a result. The binding effect contemplated by Section 31 of the IBC is in respect of the assets and management of the corporate debtor. No clause in the 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 CrPC.

49. It is true that by virtue of Section 238 of the IBC, the provisions of the CrPC 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 IBC bars the continuation of the criminal prosecution initiated against the directors and officials.

50. It is equally true that once the corporate debtor comes under the resolution process, its erstwhile managing director(s) cannot continue to represent the company. Section 305(2) of the CrPC 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 IBC. 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, this Court in ***Aneeta Hada*** (supra), even while overruling its decision in ***Anil Hada* v. *Indian Acrylic Ltd.*** reported in (2000) 1 SCC 1, as not laying down the correct law in so far as ***Anil Hada*** (supra) 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*** (supra) is overruled with the qualifier as stated in para 51. Considering the same, the ratio of the decision of this Court in ***Ajit Balse*** (supra) upon which strong reliance is placed on behalf of the appellant is of no avail.

51. 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 the 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*** reported in 1985 supp SCC 416.

52. 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*** (supra). 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.

FEW OF THE ABSURD SITUATIONS THAT MAY ARISE IF SECTION 138 PROCEEDINGS IN RELATION TO THE SIGNATORIES/DIRECTORS ARE HELD TO BE NOT MAINTAINABLE AFTER THE RESOLUTION PLAN IS APPROVED

53. If the argument that the signatories/directors are not liable to be proceeded under Section 138/141 of the NI Act once the resolution plan is approved, the same may lead to the following absurd situations:

i. If during the lifetime of the Section 14 moratorium order, some of the accused are convicted under Section 138 of the NI Act, they will have to be released in appeal once the resolution plan is approved. Thus, then, no purpose would be served by proceeding further against the co-accused under Section 138 during the moratorium.

ii. If the resolution plan is not approved and the corporate debtor goes under liquidation in such circumstances under Section 35(1)(k) of the IBC the liquidator can represent the corporate debtor. Thus, the prosecution under Section 138/141 continues. This may lead to absurd situations in working of the IBC and its impact on Section 138 proceedings.

iii. At the end of the liquidation, the distribution will take place under Section 53 of the IBC. Therein everyone, including the creditors will get their share as per the waterfall mechanism statutorily decided and the same would be binding and mandatory. Thereafter, the corporate debtor is dissolved under Section 54 of the IBC after selling of the assets under liquidation. Now during the said period, the prosecution might have been completed and appeals would be pending. Then it would be argued that because under the liquidation the amount is accepted, the prosecution against the signatory/director cannot continue after the dissolution of the corporate debtor.

54. Thus, while interpreting Sections 14, 31 & 32A resply of the IBC vis-a-vis Sections 138 and 141 resply of the NI Act, the principle of harmonious construction should be applied and followed. By permitting to proceed against the signatories/directors even after the approval of the plan, what is achieved is uniformity in the functioning of the law by removing the anomalous and absurd situations, thereby, making it compliant with Article 14 of the Constitution. The said interpretation shields the relevant provisions from attack of being manifestly arbitrary.

55. The distinction between a strict construction and a more free one has disappeared in the modern times and now mostly the question is, "what is the true construction of the statute?" A passage in Craies on Statue Law 7th Edn. reads to the following effect:-

> *"The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. 'All modern Acts are framed with regard to equitable as well as legal principles.' "A hundred years ago", said the court in Lyons' case, "statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of*

Parliament. They are construed now with reference to the true meaning and real intention of the legislature."

56. At page-532 of the same book, observations of Sedgwick are quoted as under:

"The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy."

ARGUMENT THAT AS THE DEBT STOOD EXTINGUISHED BY VIRTUE OF SECTION 31 OF THE CODE, THE CRIMINAL PROCEEDINGS U/S. 138 OF THE NI ACT CANNOT CONTINUE AS REGARDS THE DIRECTOR/SIGNATORY.

57. The argument that as the debt stood extinguished by virtue of Section 31 of the IBC, the proceedings under Section 138 of the NI Act cannot continue as regards the director/signatory, would run contrary to the line of reasoning assigned by this Court that the "Involuntary Act" of the principal debtor would not absolve the guarantors.

