



Can Corporate Debtor file a criminal proceedings like dishonour of cheque complaint even after the moratorium order



CASE COMMENT : SHAH BROTHERS ISPAT PVT. LTD. v .P. MOHANRAJ & ORS. Company Appeal (AT) (Insolvency) No. 306 of 2018

ABSTARCT

Moratorium Order (The moment petition is admitted, the moratorium that comes into effect under section 14(1) (a)[this section has defined in the footnote below] of the Insolvency and Bankruptcy Code, 2016 expressly embargos institution or continuation of pending suits or proceedings against the corporate debtors. After the imposition of Moratorium, no suit or proceedings against the corporate debtor shall be instituted or justice or to prevent abuse of process of Tribunal or Appellate. Now in this landmark judgment the National Company Law Appellate Tribunal giving a new interpretation on the provisions of Moratorium Order under the Insolvency & Bankruptcy code, 2016 where the Corporate Debtor is allowed

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to file a criminal proceedings like dishonor of cheque complaint even after the moratorium period.

BRIEF FACTS:

The Appellants (SHAH BROTHERS ISPAT PVT. LTD.) led complaint under Section 138 of the Negotiable Instrument Act, 1881[1]before the Metropolitan Magistrate prior to initiation of Corporate Insolvency Resolution Process. Another complaint under Section 138 of Negotiable Instrument Act, 1881 Act was led after the order of moratorium in Section 14 of the Insolvency and Bankruptcy Code, 2016 discussed further in this article. The Respondent – Directors(.P. MOHANRAJ & ORS.)moved before the National Company Law Tribunal (NCLT) and argued that during the period of moratorium proceeding petition under Section 138 of Negotiable Instrument Act was not maintainable. This was opposed by the Appellants but the National Company Law Tribunal (NCLT) directed the (SHAH BROTHERS ISPAT PVT. LTD.) Appellants to withdraw the complaint case led under Section 138 of Negotiable Instrument Act treating it as a proceeding led after order of moratorium with observation that such action sums to deliberate effort on the part of Appellant and absolute abuse of the procedure of law.

ISSUES:

Whether the order of moratorium will cover a criminal proceeding under Section 138 of Negotiable Instrument Act, which provides punishment of imprisonment for a term which may extend to 3 years or with fine which can extend to double the amount of cheque or with both?

JUDGEMENT:

The Company cannot be imprisoned, therefore aforesaid punishment under Section 138 cannot be imposed against the company (Corporate Debtor) However, fine can be imposed by a court of competent jurisdiction on the



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Company (Corporate Debtor), if found guilty. The Directors of the Company (Corporate Debtor) being parties so can be imprisoned or fine may be imposed on them.

The Respondent submitted that the proceeding under Section 138 of the NI Act is covered by clause of Sub-section (1)(a) of Section 14[2]of I&B Code, therefore, proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority cannot proceed.

The National Company Law Tribunal does 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. Obligation of fine cannot said as a money claim or recovery against the Corporate Debtor nor order of imprisonment, if delivered by the court of competent jurisdiction on the Directors, they cannot come within the purview of Section 14 of Insolvency & Bankruptcy Code. In fact no criminal proceeding is covered under Section 14 of Insolvency & Bankruptcy Code. The National Company Law Tribunal having failed to appreciate law and interpret the correct meaning of Moratorium/Section 14 of Insolvency & Bankruptcy code, we have no option but to set aside the impugned order of the National Company Law Tribunal. The court of competent jurisdiction may proceed with the proceeding under Section 138 of Negotiable Instruments Act, even during the period of moratorium.

END NOTES

1. Section 138 of Negotiable Instruments Act, 1881 - Dishonor of cheque for insufficiency, etc., of funds in the accounts . 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

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insufficient to honor 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 provisions of this Act, be punished with imprisonment for a term which may extend to one year, 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 fifteen 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.

2. Section 14 of the Insolvency & Bankruptcy Code, 2016 . (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 Securitisation and Reconstruction 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.



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on 04 February 2019




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