

Applicability Of Moratorium On Section 138/141 Proceedings – Resolved

written by Shushaanth S | July 2, 2021

The interesting question that evokes a great response and elicits a surge of reactions in terms of different interpretations and elucidations is that whether a moratorium granted under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) applies to Section 138/141 NI Act proceedings under the Negotiable Instruments Act, 1881 (NI Act). This has remarkably been a moot question for a long time. There have been contradicting views from various High Courts and Tribunals across India concerning this position of law. This obscure position was perpetually treated with scepticism and misgivings, and proper elucidation was a desideratum, and it was only recently that the long-debated question was satisfactorily settled.

The Hon'ble Supreme Court in *P. Mohanraj & Ors Vs. M/s. Shah Brothers Ispat Pvt. Ltd*^[1] has categorically enunciated that the moratorium granted under Section 14(1)(a) of the IBC would indeed encompass the criminal proceedings for the dishonour of cheques under Section 138/141 NI Act, against the Corporate Debtor. However, the Hon'ble Court also observed that the statutory bar under section 14 of IBC would not apply to the persons mentioned under Section 141(1) & (2) of the 141 NI Act and that these persons shall be statutorily liable under Chapter XVII of the 141 NI Act.

The Position Earlier - 141 NI act

The question of the maintainability of a proceeding under Section 138 of the NI Act when a moratorium is imposed on a corporate debtor was previously open to interpretation and was constantly up for debate between the Bar and the Bench and quite often, divergent views were given on this position of law based on the facts of a particular case. The present case, when it was brought before the NCLAT, as an appeal,^[2] the Appellate Tribunal observed^[3] that the punishment under Section 138 of the NI Act could not be imposed on the Corporate Debtor and only a fine could be imposed on them if they are found guilty.

However, the Directors of the Company (Corporate Debtor), if they are made parties to the Section 138 proceedings, can be penalized by imprisonment or fine. Further, the NCLAT viewed Section 138 as a penal provision which empowered the court of competent jurisdiction to pass the order of imprisonment or fine and opined that the Section 138 proceedings could not be held to be a "proceeding" or any "judgment" or "decree" of money claim under Section 14 of the IBC.

The Appellate Tribunal also opined and clarified that the imposition of a fine could not be considered as a pecuniary claim or recovery against the Corporate Debtor nor the order of imprisonment of the Directors, when passed by the court of competent jurisdiction, would fall within the purview of Section 14 of IBC. In fact, in that order, the NCLAT hit the nail on the head by stating that no criminal proceeding is covered under Section 14 of IBC.

Nature of Proceedings Under Chapter XVII Of The NI Act

Another major question that was decided by the Apex Court is concerning the nature of proceedings under Chapter XVII of the NI Act, wherein Sections 138 to 142 were added by an Amendment Act of 1988. The Apex Court, after judiciously taking into consideration the multiple judicial precedents, remarked, "a Section 138 proceeding can be said to be a "civil sheep" in a "criminal wolf's" clothing".

This is because in Section 138 proceeding it is the interest of the victim

that is sought to be protected, however, due to the criminal overtones given to Section 138 of the NI Act, the larger interest of the State is also subsumed in an action to proceed under Section 138 of the NI Act for the dishonour of cheque.

Further, based on the analysis drawn from the case laws and given the amendment Act 2018, which gave Chapter XVII of the NI Act a hybrid nature and a tilt towards civil nature, the Apex Court opined that Chapter XVII of the NI Act was now quasi-criminal and considering the object and context of Section 14 of IBC, observed that the term "proceeding" was indeed within the meaning of Section 14(1)(a) of IBC and therefore held that the moratorium would apply to such proceedings.

Whether Natural Persons Are Covered By Section 14 Of The IBC

The answer is a square negative. A Section 138/141 proceeding cannot be initiated or continued against the Director or Persons in the management or control of the Corporate Debtor, without the impleadment of the Corporate Debtor (Company). This is because Section 141 of the NI Act speaks of persons in charge of, and responsible to the company for the conduct of the business of the company, as well as the company.

A Section 138/141 proceeding under the NI Act cannot be solely initiated against the Director/Managing person without the impleadment of the Corporate Debtor as the doctrine of *lex non cogit ad impossibilia* would get attracted. Further, it would make sense only when the Corporate Debtor is also impleaded as a necessary party since Section 141 of the NI Act would bring under its domain the Director/or other officers who are responsible for the acts of the Company in view of the vicarious liability principle. In other words, the commission of an offence by a company is a condition precedent to attract vicarious liability of the others.

Thus, to make it simple when the company is to be prosecuted, only the Directors/other persons can be prosecuted for the offence committed by the company. In other words, it becomes imperative to arraign the company as an accused in a Section 138/141 proceeding wherein the Director/Manager/Secretary or other officers of the company can be arraigned as accused on the grounds of vicarious liability as stipulated under Section 141 of the NI Act.

Conclusion

It is pertinent to state that in view of the present judgment, the moratorium imposed under Section 14 of the IBC would cover the initiation or continuation of Section 138/141 proceeding against the Corporate Debtor during the corporate insolvency resolution process as a consequence of the statutory bar granted under section 14 of IBC.

However, it is pre-eminently imperative to note the clarification provided by the Hon'ble Apex Court, that even during the period of moratorium, a Section 138/141 proceeding can be initiated or continued against the persons mentioned in Section 141(1) and (2) of the NI Act, thereby making it amply clear that the moratorium granted under Section 14 of the IBC would become applicable only on the Corporate Debtor and not on the natural persons mentioned in Section 141 of the NI Act. Hence the natural persons mentioned in Section 141 continue to be statutorily liable under Chapter XVII of the Negotiable Instruments Act.

The conspectus of this judgment has undoubtedly dispelled the cobweb of ambiguity that existed around the question of applicability of moratorium on

a Section 138/141 proceeding of the NI Act.

- [1] CIVIL APPEAL NO.10355 OF 2018
 - [2] *Company Appeal (AT) (Insolvency) No. 306/2018*
 - [3] <https://nclat.nic.in/Useradmin/upload/10738927505b6bd66733e76.pdf>
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