58. This Court in ***Lalit Kumar Jain v. Union of India and Others*** reported in (2021) 9 SCC 321 has held that the approval of the resolution plan *per se* does not operate as a discharge of guarantors' liability. That is because:

a. an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability.

b. **a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability.**

59. The same principle is applicable to the signatory/director in the case of Section 138/141 proceedings. The signatory/director cannot take benefit of discharge obtained by the corporate debtor by operation of law under the IBC.

60. If the argument that extinguishment of debt under Section 31 of the IBC leads to the discharge of signatory/director under Section 138 proceedings is accepted, the same will lead to conflict in law as laid down compared to the guarantor's liability

wherein in spite of the plan being approved, the guarantor is held separately liable for the **remaining amount.** If the guarantor does not get the benefit of extinguishment of debt under Section 31 of the IBC, then similarly for extinguishment of debt, the signatory/director cannot get any benefit. **If accepted, this may lead to uncertainty in the first Principles of law on interpretation of extinguishment of debt.** In ***Lalit Kumar Jain*** (supra) this Court held as under:

> ***"122.*** *It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this Court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In Maharashtra SEB [Maharashtra SEB v. Official Liquidator, (1982) 3 SCC 358] the liability of the guarantor (in a case where liability of the principal debtor was discharged under the Insolvency law or the Company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the creditor can realise the same from the guarantor in view of the language of Section 128 of the Contract Act, 1872 as there is no discharge under Section 134 of that Act. This Court observed as follows: (SCC pp. 362-63, para 7)*
>
> > *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Contract Act, 1872, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract.* ***A surety is no doubt discharged under Section 134 of the Contract Act, 1872 by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety***

> ***<u>of his liability (see Jagannath Ganeshram Agarwale v. Shivnarayan Bhagirath [1939 SCC OnLine Bom 65 : AIR 1940 Bom 247] ; see also Fitzgeorge, In re [Fitzgeorge, In re, (1905) 1 KB 462]).””</u>***
>
> (Emphasis supplied)

<u>LITIGANT CANNOT TAKE ADVANTAGE OF ITS OWN WRONG</u>
<u>(NULLUS COMMODUM CAPERE POTEST DE INJURIA SUA PROPRIA)</u>

61. This Court while upholding the validity of Section 32A, IBC (***Manish Kumar's*** case) has held that "***<u>The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away."</u>*** That is a very important object and the same should not be permitted to be defeated by accepting the argument that permits the Signatory/Director to enjoy the fruits of their own wrong.

62. In an interesting case titled ***Goa State Cooperative Bank Limited v. Krishna Nath A. and Others*** reported in (2019) 20 SCC 38, the facts were that the liquidation proceedings were required to be completed within a fixed number of years, but failed. Thereafter the borrowers claimed in the recovery suit that now no recovery could be made. This Court held that the defaulters cannot take benefit of their own action. The disbursement of loan in an arbitrary manner and failure to recover was the very fulcrum on the basis of which the winding up of the Society was ordered. I quote the relevant observations as under:-

> ***"21. It is apparent that on the termination of the liquidation proceedings, liability of the members for the debts taken by them does not come to an end. There is no such provision in the Act providing once winding-up period is over, the liability of the members for loans obtained by them which is in their hands, and for which recovery proceedings are pending shall come to an end. No automatic termination of recovery proceedings against the members is contemplated.*** *On the other hand, on completion of the period fixed to liquidate the Society, final report has to be submitted as to the amount standing to the credit of the Society in liquidation after paying off its liabilities including the share or interest of members. Thus, even in the case of liquidation the accountability remains towards surplus and liabilities do not come to an end. Even if the period fixed for liquidation of Society is over, that does not terminate the proceedings for recovery which have been initiated and appeals are pending.*
>
> *Xxx xxx xxx*

> *24.* ***The concept of restitution is a common law principle and it is a remedy against unjust enrichment or unjust benefit. The court cannot be used as a tool by a litigant to perpetuate illegality. A person who is on the right side of the law, should not have a feeling that in case he is dragged in litigation, and wins, he would turn out to be a loser and wrongdoer as a real gainer, after 20 or 30 years****. Thus, the members who have obtained stay in appeal or on recovery proceedings or the case is pending, cannot take advantage of the fact that the period fixed for the Liquidator under the Act is over.*
>
> *25. Once a report has been submitted, the Registrar has to take action in terms of the report and in such circumstances when the proceedings for recovery are pending against the members and the Society has taken loan from the banks for its member, the actual money has to go to the creditor i.e. to the bank who is going to be benefitted by recovery of public money in the hands of members. In such cases it would be appropriate for the Registrar to send notice of the proceedings to a person who is to be benefitted from the recovery. In the instant case, the Bank itself is a prime lender-cum- liquidator. The proceedings cannot come to the end. Thus, in our considered opinion, it is open to the bank to continue with the recovery proceedings and make recoveries from the defaulting members.* ***Merely on the liquidation of the Society, or the factum that the period fixed for liquidation is over, liability of the members for the loans cannot be said to have been wiped off. The disbursement of loan in an arbitrary manner and failure to recover was the very fulcrum on the basis of which winding up of the Society was ordered."***
>
> **(Emphasis supplied)**

