Handbook on Moratorium under The Insolvency and Bankruptcy Code, 2016

Committee on Insolvency & Bankruptcy Code
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

The Insolvency and Bankruptcy Code, 2016 in India has been in implementation phase over the last four years. Being a unitary codified legislation, it has several distinctive features which are essential to achieve the enshrined mandate of the Code which includes time bound resolution process and maximisation of value of the stressed assets.

One such distinguishing feature under the Code has been the applicability of Moratorium during the insolvency resolution process that prevents any interruption and helps in smooth conduct of the process. It is also referred as the 'calm period' which has a fixed time of closure under the Code, and allows the insolvency professional to manage the affairs of the corporate debtor in a conflict free environment; thereby letting both the debtor and the creditors to take care of their respective objectives.

I compliment the Committee on Insolvency & Bankruptcy Code of ICAI for taking this initiative of bringing out the publication - **Handbook on Moratorium under The Insolvency and Bankruptcy Code, 2016** to help in understanding the provisions relating to Moratorium under the Code and also know about the practical aspects based on case laws.

I sincerely appreciate the entire Committee and particularly commend the efforts put in by CA. Durgesh Kumar Kabra, Chairman, Committee on Insolvency & Bankruptcy Code and CA. Prakash Sharma, Vice- Chairman, Committee on Insolvency & Bankruptcy Code in bringing out this easy to understand publication on such an important subject.

I am sure that this publication would be of great help to the members, especially to insolvency professionals and other stakeholders.

CA. Nihar N. Jambusaria
President ICAI

Date: 27th June, 2021

Place: New Delhi

Preface

The Insolvency and Bankruptcy Code, 2016 (IBC) is one of the most significant reforms being brought by the Government of India in recent times. The whole objective of IBC is to provide a market determined, time bound structure for orderly resolution of insolvency wherever possible and orderly and easy exit wherever required. To understand the various processes under IBC, it becomes imperative to understand the different aspects as prescribed therein.

The Committee on Insolvency & Bankruptcy Code of ICAI as part of its knowledge dissemination initiative in the insolvency resolution space has decided to bring Handbooks on important topics under IBC, so that it facilitates knowledge about a particular facet under IBC, its provisions, its applicability and practical implications. The instant publication - **Handbook on Moratorium under The Insolvency and Bankruptcy Code, 2016** by the Committee covers the stipulations with respect to Moratorium under Corporate Insolvency Resolution Process and under Insolvency Resolution Process of Individuals and Partnership firms. It also covers the effects of Moratorium and important Case Laws under IBC on Moratorium.

We would like to sincerely thank the President of ICAI, CA. Nihar N. Jambusaria and Vice President of ICAI, CA. (Dr.) Debashis Mitra for their encouragement and moral support in bringing out this publication.

We would like to thank all the Committee Members for their support and guidance in bringing out this publication.

We would like to sincerely appreciate and thank the Group of Insolvency Professionals- CA. Rajneesh Singhvi, CA. Vikas Rajvanshi, CA. Anuradha Gupta, CA. Prashant Agrawal, CA. Pawan Kumar Sharma and CA. Shweta Agarwal who prepared the Draft of the publication under the Convenorship and guidance of Vice-Chairman of the Committee.

We appreciate the efforts put in by Shri Rakesh Sehgal, Director, Directorate of Corporate and Economic Laws, ICAI, Ms. S. Rita, Secretary, Committee on Insolvency & Bankruptcy Code, ICAI, CA. Sarika Singhal, Deputy Secretary, ICAI and the Committee Secretariat comprising of CA. Himanshu

Gulati and CA. Abhishek Tarun for providing their technical and administrative support in bringing out this publication.

We are sure that the members of the profession, industries and other stakeholders will find the publication immensely helpful.

