



Judgment

wp251.25

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL WRIT PETITION No. 251 OF 2025.

Ortho Relief Hospital and Research
Centre, having its Hospital at
Plot No.19, Opposite Ramkrishna Math,
Dhantoli, Nagpur 440012.
through its Proprietor Shri Hargun
J. Sangtani, Aged about – years,
Profession – Doctor.

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PETITIONER.

VERSUS

1.M/s. Anand Distilleries,
through its Directors

2.Abhaykumar Anandkumar Bhambore,

3. Anamdkumar Gulabchandji Bhambore,

Having their registered office at,
147, Davargaon to Mozari Road,
Kekatpur, Near MIDC,
Amravati 444601 and
Babar Chowk, Amravati,
Maharashtra.

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RESPONDENTS.

Mr. S.S. Dewani, Advocate for the Petitioner.
Mr. S.D. Khati, Advocate for Respondents.

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CORAM : M.M. NERLIKAR, J.
DATE : OCTOBER 01, 2025.

ORAL JUDGMENT.

Heard. Issue Rule, returnable forthwith. Learned Senior Counsel appearing for Respondents, waive notice. By their consent, the matter is taken up for final disposal.

2. By present Writ Petition filed under Articles 226 and 227 of the Constitution of India, the petitioner's challenge is to the common orders passed by the learned 10th Joint Civil Judge, Senior Division and Additional Chief Judicial Magistrate, Nagpur below Exhs.39 and 1 in Criminal Complaint Case No.7281/2019 on 31.01.2025, by which the application filed by the respondent nos. 2 and 3/original accused at Exh.39 came to be allowed and they were discharged of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and by another order of the same date at Exh.1, the learned Trial Court has held that in view of the order passed below Exh.39, the complaint is

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not maintainable against the accused no.1 and thus disposed of the said complaint.

3. The facts in brief are as under :

The petitioner is Proprietor of Ortho Relief Hospital and Research Centre, Nagpur, whereas the respondent no.1 is a Company engaged in the business of liquor distillation and respondent nos.2 and 3 are its Directors who are responsible for its financial and business operations. They are in control of the day to day activities of the affairs of the respondent no.1 Company, including the decision as regards financing, borrowings, repayments etc. That in October, 2015 the respondent nos.2 and 3 through one Deep Aditi Multi Services Pvt. Ltd. approached the petitioner for a short term loan of Rs.15,00,000/-, which the petitioner extended on 15.10.2015. Towards the security of said loan, respondent nos.2 and 3 had issued a post dated cheque amounting to Rs.15,00,000/- drawn on Cosmos Bank, Amravati. The said cheque was signed by respondent no.2 in the capacity of Director and Authorized Signatory of respondent no.1 Company. It is the case of petitioner that the respondents acknowledged the liability and agreed to

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pay interest @ 18% p.a., which he received periodically. However, after January, 2018 respondents stopped making payments, and despite multiple reminders failed to respond to the same.

4. It is submitted that in February, 2018 the petitioner came to know about the insolvency proceedings initiated against respondent no.1 Company by Punjab National Bank under the provisions of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the IB Code” for short) and the order passed by the National Company Law Tribunal (NCLT) on 14.02.2018 admitting the insolvency petition and appointing an Interim Resolution Professional (IRP) to take over the affairs of the respondent no.1. Pursuant to the same, the petitioner lodged his claim before the IRP, but, no communication is received regarding the status of his claim or possibility of repayment. In the backdrop of the aforesaid fact, the petitioner started persuading respondent nos.2 and 3 to repay the loan amount, who assured him that the insolvency proceedings would not be successful and respondent no.1 Company would soon resume normal operations. They reassured the petitioner and asked him to present the cheque for encashment, which

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the petitioner presented to his Banker. However, on 14.12.2018, petitioner received a message regarding dishonor of the cheque with memo remarking “insufficient funds”. Accordingly, a legal notice was issued to respondents on 05.01.2019, and thereafter, a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as “the NI Act” for short), along with Section 406 and 420 of the Indian Penal Code came to be filed. The said case was registered as S.C.C.No.7281/2019.

