

**LEX NEWSLETTER ZONE**

**Litigation Bytes**

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**✚ S. 138 matters to continue during the moratorium period: No relief to directors**

The National Company Law Appellate Tribunal has while deciding the matter of Shah Brothers Ispat Pvt Ltd vs P. Mohanraj & Ors has held that proceedings under S. 138 of the Negotiable Instruments Act, 1881 (NI Act) is one of Criminal in nature. It has also held that no criminal proceeding is covered under Section 14 of the Insolvency & Bankruptcy Code (IBC).

The Appellants filed complaint under Section 138 of NI Act before the Metropolitan Magistrate in Mumbai prior to initiation of Corporate Insolvency Resolution Process. Another complaint u/s 138 of NI Act was filed after the order of moratorium. The Respondent – Directors moved before the Adjudicating Authority and argued that during the period of moratorium, proceeding petition under Section 138 of NI Act was not maintainable. This was opposed by the Appellants, but the Adjudicating Authority

(National Company Law Tribunal) Single Bench, Chennai, directed the Appellants to withdraw the complaint case filed under Section 138 of NI Act treating it as a proceeding filed after order of moratorium with observation that such action amounts to deliberate attempt on the part of Appellant and sheer misuse of the process of law.

The Appellants moved the NCLAT in appeal and submitted that criminal prosecution is not barred by the IBC.

The Respondents submitted that the proceeding under Section 138 of the NI Act is covered by clause of Sub section (1)(a) of Section 14 of the IBC, 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 Appellate Tribunal held "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 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 IBC."

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

#### **WhatsApp to be an acceptable mode for sending Court Orders**

Considering the “digital India” campaign started by our Prime Minister Narendra Modi, the usage of WhatsApp in courts is not astounding. There have been cases where the court has allowed electronic means of communication to smoothen the court proceedings for e.g. in 2g case, the court considered summons sent through email as a valid summons. Provisions under Part X of the code of civil procedure, 1908 and order V, rule 9 of the code of civil procedure, 1908 enables the high court to make rule and regulations in this regard.

For the first time in the country in order to speed up the burdensome legal process, Delhi High court, while hearing the case of domestic violence, passed an order restraining the husband and the relatives from taking custody of a minor daughter from his divorced wife. In order to expedite up the process the court directed to send the order via WhatsApp.

But the court failed to get into the technicality of WhatsApp application. Blue tick is considered to be the valid evidence that the respondent has accepted the physical copies of the communication but the court did not ponder upon the question that whether message serving the order or notice or summons was actually read by the person, because of the existence of possibility that the user has disabled the blue ticks.

The main idea behind allowing WhatsApp in court proceedings was to take away the unjust benefit of voluntarily keeping oneself away from the court.

One should also remember that using WhatsApp as a mode of sending notices, orders is a not a matter of right but it depends on the discretion of the court to grant permission for the same.<sup>1</sup>

#### **Conclusion**

Indian legal system has made amendment from time to time in the existing laws in order to run parallel with the requirement of time. Indian legal system follows the principal of natural justice if the interest of innocent party is at stake. The principal of right to speedy trial has rightly been followed by allowing WhatsApp to serve notices, orders and summons.

#### **Legally Recoverable Debt: An essential element for Sc. 138 of Negotiable Instruments Act (NI Act)**

In the Case of R. Parimala Bai vs Bhaskar Narsimhiah<sup>2</sup>, Karnataka High Court discussed the criteria for taking cognizance of cases arising under Section 138 of NI Act. The main idea underlying in this case is, if the complainant himself does not plead the existence of legally recoverable debt, then there is no question of raising any initial presumption in favour of the complainant.

In the present case, the petitioner sought to withdraw criminal proceedings against her under section 138 of NI Act. The petitioner in the case challenged that there was no allegation in the complaint that there exists a legally recoverable debt, offence under section 138 of the NI Act can't be established.

Keeping in mind the end goal to pull in Section 138 of the Negotiable Instruments Act, the elements of Section 138 must be set up essentially by the complainant by arguing in the objection with respect to the presence of

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<sup>1</sup> Bhim Rathke vs Mr. R.K. Sharma Cr. Revision No. 16/2018

<sup>2</sup> CRL.P. No. 1387/2011

any legally recoverable debt or liability on part of the accused. Section 138 of the Negotiable Instruments Act mandates that, there should be an existence of legally recoverable debt and in order to attract Section 138 of the Negotiable Instruments Act, the party has to plead with regard to the existence of legally recoverable debt. If he pleads with regard to the existence of the legally recoverable debt u/s.138 of the Act, then only presumption u/s.139 of the Act can be raised in favour of the complainant. It has been very rightly observed by the Court that only for those offences, where the allegations constitute offence the Magistrate is entitled to take cognizance and proceed with the matter. Otherwise, the issuance of summons to the accused virtually violates the constitutional right of liberty, which is guaranteed to the citizens of the country.

That even a façade of uncertainty is raised as to the presence or non-presence of legally recoverable debt then also it should be established during the course of trial by means of pleadings the facts and leading evidence.

In order to conclude we can say that the burden of proof at the initial stage lies on the complainant to prove the existence of a legally recoverable debt, post which the burden shifts on the accused.

#### **Statement of co-accused not sufficient for conviction**

In the case of Surinder Kumar Khanna vs. Intelligence Officer Directorate of Revenue Intelligence<sup>3</sup>, the Apex Court was considering an appeal that was made with respect to the Judgment passed by the High Court of Punjab & Haryana, challenging the decision of conviction made thereupon for the offences punishable under section 21(c) read with

section 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985.

It was contended before the court that, conviction cannot be made depending solely on the basis of the statements made by the co-accused without producing pertinent evidence explaining as to why the arrest was made, or associating the accused to the drugs which were seized. The court trying the matter must first begin with the evidence presented by the prosecution and satisfy itself of the eminence and its weightage towards the offense the accused is charged with. The Court observed<sup>4</sup> that conviction cannot be made only on the statements of the co-accused in instances wherein substantive evidence proving the guilt thereof is missing.

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<sup>3</sup> Criminal Appeal No. 949 of 2018

<sup>4</sup>[https://www.sci.gov.in/supremecourt/2017/36059/36059\\_2017\\_Judgement\\_31-Jul-2018.pdf](https://www.sci.gov.in/supremecourt/2017/36059/36059_2017_Judgement_31-Jul-2018.pdf)