CA. Durgesh Kumar Kabra
Chairman
Committee on Insolvency &
Bankruptcy Code, ICAI

CA. Prakash Sharma
Vice- Chairman
Committee on Insolvency &
Bankruptcy Code, ICAI

Date: 23rd June, 2021

Contents

Chapter-1
Introduction - Moratorium under IBC

One of many things that make Insolvency and Bankruptcy Code, 2016 a success from erstwhile laws is the applicability of **Moratorium** for companies undergoing Corporate Insolvency Resolution Process (CIRP), It plays a very vital role in achieving objective of Code for maximization of value of assets and keeps the corporate debtor as going concern.

The importance of Moratorium is also reckoned as a shield for the corporate debtor while activities for rehabilitation, revival, reorganization or resolution of the corporate debtor is under process. In this manner, it not only provides a shield to the corporate debtor, but also helps in protecting the interests of all the stakeholders of the company. The elaborated explanation about Moratorium for the corporate debtor and for other stakeholder is presented in further paragraphs.

Predominantly, the objective of moratorium is to keep the corporate debtor unharmed during the period of insolvency resolution process and to maintain the status quo in respect of initiating or continuing any proceedings against the corporate debtor which, otherwise will disrupt the process of resolution.

Since the word moratorium has not been defined anywhere in the Insolvency and Bankruptcy Code, we may partially depend on the dictionary meaning of that word that may help interpret and bring some clarity in reference to provisions of the Code.

- **Cambridge Dictionary:**

"A stopping of an activity for an agreed amount of time"

- **Merriam Webster Dictionary:**

a. *"a legally authorized period of delay in the performance of a legal obligation or the payment of a debt"*

b. *"a waiting period set up by an authority"*

- **Oxford Dictionary:**

"A temporary stopping of an activity, especially by official agreement"

- **Lexico Dictionary:**

"A legal authorization to debtors to postpone payment"

1.1 Objective of Moratorium

Paragraph 5.2 of Bankruptcy Law Reforms Committee Report, Nov 2015

The calm period of the Insolvency Resolution Process: IRP

"As described in Section 3.2.2, several conflicts arise between the debtor and creditors when the debtor defaults on payments. While it is optimal for both parties to negotiate to maximize value, the difference in their objectives lead them to take individual action to protect their investments. The Code provides legal recourse to both the debtor and the creditor for a calm period where these negotiations can take place in an orderly, non-conflicted manner, managed by a neutral third-party professional.

The Insolvency Resolution Process, or IRP, is the period during which viability is assessed in the Code proposed by the Committee."

5.3.1 Steps at the start of the IRP

In order to ensure that the resolution can proceed in an orderly manner, it is important for the Adjudicator to put in place an environment of a "calm period" with a definite time of closure, that will assure both the debtor and creditors of a time-bound and level field in their negotiations to assess viability.

The first steps that the Adjudicator takes is to put in place an order for a moratorium on debt recovery actions and any existing or new lawsuits being filed in other courts, a public announcement to collect claims of liabilities, the appointment of an interim RP and the creation of a creditor committee.

Moratorium on debt recovery action

The motivation behind the moratorium is that it is value maximizing for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP. The order for the moratorium during the IRP imposes a stay not just on debt recovery actions, but also any claims or expected claims from old lawsuits, or on new lawsuits, for any manner of recovery from the entity.

The moratorium will be active for the period over which the IRP is active."

Further, the Bankruptcy Law Reforms Committee in its report on 04.11.2015 mentioned about moratorium at point no. 3, its paragraph at 3.4.2 as under

"3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors."

Which has been further described in the above-referred report as under:

Resolution phase I: A calm period for insolvency resolution

The Committee recommends two phases of resolution, once a procedure of default resolution has been triggered. The first phase is a collective negotiation to rationally assess the viability of the debt. The Committee recommends that the assessment must be ensured a calm period where the interests of the creditors can be protected, without disrupting the running of the enterprise.

This calm period is implemented in two orders passed by the Adjudicator. One is an order passing a moratorium on all recovery actions or filing of new claims against the enterprise. The other is by putting in place an insolvency professional who has the powers to take over the management and operations of the enterprise.