5. In view of insolvency proceedings before the National Company Law Tribunal, respondents herein filed an application at Exh.39, which came to be allowed, and the respondents herein i.e. Original accused nos. 2 and 3 were discharged of the offence punishable under Section 138 of the NI Act. It is this order, which is subject matter of challenge in this petition.

6. The learned Counsel for the petitioner submits that so far as the proceeding under Section 138 of the NI Act and proceeding under the IB Code are concerned, they are quite distinct, operating in different

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spheres. The provisions of the NI Act are penal in nature and thus, are not in the nature of recovery, therefore, the proceedings under IB Act has nothing to do with the proceedings under Section 138 of the NI Act. He further submits that though a resolution plan is approved under Section 131[1] of the IB Code, that by itself will not absolve the respondents from the penal action under Section 138 of the NI Act. That being so, the findings recorded by the 10th Joint Civil Judge, Senior Division and ACJM Nagpur below Exh.39 is contrary to the well settled principles of law.

7. It is submitted that on 14.12.2018 the cheque dishonored and accordingly on 18.02.2019 a complaint came to be filed after serving legal notice. No doubt the liquidation proceedings have been finalized and the petitioner has already submitted his claim before the IRP, however, till date there is no communication from the said Authority and that by itself will not preclude the petitioner from prosecuting the remedy under Section 138 of the NI Act. It is further submitted that the liability of respondent no.2 is in his personal capacity and since the liquidation order was passed, the moratorium period came to an end, and

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therefore, now there is no impediment even to recover the amount. However, he further submits that a Company being a separate legal entity, can be prosecuted independently under Section 138 of the NI Act. The learned Court below ought not to have closed the proceedings when the IB Code proceeding provides for limited protection at the most. He further submits that closing of the proceedings by the Magistrate and discharging respondent nos.2 and 3, is erroneous and the respondent nos.2 and 3 cannot escape from the liability by merely claiming that the transaction was undertaken in the name of the Company. It is the respondent nos.2 and 3 who are natural persons and they are liable for prosecution. The learned Counsel for the petitioner in support of his aforesaid submissions relied on the following judgments :

- (1) **P.Mohanraj and others .vrs. Shah Brothers Ispat Pvt.Ltd.**
[2021] 6 SCC 258.
- (2) **Ajay Kumar Radheyshyam Goenka .vrs. Tourism Finance Corporation of India Limited.**
[2023] 10 SCC 545.
- (3) **Narinder Garg and others .vrs. Kotak Mahindra Bank Ltd.**
(2022) 19 SCC 623.

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- (4) **Shashankbhai Jayantibhai Shah .vrs. HDFC Bank Ltd.**
Criminal Appeal No.5606/2024, decided on 23.04.2025.
- (5) **Rakesh Bhanot .vrs. Gurdas Agro Private Limited.**
(2025) 6 SCC 781.

8. On the other hand, the learned Counsel appearing for the respondents submits that for a just decision, dates would be relevant in this matter. He submits that the proceedings under IB Code were initiated much prior to the proceedings under Section 138 of the NI Act. The cheque was issued on 12.12.2018, and it was dishonored on 14.12.2018. It is alleged that the legal notice was issued on 05.01.2019 and the same is alleged to be received on 17.01.2019. He further submits that on 18.02.2019, a complaint came to be filed under Section 138 of the NI Act, moratorium was imposed on 14.02.2018, and the order of liquidation was passed on 08.02.2019. So the cause of action, so far as the present case is concerned, has arisen after imposition of moratorium. He further submits that Section 32A of the IB Code provides for liability in case of prior offences, and my attention was invited to Section 14 which provides that once the moratorium is

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declared, institution of suit or proceeding against a Corporate Debtor in any Court of law, Tribunal etc., is barred. It further appears from the record that the petitioner has also lodged a claim before the IRP and now it is within its domain to pass appropriate order and therefore, submits that the proceedings under Section 138, in such circumstances would not be tenable. Accordingly, respondent nos.2 and 3 herein filed an application at Exh.39 praying for dismissal of the complaint against accused nos.2 and 3, so also for discharging them under Section 245[2] of the Code of Criminal Procedure.