<u>TERMS OF THE RESOLUTION PLAN CANNOT CONTROL THE ENACTMENT/RULES</u>

63. Before I proceed to comment on the aforesaid, it is necessary to look into the relevant clauses of the resolution plan upon which strong reliance is sought to be placed on behalf of the appellant. The relevant clauses read thus:

> *"Part K: Extinguishment of Claims/Rights*
>
> *1. Save and except specifically dealt with under this Resolution Plan, no other payments or settlements (of any kind) shall be made to any other Person in respect of claims filed under the CIRP (including, for the avoidance of doubt, any unverified portion of their claim) and* ***all claims against the Corporate Debtor along with any related legal proceedings, including criminal proceedings, and other penal proceedings, shall stand irrevocably and un-***

> ***conditionally abated, settled and extinguished in perpetuity*** *on the Effective Date, and with effect from the Appointed Date.*
>
> *2. The payment to Persons contemplated in this Resolution Plan shall be the Corporate Debtors and Resolution Applicant's full and final performance and satisfaction of all its obligations to such Persons and all Claims (including, for the avoidance of doubt, any unverified portion of their Claims) of such Persons against the Corporate Debtor shall stand irrevocably and unconditionally settled and extinguished in perpetuity on the Effective Date and with effect from the Appointed Date.*
>
> *3. …Accordingly, the Resolution Applicant and the* ***Corporate Debtor shall have no responsibility or liability in respect of any claims against the Corporate Debtor*** *attributable to the period prior to the Effective Date other than any payments to be made under this Resolution Plan and all claims along with any related legal proceedings, including criminal proceedings and other penal proceedings, shall stand irrevocably and unconditionally abated, settled and extinguished in perpetuity.*
>
> *Xxx xxx xxx*
>
> *6. On the Effective Date and with effect from the Appointed Date,* ***all the outstanding negotiable instruments issued by Director/promoter*** *or Corporate Debtor or* ***by any Person on behalf of the Corporate Debtor for any dues of Corporate Debtor including demand promissory notes, post-dated cheques and letters of credit, shall stand terminated*** *and the Corporate Debtor's liability under such instruments shall stand extinguished.*"
>
> (Emphasis supplied)

64. I have referred to Section 31 of the IBC and ***Ebix Singapore*** (supra) to explain that the resolution plan is binding on the creditors who have not consented to it. This is a very important factor, which indicates that the complainant under Section 138 NI Act is bound by the approved resolution plan, even though he may not have consented to it (if he is part of the CoC) or likes it. If he is not a part of the CoC, then also it is binding on him.

65. **Section 30(2)(e) of the IBC requires the resolution professional to approve the resolution plan, only if the same does not violate any of the provisions of the law for the time being in force.** Thus, the clauses of the resolution plan cannot control the Enactment/Rules in force. It is the resolution plan which has to comply with the laws in force. In the case on hand, any clause giving any effect to the corporate debtor under Section 138 NI Act proceedings, cannot be used to protect the signatories/direc-

tors under Section 138/141 NI Act.

66. Section 61(3)(i) of the IBC provides for an appeal against an order approving a resolution plan if it contravenes any provision of law.

> *"61. **Appeals and Appellate Authority**.—*
> *xxx xxx xxx*
> *(3) An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely:*
> *(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;…."*

67. The complainant-creditor of Section 138 NI Act proceedings may or may not have any role to play in the approval of the resolution plan and majority of Section 138 creditors may be small players unlike big financial creditors.

68. The terms of the resolution plan cannot run contrary to the enactment i.e. the IBC or any other plenary law or rules.

69. Thus, the said clauses of the resolution plan have no role to play in answering the neat question of law, which is dependent on the interpretation of various provisions of the IBC and NI Act.