The word Moratorium has its effects on various parts and its chapters of Code as under:

a. Part II which deals with Insolvency resolution and liquidation for corporate persons

   Chapter II: Corporate Insolvency Resolution Process

   Chapter III: Liquidation Process

b. Part III which deals with Insolvency resolution and bankruptcy for Individuals and partnership firms

   Chapter II: Fresh Start Process

   Chapter III: Insolvency Resolution Process

   Chapter IV: Bankruptcy order for Individuals & Partnership Firms

The word moratorium has notable effects in different cases, the practical aspects of moratorium can be analyzed from the various sources which include not only plain reading of its meaning in dictionary, reading of provisions of Code, but also from the various interpretations that arose out of leading judgments which will not only elaborate its meaning but also safeguard the objective of Code vested in the applicability of moratorium during insolvency and bankruptcy process.

Chapter-2
Highlights of Moratorium under IBC

Highlights related to Moratorium under CIRP

Details	Provision w.r.to Moratorium
Applicability	To Corporate Person
From which date Moratorium comes into effect?	Moment application is admitted under section 7, 9 or 10
When the moratorium shall cease to have effect ?	When Adjudicating Authority approves the resolution plan under sub section (1) of section 31 or Passes an order for liquidation of the corporate debtor under section 33.
Events/activities that are prohibited under moratorium	• Institution of suits • Continuation of pending suits • Proceedings against the corporate debtor • Execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets
Transactions on which moratorium shall not apply	• Transaction as may be notified by the CG • A surety in a contract of guarantee to a corporate debtor • The supply of essential goods or services to the corporate debtor
Moratorium under Liquidation Process	While passing the order of Liquidation by Adjudicating Authority, Sub-section (5) of section 33 of the Code, restricts that, "No suit or other legal proceedings shall be instituted by or against the corporate debtor"

Highlights related to Moratorium under Fresh Start Process

Particular	Provision w.r.to Interim-Moratorium	Provision w.r.to Moratorium
Applicability	Individuals	Individuals
From which date Interim-Moratorium/ Moratorium comes into effect?	On the date of filing of application for the order of fresh start.	On the date of admission of application for the order of fresh start.
When the Interim-Moratorium/ Moratorium shall cease to have effect?	On the date of admission or rejection application for the order of fresh start.	The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under sub-section (2) of section 91.
Effect of Interim-Moratorium/ Moratorium	• Pending legal action or legal proceeding shall be deemed to have been stayed. • No creditor shall initiate any legal action or proceedings in respect of such debts	• any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed • No creditor shall initiate any legal action or proceedings in respect of such debts

Highlights related to Moratorium under Insolvency Resolution Process

Particular	Provision w.r.to Interim-Moratorium	Provision w.r.to Moratorium
Applicability	Individuals and Partnership Firm	Individuals and Partnership Firm
From which date Interim-Moratorium/ Moratorium comes into effect?	On the date of filing of application under section 94/95 for Insolvency Resolution in relation to all the debts	On the date of admission of application for the Insolvency Resolution Process.
When the Interim-Moratorium/ Moratorium shall cease to have effect?	On the date of admission of application for the Insolvency Resolution Process.	The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or On the date the Adjudicating Authority passes an order on the repayment plan under section 114 Whichever is earlier.
Effect of Interim-Moratorium/ Moratorium	• Pending legal action or legal proceeding shall be deemed to have been stayed. • No creditor shall initiate any legal action or proceedings in respect of such debts • Where the application has been made in	• any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed • No creditor shall initiate any legal action or proceedings in

	relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.	respect of such debts • The debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein
Transactions on which Interim-Moratorium/ Moratorium shall not apply	Transaction as may be notified by the CG in consultation with any financial sector regulator	Transaction as may be notified by the CG in consultation with any financial sector regulator

Chapter-3
Decoding the provisions w.r.t. Moratorium under Corporate Insolvency Resolution Process in IBC

As discussed in the Introduction Chapter, the word moratorium has its effects on various parts and its chapters of Code. To further understand the impact and effect of Moratorium, the provisions prescribed in Chapter-II and Chapter-III of Part II of the Code has been decoded.