9. The learned Counsel has emphasized on the fact that once proceedings are initiated under IB Code prior to initiation of Section 138 proceedings, in such circumstances the ratio laid down by the Hon'ble Supreme Court in cases of P. Mohanraj, Ajay Goenka and Narinder Garg [supra] would not be applicable. He has invited my attention to the facts of those cases, wherein he submits that in all those cases the IB Code proceedings are initiated at a later point of time. So as to substantiate his contentions, he has relied on the judgment of the Hon'ble Supreme Court in case of **Vishnoo Mittal .vrs. M/s. Shakti Trading Company –**

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2025 SCC OnLine SC 558.

10. So far as the present case is concerned, it is his submission that the proceedings under IB Code are initiated at a prior point of time, rather than the proceedings under Section 138 of the NI Act, and thereby he tried to distinguish the ratio laid down by the Supreme Court in above referred cases. He submits that, the impugned order passed by the Magistrate is proper and legal and prays for dismissal of the petition.

11. Upon hearing both the parties at length, and so also after going through the material placed on record, it would be appropriate to frame the issue for determination, the same is as under :

“Whether prior initiation of proceeding under the IB Code would frustrate the claim of the petitioner under Section 138 of the NI Act ?”

12. Before answering the above question, it would be useful to refer to the judgments relied on by the parties. The Supreme Court in case of P. Mohanraj (supra) has observed as under :

“32. Viewed from another point of view, clause (b) of Section 14(1) also makes it clear that during the

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moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur.

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102. Since the corporate debtor would be covered by the moratorium provision contained in Section 14 of the IBC, by which continuation of Section 138/141 proceedings against the corporate debtor and initiation of Section 138/141 proceedings against the said debtor during the corporate insolvency resolution process are interdicted, what is stated in paragraphs 51 and 59 in *Aneeta Hada* (supra) would then become applicable. The legal impediment contained in Section 14 of the IBC would make it impossible for such proceeding to continue or be instituted against the corporate debtor. Thus, for the

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period of moratorium, since no Section 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 Section 141(1) and (2) of the Negotiable Instruments Act. This being the case, it is clear that the moratorium provision contained in Section 14 of the 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.

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104. Resultantly, the civil appeal is allowed and the judgment under appeal is set aside. However, the Section 138/141 proceedings in this case will continue both against the company as well as the appellants for the reason given by us in paragraph 77 above as well as the fact that the insolvency resolution process does not involve a new management taking over. We may also note that the moratorium period has come to an end in this case.”

13. Again another judgment which is necessary to be referred herein is the case of Ajay Goenka (supra), wherein the Supreme Court while dealing with the provisions of IB Code has held as under :

“70. 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

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the CrPC would not stand terminated.

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75. Thus, where the proceedings under Section 138 of the NI Act had already commenced and during the pendency the plan is approved or the company gets dissolved, the directors and the other accused cannot escape from their liability by citing its dissolution. What is dissolved is only the company, not the personal penal liability of the accused covered under Section 141 of the NI Act. They will have to continue to face the prosecution in view of the law laid down in *Aneeta Hada (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.

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98. 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

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not making the payment of the cheque amount despite the receipt of the statutory notice. The only question before the criminal court is whether the cheque issued by the accused towards the discharge of his liability was dishonoured and despite the service of demand notice, whether he had not paid the amount. There is no bar contained in any of the provisions of the IBC, and the NI Act from approaching the criminal court to seek penal action under Section 138 of the NI Act.

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108. 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.

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109.2. 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.”