70. It was also sought to be argued on behalf of the appellant that the plain reading of the clauses of the resolution plan referred to above, would indicate that the respondent (complainant) could be said to have compounded the offence punishable under Section 138 of the NI Act.

71. 'Compounding' and 'quashing' are not synonymous terms. In law, they have different meanings and consequences. They arise from different situations and operate in different fields and stages. There is no apparent legal interdependence or interlink to the extent that one could exist only if the conditions of the other were satisfied or vice-versa. Quashing is one of the facets of inherent powers, while compounding of an offence being a statutory expression contained under Section 320 the CrPC is entirely a different concept.

72. The expressions 'compromise' and 'compounding' are not synonyms in criminal jurisprudence even though these expressions are usually used without any distinction.

Any dispute can be compromised between the parties if the terms are not illegal. But only a compoundable offence allowed by law can be compounded. A dispute relating to a crime can be compromised even before the case is registered, and in that case, victim of the crime may refuse to file a complaint. But if in spite of compromise, if he files a complaint and court finds that what is compromised is a compoundable offence, depending upon the facts and circumstances of each case Magistrate can refuse to take cognizance, or acquit the accused as offence was compounded or the complaint can be quashed in proceedings under Section 482 of the CrPC.

73. In a compromise, consensus between the parties to give and take is more important and in a compounding, decision of the victim of the offence not to prosecute and not to continue with prosecution is more important.

74. I am of the view that the clauses as contained in the resolution plan referred to above, only extinguishes the liability of the corporate debtor and not the natural persons.

75. 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.

<u>FEW RELEVANT DECISIONS ON THE SUBJECT</u>

76. In ***State Bank of India v. V. Ramakrishnan and Another*** reported in (2018) 17 SCC 394, this Court held that:-

> *"31. The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26-3-2018, made certain key recommendations.….*
>
> *32. The Committee insofar as the moratorium under Section 14 is concerned, went on to find:…*
>
> *"5.11. Further,* ***since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees****, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only."*
>
> Xxx xxx xxx
>
> *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 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****.*
>
> *Xxx xxx xxx*
>
> ***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.*** *…"*
>
> (Emphasis supplied)

77. In ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others*** reported in (2020) 8 SCC 531, this Court held that:

> *"106. Following this judgment in V. Ramakrishnan case (2018) 17 SCC 394, it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the* ***claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor****. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case (2018) 17 SCC 394, is set aside."*
>
> (Emphasis supplied)

78. In ***Vijay Kumar Jain v. Standard Chartered Bank*** reported in (2019) 20 SCC 455, this Court held that:

> *"19.3… we find that Section 31(1) of the Code would make it clear that such* ***members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them****. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt.*
>
> *19.4. The regulations also make it clear that these persons are vitally interested in resolution plans as they affect them."* (Emphasis supplied)

79. In ***Lalit Kumar Jain*** (supra), this Court held that:

> *"122. It is therefore, clear that* ***the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability****. As to the nature and extent of the liability,*

much would depend on the terms of the guarantee itself. However, this Court has indicated, time and again, ***that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability****…..”*

(Emphasis supplied)

80. In ***JIK Industries Limited and Others v. Amarlal V. Jumani and Another*** reported in (2012) 3 SCC 255, this Court held that:

> *“**19.** In the instant appeal in most of the cases the offence under the NI Act has been committed prior to the scheme. Therefore, the offence which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme. Therefore, even by relying on the ratio of the aforesaid judgment in J.K. (Bombay) (P) Ltd. [J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. And Wvg. Co. Ltd., AIR 1970 SC 1041], this Court cannot accept the appellant's contention that the scheme under Section 391 of the Companies Act will have the effect of automatically compounding the offence under the NI Act.*
>
> *Xxx xxx xxx*
>
> *27. The compounding of an offence is always controlled by statutory provision. There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender that the offence has been compounded.* ***Thus, compounding of an offence cannot be achieved indirectly by the sanctioning of a scheme by the Company Court.***
>
> *Xxx xxx xxx*
>
> *70. In the instant case* ***no special procedure has been prescribed under the NI Act relating to compounding of an offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under Section 320 shall automatically apply in view of clear mandate of sub-section (2) of Section 4 of the Code.***
>
> *Xxx xxx xxx*
>
> *83. For the reasons aforesaid, this Court is unable to accept the contentions of the learned counsel for the appellant(s) that as a result of sanction of a scheme under Section 391 of the Companies Act there is an automatic compounding of offences under Section 138 of the NI Act even* ***without the consent of the complainant****.”* (Emphasis supplied)