This Chapter of the book is divided into two parts viz Moratorium under CIRP in IBC and under Liquidation. For the purpose of better understanding, the provisions are referred and thereafter its effect of moratorium has been explained in an easy to understand language.

3.1 Decoding the provisions w.r.t. Moratorium under Corporate Insolvency Resolution Process in IBC

3.1.1 Provisions relating to Moratorium under Chapter II of Part II i.e. Corporate Insolvency Resolution Process

Under Chapter II of Part II of the Code, moratorium has been mentioned under section 13, 14, and 15. Section 13(1)(a) mentions that the Adjudicating Authority soon after admission of application under section 7, 9 or 10 shall, by an order, declare a moratorium for the purposes referred to, in section 14 of the Code. The said section is produced hereunder:

- **Section13- Declaration of moratorium and public announcement.**

  13. *(1) The Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order—*

  (a) declare a moratorium for the purposes referred to in section 14

  (b) …….

  (c) …….

Section 14 of the Code gives elaborate understanding about the moratorium and explains about "protections available to the Corporate Debtor as well as other stakeholders during the period of Insolvency resolution process for

achieving the object of Code i.e. maximization of the value of assets of the corporate debtor."

Before going into detailed analysis, it is imperative to produce section 14 hereunder:

- **Section 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 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*

   Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

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.

2A. Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

3. The provisions of sub-section (1) shall not apply to—

a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

b) a surety in a contract of guarantee to a corporate debtor.

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.*

Now we hereby elaborate section 14 of the Code for better understanding and its effects in the practical course of insolvency resolution process.

3.1.2 Insolvency Commencement date vis-à-vis Moratorium

We already know that the Insolvency and Bankruptcy Code (Code) was enacted by Parliament and is being amended on a time-to-time basis to

achieve the objective of the Code for resolution in a time -bound manner and for maximization of value of the assets of such Corporate Debtors.

Now section 5(12) of the Code defines Insolvency Commencement as *"the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be:"*

Proviso to the section has been omitted by Insolvency and Bankruptcy Code (Amendment) Act, 2020 w.e.f. 28-12-2019. Prior to the omission, it read as under:

"Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority."

Section 13(1)(a) of the Code makes it clear that the Adjudicating Authority immediately on admission of the application under section 7, 9 or 10, declares a moratorium for the purpose referred to in section 14.

From which date Moratorium comes into effect?

Insolvency and Bankruptcy Code (Amendment) Act, 2020 makes it unambiguously clear that moratorium will be effective from the moment application is admitted under section 7, 9 or 10 and also now the Adjudicating Authority appoints interim resolution professional at the time of admitting application.

When the moratorium shall cease to have effect or what is the period of moratorium?

Section 14(4) of the Code speaks about effect along with completion of the moratorium period. According to sub-section (4) of section 14:

- ✓ Moratorium shall have effect from the order of admission of application under section 7, 9 or 10, and
- ✓ It shall have effect till the completion of the corporate insolvency resolution process.

Proviso to this subsection further provides for two situations during the period of corporate insolvency resolution process period, when moratorium shall cease to have effect i.e.:

(a) When Adjudicating Authority approves the resolution plan under sub section (1) of section 31 or

(b) Passes an order for liquidation of the corporate debtor under section 33.

Clause (a) above enunciates that once the resolution plan is approved by Committee of Creditors and then further approved by Adjudicating Authority under section 31(1) of the Code, then automatically moratorium shall cease to have effect and no separate order is required for that.