14. It will be also useful to refer to the latest ruling of the Supreme Court in case of Rakesh Bhanot (supra), wherein in paragraph nos.22 and 24, the Supreme Court has held as under:

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“22. The legislative intent behind the Insolvency and Bankruptcy Code (IBC) is to provide a structured framework for the resolution of corporate debtors' financial distress, facilitating their rehabilitation and ensuring the maximization of asset value. The application under Section 94 or 95 would fall under Chapter III of the IBC. An application under Section 94, when taken out by a debtor in the capacity of a personal guarantor of a company, to declare him/her as insolvent, is to be disposed by following the procedures in Sections 97 to 119. The application filed under Section 94 is scrutinized by the Resolution Professional and a report is submitted as contemplated under Section 99 recommending either the approval or rejection of the application. The interim moratorium which commences on the presentation of the application will expire on the admission of the application by an order of the adjudicating authority under Section 100. Upon admission, the moratorium under Section 101 comes into operation. The interim moratorium 28 under Section 96 and the moratorium under Section 101 IBC are designed to offer a breathing space to the corporate debtor, allowing them to reorganize their financial affairs without the immediate threat of creditor actions. However, this moratorium is not intended to shield individuals from personal criminal liabilities arising from their actions outside the scope of corporate debt restructuring. The respective appellants / petitioners, having filed insolvency applications as personal guarantors under Section 94 IBC, cannot extend this protection to avoid

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prosecution under Section 138 of the N.I. Act, 1881.

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24. *On the other hand, the proceedings under Section 138 of the N.I. Act, 1881, pertain to the dishonor of cheques issued by the respective appellants / petitioners in their personal capacity. These proceedings are distinct from the corporate insolvency proceedings and are aimed at upholding the integrity of commercial transactions by holding individuals accountable for their personal actions. The scope and nature of the proceedings under the IBC may result in extinguishment of the actual debt by restructuring or through the process of liquidation. But such extinguishment will not absolve its directors from the criminal liability. Section 141 of the N.I. Act, 1881 enables the prosecution of the persons in charge of the affairs and responsible for the conduct of the business of the company along with the company. The statutory liability against the directors under Section 138 of the N.I. Act, 1881, is personal and hence, continues to bind natural persons, irrespective of any moratorium applicable to the corporate debtor.”*

15. In *Narinder Garg* (supra), the Supreme Court has observed as under.

“We thus clarify that the petitioners would not be prevented by the moratorium under Section 14 IBC from initiating proceedings against the promoters of the first respondent corporate debtor in relation to

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honouring the settlements reached before this Court. However, as indicated earlier this Court cannot issue such a direction relying on a Resolution Plan which is still pending approval before an adjudicating authority”

16. Coming to the facts of the present case, it is not in dispute that the proceedings under IB Code were initiated much prior to the initiation of proceedings under Section 138 of the NI Act, as can be gathered from the record that the cheque dishonored on 14.12.2018 and complaint under Section 138 of the NI Act came to be filed on 18.02.2019. Whereas the moratorium was imposed on 14.02.2018, that means that the proceedings under IB Code were initiated much prior to initiation of the proceedings under Section 138 of the NI Act. As submitted by the learned Counsel for the petitioner that if this is to be permitted then Section 32A would be held redundant and the protection granted under Section 32A would be of no use. At this stage it is necessary to reproduce Section 32A of the IB Code.

[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

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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

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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.”

17. Bare perusal of the above Section would demonstrate that it bars prosecution in respect of corporate debtor for offences committed prior to commencement of the proceedings under IB Code. However, an exception has been carved out, so far as the second proviso is concerned, which speaks about persons against whom the prosecution would continue and therefore, the prosecution against natural persons can be continued.

18. Reliance is placed by the respondents on the judgment in case of *Visnhoo Mittal* [supra], wherein the Supreme Court has held that “*the moratorium under Section 14 of the IB Code, bars initiation or continuation of proceedings against the corporate debtor, and therefore,*

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natural persons such as Directors, cannot be prosecuted under Section 138 of the NI Act if the cause of action arose after the imposition of the moratorium.” The Supreme Court therefore, considered the cause of action as an important facet of initiation of proceedings under Section 138 of the NI Act. From the entire text it can be gathered that if Section 138 proceedings are initiated after the initiation of proceedings under IB Code, in such circumstances, the provision of IB Code bars initiation of proceedings under Section 138 of the NI Act.