81. In ***Indorama Synthetics (I) Ltd., Nagpur v. State of Maharashtra and others***

reported in 2016 SCC OnLine Bom 2611, the question that arose before the Bombay High Court 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 NI Act. It was held that:-

> *“17. Thus, the main object of section 138 of N.I. Act, which can be inferred, 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****. No civil liability or any liability against the assets of the drawer of the cheque is contemplated under section 138 of the N.I. Act. Hence, it follows that the provisions of section 446(1) of the Companies Act can have apparently and in essence no application to the proceedings under section 138 of Negotiable Instruments Act, as it is not a suit or proceeding having direct bearing on the proceedings for winding-up or the assets of the Company.*
>
> *xxx xxx xxx*
>
> *24. Thus, the sum and substance of all these judicial decisions is that the provisions of section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up proceedings or with the assets of the Company.* ***The expression “suit or other proceedings”, therefore, as used in section 446(1) of the Companies Act, has to be construed accordingly and not to be interpreted so liberally and widely so as to include each and every proceeding of whatsoever nature initiated against the Company, including even the criminal proceedings like for the offence under section 138 of N.I. Act, which has got no bearing on the winding-up proceedings of the Company and are not concerned with, directly with the assets of the Company, but are mainly dealing with the penal and personal liability of the Directors of the Company.***
>
> *25. The conflict involved in the case can also be looked into from another aspect ‘as to* ***whether the provisions of section 138 of N.I. Act can override the provisions of Companies Act****, as it is a very special provision incorporated in the Negotiable Instruments Act, though the Companies Act contains certain special provisions in order to safeguard the rights of the Company under liquidation?’*
>
> *Xxx xxx xxx*
>
> *28. If one considers the provisions of section 138 of the N.I. Act, which are introduced subsequently by way of amendment in the said Act, in the year 1988, it being a subsequent Statute, it will necessarily override the*

provisions of General Statute, like, the Companies Act.

Xxx xxx xxx

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."

(Emphasis supplied)

82. In ***Manish Kumar*** (supra), this Court upheld Section 32A of the IBC and stated thus:

"318. The first proviso in sub-section (1) declares that if there is approval of a resolution plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub-section (1), however, the designated partner in respect of the liability partnership or the officer in default, as defined under Section 2(60) of the Companies Act, 2013, or ***every person, who was, in any manner, in charge or responsible to the corporate debtor for the conduct of its business****,* ***will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor****.* ***This is despite the extinguishment of the criminal liability of the corporate debtor under sub-section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the report submitted and report filed by the investigating authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor.***

319. Thus, the combined reading of the various limbs of sub-section (1)

would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the ***criminal liability will continue to haunt the persons****,* ***who were in charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.***

Xxx xxx xxx

326. ***We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32-A****. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the Code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere.* ***The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate.*** *We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the interim resolution professional and thereafter into the hands of the resolution professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.*

327…..Significantly ***every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor****."*

(Emphasis supplied)

83. In ***P. Mohanraj*** (supra) Full Bench of this Court held thus:

"41. Section 32-A cannot possibly be said to throw any light on the true interpretation of Section 14(1)(a) as the reason for introducing Section 32-A had nothing whatsoever to do with any moratorium provision. At the heart of the section is the extinguishment of criminal liability of the corporate debtor, from the date the resolution plan has been approved by the adjudicating authority, so that ***the new management may make a clean break with the past and start on a clean slate.*** *A moratorium provision, on the other hand, does not extinguish any liability, civil or criminal, but only casts a shadow on proceedings already initiated and on proceedings to be initiated, which shadow is lifted when the moratorium period comes to an end. Also,* ***Section 32-A(1) operates only after the moratorium comes to an end. At the heart of Section 32-A is the IBC's goal of value maximisation and the need to obviate lower recoveries to creditors as a result of the corporate debtor continuing to be exposed to criminal liability.***

