

August, 2018



**AMLEGALS | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

**SECTION 138 NI ACT **OUTSIDE THE PURVIEW** OF  
MORATORIUM UNDER SECTION 14 OF IBC**

LEGAL INTELLIGENCE  
SERIES

August, 2018



**AMLEGALSLegal Strategists | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

**In the National Company Law Appellate Tribunal**

**IN THE MATTER OF**

***Shah Brothers Ispat Pvt. Ltd v. P. Mohanraj & Ors.***

**New Delhi Company Appeal (AT) (Insolvency) No. 306 of 2018**

**NO CRIMINAL PROCEEDING IS COVERED UNDER  
SECTION 14 OF IBC. PROCEEDINGS UNDER SECTION  
138 OF NI ACT SHALL BE UNDERTAKEN EVEN DURING  
THE PERIOD OF MORATORIUM.**

**FACTS**

The current case in question revolves around two **complaints** filed by the Appellants under **Section 138 of the Negotiable Instruments Act, 1881**

**one prior to the initiation of Corporate Insolvency Resolution Process and the other thereafter.**

It was the contention of the Respondent – Directors, that during



**AMLEGALS | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

the period of Moratorium proceeding, petition under Section 138 of NI Act was not maintainable.

The Adjudicating Authority– National Company Law Tribunal, Chennai – by order, directed the Appellants to withdraw the aforementioned complaint.

This was because the complaint was treated as a proceeding filed after the order of moratorium and hence sheer misuse of law.

**ISSUE**

WHETHER THE ORDER OF MORATORIUM WILL COVER A CRIMINAL PROCEEDING UNDER SECTION 138 OF NI ACT (WHICH PROVIDES IMPRISONMENT FOR A TERM WHICH MAY EXTEND TO 3 YEARS OR WITH FINE WHICH MAY EXTEND TO TWICE THE AMOUNT OF CHEQUE OR WITH BOTH)?

**MORATORIUM: SECTION 14 – IBC, 2016**

Section 14 needs to be referred.

**“14. Moratorium. –**

*(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*

- a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
- b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
- c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction*



**AMLEGALS | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

*of Financial Assets and Enforcement of Security Interest Act, 2002;*

*d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

*(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

*(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.*

*(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

*Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the*

*moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."*

**OBSERVATIONS & FINDINGS OF NCLAT**

The Bench observed that ***the Company cannot be imprisoned***; therefore the punishment under Section 138 cannot be imposed against the Company i.e. the Corporate Debtor.

However, the same can be subjected to a fine, if ordered by a court of competent jurisdiction.

It is the Directors of the Company who can be subjected to the aforementioned punishments and hence proceedings under Section 138 are an exception to moratorium.

**RATIO**

The bench observed that –



**AMLEGALSLegal Strategists | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

*"We do not agree with such submission as **Section 138 is a penal provision**, which empowers the court of competent jurisdiction to pass order of imprisonment or fine, which cannot be held to be proceeding or any judgment or decree of money claim. Imposition of fine cannot be held to be a money claim or recovery against the Corporate Debtor nor order of imprisonment, if passed by the court of competent jurisdiction on the Directors, they cannot come within the purview of Section 14. In fact no criminal proceeding is covered under Section 14 of I&B Code."*

**ORDER**

The Bench remarked that the Adjudicating Authority had failed to appreciate the law hence the order passed by them has been set aside.

The Bench advised the court of competent jurisdiction to proceed with the proceeding under Section 138 of NI Act, even during the period of moratorium.

The appeal was hence allowed.

**AMLEGALSLegal Strategists' CONCLUSION**

**Section 14 of IBC has four limbs.** All such limbs are contained to commercial aspects in its entirety. It nowhere talks about penal actions of fine and/or imprisonment.

Hence, the moratorium is per se for actions related to commercial claims alone.



**AMLEGALS | Attorneys & Advisors | A Full Service Law Firm**

An ISO 9001:2015 Certified Law firm

*The content is purely an academic analysis under “Legal intelligence series.*

© Copyright **AMLEGALS**.

**Disclaimer:** *The information contained in this document is intended for informational purposes only and does not constitute legal opinion, advice or any advertisement. This document is not intended to address the circumstances of any particular individual or corporate body. Reader should not act on the information provided herein without appropriate professional advice after a thorough examination of the facts and circumstances of a particular situation. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*



**AMLEGALS - Attorneys & Advisor**

An “ISO 9001: 2015” Certified Law Firm  
206, Advait, Besides Sandesh Press,  
Vastrapur, Ahmedabad - 380 015,  
Gujarat, INDIA.

Website: [www.amlegals.com](http://www.amlegals.com)

E-mail: [info@amlegals.com](mailto:info@amlegals.com).

Tele: +91 – 79 –4800 5359/4003 3359

**AMLEGALS Associates & Affiliates**

**Ahmedabad** | Bangalore | Chandigarh |  
Chennai | Delhi | Hyderabad | Kolkata |  
Mumbai | Singapore | UAE | China |