19. No doubt so far as the present case is concerned, Section 138 proceedings are initiated much after the initiation of IB Code proceedings. However, the Supreme Court in cases of P. Mohanraj, Ajay Kumar and Rakesh Bhanot [supra], has held that the moratorium provision in Section 14 of IB Code would apply only to the corporate debtor, the natural person mentioned in Section 141 continue to be statutorily liable under Chapter XVII of the NI Act. Further, the scope and nature of proceedings under these two Acts is quite different and would not intercede each other.

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20. From the bare perusal of the above observations, it is crystal clear that the proceedings under Section 138 of the NI Act is not a recovery proceeding. Once it is held by the Larger Bench of the Supreme Court (Three Judges), that the IB Code proceeding and Section 138 NI Act proceedings are altogether different, it is not open for this Court to take a different view. Some of the key features which can be culled out from those judgments are as under :

- (i) Section 138 NI Act proceedings are not recovery proceedings.
- (ii) The Directors of the Company remain liable under Section 138 of the NI Act, even if Company's debt is resolved under the IB Code.
- (iii) A resolution plan approved under the IB Code does not automatically extinguish the criminal liability of Directors under Section 138 of the NI Act.
- (iv) Section 138 of the NI Act proceedings are penal in nature, aimed at maintaining the integrity of commercial transactions and not just compensating.
- (v) The approval of a resolution plan under Section 31 of the IB Code does not automatically discharge the signatory/ Directors from the liability under Section 138 of the NI Act.
- (vi) Section 32A protects the corporate debtor, but, not individuals responsible for Company's conduct.

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- (vii) The IB Code and the NI Act serve different purposes and do not conflict with each other.

21. From the above discussion it is clear that it makes no difference whether the proceedings are initiated prior to initiation of IB Code proceeding or thereafter. The Supreme Court has in unequivocal terms held that natural persons cannot escape from their personal liability under Section 138 of the NI Act. It is further held that Section 138 proceedings in relation to the signatories who are liable or covered by the two proviso to Section 32A[1], will continue in accordance with law. I am further fortified in my view by the judgment of the Punjab and Haryana High Court in the matter of **Rakesh Juneja and another .vrs. M/s. Maruti Suzuki India Ltd. and another - 2025 NCPHHC 101360**, wherein a similar view is taken while dealing with the identical factual matrix, as in the present case. The Court after taking into consideration the judgment of the Supreme Court in Vishnoo Mittal [supra], has stated that the reliance on the same is misplaced in view of legal position as settled by the Three Judges Bench of the Supreme Court. Eventually, the fact remains that in Ajay Kumar Goenka [supra], the Three Judges

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Bench of the Supreme Court has in unequivocal term held that the scope of nature of proceedings under the two Acts are quite different. Further it is clarified that the nature of proceedings which have to be kept in abeyance under Section 14 of the IB Code, would not include criminal proceedings, which is the nature of proceedings under Section 138 of the NI Act.

22. In view of the above facts and circumstances of the present case, the Court below has lost sight of the fact that the Supreme Court has already settled this issue as discussed above, and therefore, committed a gross error in allowing the application at Exh.39, and thereby discharging the accused nos. 2 and 3 for the offence punishable under Section 138 of the NI Act.

23. In view of above discussion I proceed to pass the following order.

ORDER

- (i) Criminal Writ Petition is allowed and disposed of.

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- (ii) The orders passed by the learned 10th Joint Civil Judge, Senior Division and Additional Chief Judicial Magistrate, Nagpur below Exhs.39 and 1 in Criminal Complaint Case No.7281/2019 on 31.01.2025, by which the application filed by the respondent nos. 2 and 3/original accused at Exh.39 came to be allowed and they were discharged of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881, is quashed and set aside.
- (iii) Rule is made absolute in aforesaid terms.

24. At this stage, the learned Counsel for respondents prays for stay of this judgment and order. The said prayer is rejected.

JUDGE

Rgd.