However as per clause (b) above, following are the cases where Adjudicating Authority will decide to liquidate the corporate debtor:

- ✓ No resolution plan has been received by Adjudicating Authority during the insolvency resolution period which has been approved by the Committee of Creditors under section 30(6) [Section 33(1)(a)], or
- ✓ Adjudicating Authority rejects the resolution plan under section 31 for non-compliance of the said section. [Section 33(1)(b)]
- ✓ If the Committee of Creditors have decided at any time during the insolvency resolution process period for liquidation, by not less than 66 per cent of the voting power and resolution professional intimates the Adjudicating Authority of the decision of the Committee of Creditors. [section 33(2)]

The Insolvency and Bankruptcy Code, 2016 is silent about cessation of moratorium in the case of withdrawal of application admitted under section 7, 9 or 10 as per provisions mentioned under section 12A of the Code. The moratorium shall cease to have effect from the date of order of the Adjudicating Authority, allowing withdrawal of application under section 12A; as once application itself has been withdrawn, there is no question of continuing the insolvency resolution process and thereby moratorium.

3.1.3 Effects of Moratorium

Now it is the time to understand the effect of moratorium on the Corporate Debtor and on other stakeholders. Section 14(1) of the Code discusses actions that are prohibited under moratorium while sub sections 2, 2A and 3 of section 14 discuss exceptions to such prohibitions.

Section 14(1)(a) provides protection to the corporate debtor by prohibiting

"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;"

Metaphorically, moratorium is like a vault where no creditors will be able to breach the safety net of a corporate debtor for recovering their money during the period of corporate insolvency resolution process.

Further, clause (a) of section 14(1) of the Code provides that during the period of moratorium:

- ✓ No creditor shall be able to ***institute a new suit*** against the corporate debtor,
- ✓ No creditor shall be able to ***continue pending suit*** against the corporate debtor,
- ✓ No creditor shall be able to ***do any proceedings*** against the corporate debtor in relation to above,
- ✓ No creditor shall be able to ***get execution of even any judgement, decree or order*** in any court of law, tribunal, arbitration panel or authority.

Clause (b) of section 14(1) of the Code lists the events/activities that are prohibited under moratorium on following:

"*transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;"*

That is to say that clause (b) restricts a corporate debtor to dispose of its assets, legal rights or beneficial interest therein.

As demonstrative above, Clause (a) speaks about recovery of debts from the corporate debtor and gives protection to the corporate debtor against creditors/stakeholders, whereas clause (b) speaks about protection to stakeholders/creditors against transfer, alienating or disposing of assets by the corporate debtor.

Section 14(1)(c) of the Code provides protection to the corporate debtor against actions of creditors by prohibiting them from taking: "*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 of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);"*

Creditors cannot enforce any security interest created on the property of the corporate debtor during the period of moratorium, which includes action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI). It is just an extension of clause (a) by including enforcement of security interest; also, on the property of the corporate debtor and taking any action against the corporate debtor for recovery of debts under any Act, including of SARFAESI Act, 2002.

Clause (d) of section 14(1) of the Code extends protection of recovery from owner or lessor from unwanted vacation of property/premises occupied by or in possession of the corporate debtor.

If a corporate debtor has in occupation or in possession of any premise/property and not able to make the payment of lease, the owner or lessor shall not be entitled to recover his property from corporate debtor during the period of moratorium.

However, it is to be noted that such property shall not become part of assets of the corporate debtor during the course of insolvency resolution process or in liquidation as part of liquidation estate as per explanation to section 18(1) and section 36 of Code.

Explanation to section 14(1) corporate debtor has been provided that "*notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period***."**

By this, a corporate debtor can be maintained as going concern and protected from any suspension or termination of its rights, grant, license, permit, registration, quota, concession or clearances etc. on the grounds of insolvency on or before insolvency commencement date. However corporate debtors are liable to make the payment of current dues of moratorium period for the use of continuation of such rights. It gives an additional protection to the corporate debtor that no suits or proceedings shall be maintained against

the corporate debtor and also corporate debtor will be privileged for continuing usages of various rights in respect of licenses, permits, registration, concession or clearances etc. which are effective since the date of establishment of moratorium with a rider that corporate debtor is required not to default in payment of current dues arising for the use or continuation of such privileges.

Section 14(2): Supply of essential goods or services:

"*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."*

It is deemed necessary that a corporate debtor be provided with electricity, water, telecommunication services or Information technology services during the moratorium period to maintain its status quo as "going concern".