42. Unfortunately, Section 32-A is inelegantly drafted. The second proviso to Section 32-A(1) ***speaks of persons who are in any manner in charge of****, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor and who are, directly or indirectly, involved in the commission of "such offence" i.e. the offence referred to in sub-section (1), "as per the report submitted or complaint filed by the investigating authority …". The report submitted here refers to a police report under Section 173 CrPC, and complaints filed by investigating authorities under special Acts, as opposed to private complaints. If the language of the second proviso is taken to interpret the language of Section 32-A(1) in that the "offence committed" under Section 32-A(1) would not include offences based upon complaints under Section 2(d) CrPC, the width of the language would be cut down and the object of Section 32-A(1) would not be achieved as all prosecutions emanating from private complaints would be excluded. Obviously, Section 32-A(1) cannot be read in this fashion and* ***clearly incudes the liability of the corporate debtor for all offences committed prior to the commencement of the corporate insolvency resolution process****. Doubtless, a* ***Section 138 proceeding would be included, and would, after the moratorium period comes to an end with a resolution plan by a <u>new management</u> being approved by the adjudicating authority, cease to be an offence qua the corporate debtor****.*

43….the expression "prosecution" in the first proviso of Section 32-A(1) refers to criminal proceedings properly so-called either through the medium of a first information report or complaint filed by an investigating authority or complaint and not to quasi-criminal proceedings that are instituted under Sections 138/141 of the Negotiable Instruments Act against the corporate debtor, the object of Section 14(1) IBC gets subserved, as does the object of Section 32-A, which does away with criminal

prosecutions in all cases against the corporate debtor, thus absolving the corporate debtor from the same ***after a new management comes in****.*

Xxx xxx xxx

45. Section 138 contains within it the ingredients of the offence made out. The deeming provision is important in that the legislature is cognizant of the fact that ***what is otherwise a civil liability is now also deemed to be an offence, since this liability is made punishable by law.*** *It is important to note that the transaction spoken of is a commercial transaction between two parties which involves payment of money for a debt or liability****. The Explanation to Section 138 makes it clear that such debt or other liability means a legally enforceable debt or other liability****. Thus, a debt or other liability barred by the law of limitation would be outside the scope of Section 138. This, coupled with fine that may extend to twice the amount of the cheque that is payable as compensation to the aggrieved party to cover both the amount of the cheque and the interest and costs thereupon, would show that* ***it is really a hybrid provision to enforce payment under a bounced cheque if it is otherwise enforceable in civil law****. Further, though the ingredients of the offence are contained in the first part of Section 138 when the cheque is returned by the bank unpaid for the reasons given in the section, the proviso gives an opportunity to the drawer of the cheque, stating that the drawer must fail to make payment of the amount within 15 days of the receipt of a notice, again making it clear that the real object of the provision is not to penalise the wrongdoer for an offence that is already made out, but to compensate the victim."*

(Emphasis supplied)

84. In ***Narinder Garg and Others v. Kotak Mahindra Bank Ltd. and Others*** reported in (2022) SCC OnLine SC 517, this Court held that:

"3. In P. Mohanraj v. Shah Brothers Ispat Private Limited, (2021) 6 SCC 258, a Bench of three-Judges of this Court considered the matter whether a corporate entity in respect of which moratorium had become effective could be proceeded against in terms of Sections 138 and 141 of the Negotiable Instruments Act, 1881 ("the Act" for short).

4. A subsidiary issue was also about the liability of natural persons like a Director of the Company. In paragraph 77 of its judgment, this Court observed that the moratorium provisions contained in Section 14 of the Insolvency and Bankruptcy Code, 2016 would apply only to the corporate debtor and that the natural persons mentioned in Section 141 of the Act would continue to be statutorily liable under the provisions of the Act.

5. It is submitted by Mr. Gopal Sankaranarayanan, learned Senior

> *Advocate that the **resolution plan having been accepted in which the dues of the original complainant also figure, the effect of such acceptance would be to obliterate any pending trial under Sections 138 and 141 of the Act.***
>
> *6. **The decision rendered in P. Mohanraj is quite clear on the point and, as such, no interference in this petition is called for**."*
>
> (Emphasis supplied)

85. 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.

86. I may draw my final conclusions as under:

(a) After passing of the resolution plan under Section 31 of the IBC by the adjudicating authority & in the light of the provisions of Section 32A of the 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.

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

87. In view of the aforesaid discussion, the appeal fails and is hereby dismissed.

88. The connected appeals also fail and are hereby dismissed.

89. Pending application(s), if any, shall stand disposed of.

………………………………………..J.
(J.B. PARDIWALA)

NEW DELHI;
MARCH 15, 2023.