Section 14(2) of the Code provides for uninterrupted essential supplies and services during moratorium. Essential goods and services have been defined under regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The word "shall not be terminated or suspended or interrupted" means even if a corporate debtor is not able to make the payment of current dues, the service provider shall maintain uninterrupted service.

Although goods and services referred to in section 14(2) of the Code and as defined in regulation 32 are considered as 'essential' to the extent these are not a direct input to the output produced or supplied by the corporate debtor as these goods or services are not to be used for direct output but just to facilitate the essential requirement of the corporate debtor.

Section 14(2A): Supply of goods or services critical to protect and preserve the value of a corporate debtor:

Prior to Insolvency and Bankruptcy Code (Amendment) Act, 2020, there was no clarity, if supply of goods and services which are not part of section 14(2) but are still equally important for protecting the value of corporate debtor, whether supply of these goods and services be uninterrupted?

The answer was given by introducing section 14(2A) w.e.f. **28-12-2019** in the Insolvency and Bankruptcy Code (Amendment) Act, 2020 as under:

"*Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and*

preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified."

The only difference of using goods and services as mentioned in section 14(2) and 14(2A) is that under section 14(2A), corporate debtor has to pay current dues of such supply during the period of moratorium, however this is not the case in section 14(2).

Section 14(3): Provisions of subsection (1) shall not apply to-

(a): Such transactions as may be notified by the Central Government:

Provisions of sub section 1 of section 14 shall not apply on transactions, agreements or other arrangement as the Central Government may notify in consultation with financial sector regulator or other authority.

However, no such transaction has been notified by the Central Government yet.

(b) Surety:

In this case, prohibitions of section 14(1) shall not apply to the surety who has given guarantee to the corporate debtor as this is an exclusive shelter for the corporate debtors only.

Enforcing of security interest or guarantee can be invoked against the surety to the corporate debtor at any time during the insolvency resolution process without being affected with the provisions of section 14(1) which is available for the corporate debtor, not for the surety to the corporate debtor.

3.2 Decoding the provisions w.r.t. Moratorium under Liquidation Process

Chapter III of Part II deals in Liquidation Process wherein section 33 speaks about initiation of Liquidation. While passing the order of Liquidation by Adjudicating Authority, Sub-section (5) of section 33 of the Code, restricts that, "*No suit or other legal proceedings shall be instituted by or against the corporate debtor*"

However, there is a proviso to the subsection that, "*a suit or other legal proceedings may be instituted by the liquidator on behalf of the corporate debtor with the prior approval of the Adjudicating Authority."*

Section 14(1)(a) prohibits the institution or continuation of pending suits or proceedings against the corporate debtor, while provision of section 33(5) restricts that no suit or other legal proceeding shall be instituted by or against the corporate debtor. Unlike section 14(1)(a) in liquidation section 33(5) does not restrict to continuation of pending suits.

It can be understood from the plain reading that pending suits or proceedings can be continued by or against the corporate debtor and for which powers and duties of Liquidator have been mentioned under clause (k) of section 35, "*to institute or defend any suit, prosecution or other legal proceedings, civil or criminal in the name of, on behalf of corporate debtor"*

Chapter-4
Decoding the provisions w.r.t. Interim – Moratorium and Moratorium under Fresh Start Process and Insolvency Resolution Process of Individuals and Partnership Firms

The effect of Moratorium and Interim Moratorium can be seen even in Part III of the Code. Therefore with the objective of in-depth understanding of the impact of Moratorium and Interim Moratorium for Individuals and Partnership Firms, the provisions prescribed in Chapter-II and Chapter-III of Part III of the Code has been decoded.

This Chapter of the book is divided into three parts viz Moratorium and Interim Moratorium under Insolvency Resolution and Bankruptcy – (1) For Individuals, (2) For Partnership Firms and (3) For Individuals and Partnership Firm both.

For the purpose of better understanding, firstly the provisions are referred and thereafter its effect of moratorium has been explained in an easy to understand language.

4.1 Decoding the provisions w.r.t. Interim Moratorium and Moratorium under Insolvency Resolution and Bankruptcy for Individuals

4.1.1 Provisions relating to Interim Moratorium under Insolvency Resolution and Bankruptcy for Individuals under Fresh Start Process

Section 81(1) of IBC, 2016 deals with an interim moratorium in the case of an application for the order of fresh start. Interim Moratorium shall commence on the date of filing of said application in relation to all the debts and shall cease to have an effect on the date of admission or rejection of such application.

4.1.2 Effects of Interim Moratorium

Effects of Interim Moratorium under section 81(2):

Under section 81(2) of IBC, 2016, *during the period of the interim moratorium:*

(i) Any legal action or legal proceeding pending in respect of any of his debts shall be deemed to have been stayed; and

(ii) no creditor shall initiate any legal action or proceedings in respect of such debt.

The objective of providing an interim moratorium is to allow a conducive time for the debtors and creditors for negotiating their contract for the fresh start process. The creditor shall not be eligible to take any legal action during the said interim moratorium period against the said debtor

Section 85 of the Code is about the effect of admission of application of fresh start. The moratorium period shall commence from the date of admission of such application under section 85(1) of the Code.

4.1.3 Provisions relating to Moratorium under Insolvency Resolution and Bankruptcy for Individuals

- **Section 85(2) - Effect of Moratorium under section 85(1) is covered under section 85(2) of the Code which is produced hereunder:**

  During the moratorium period-

  (a) any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed; and

  (b) subject to the provisions of section 86, the creditors shall not initiate any legal action or proceedings in respect of any debt.

- **Section 85(3)- Effects of Moratorium under section 85(3) of the Code are produced hereunder:**

  During the moratorium period, the debtor shall -

  (a) not act as a director of any company, or directly or indirectly take part in or be concerned in the promotion, formation or management of a company;

  (b) not dispose of or alienate any of his assets;

  (c) inform his business partners that he is undergoing a fresh start process;

(d) be required to inform prior to entering into any financial or commercial transaction of such value as may be notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process;

(e) disclose the name under which he enters into business transactions, if it is different from the name in the application admitted under section 84;

(f) not travel outside India except with the permission of the Adjudicating Authority."

- **Section- 85(4) Moratorium ceases to have effect under section 85(4):**

  Section 85(4) of the Code deals with cessation of effect of Moratorium. According to such provision, Moratorium shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under section 91(2).

4.1.4 Effect of Moratorium:

As per Section 85(2) any legal action pending or newly initiated shall be stayed in respect of any debt against debtor subject to provisions of section 86. Under the provisions of section 86 of the Code, any creditor may raise an objection and its examination has to be done by Resolution Professional.

Under the provision of section 85(3), the debtor shall be barred from acting as director and being involved from directly or indirectly managing a company. The debtor shall not dispose of or alienate his assets and will also inform his business partners about undergoing a fresh start process. He shall be restricted to travel outside of India except with the permission of the Adjudicating Authority.

Further, as per Section 85(4), the moratorium shall cease to have effect from 180 days from the date of admission or revocation of the application under section 91(2) of the Code.

4.2 Decoding the provisions w.r.t Interim-Moratorium and Moratorium under Insolvency Resolution and Bankruptcy for Partnership Firms

4.2.1 Provisions relating to Interim - Moratorium under Insolvency Resolution and Bankruptcy for Partnership Firms

Section 96(1) of IBC, 2016, Interim Moratorium shall commence on the date of filing of said application in relation to all the debts and shall cease to have effect on the date of admission of such application.

4.2.2 Effects of Interim Moratorium (Section 96(1)(b))

During the interim-moratorium period-

(i) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

Explanation: All the provisions of section 96 regarding Interim Moratorium are similar to the provisions mentioned under section 81 except that provisions of interim moratorium shall operate against all the partners of the firm as on the date of application and the interim moratorium shall not apply on transactions as notified by Central Government in consultation with financial sector regulator.

4.2.3 Provisions relating to Moratorium under Insolvency Resolution and Bankruptcy for Partnership Firms

Section 101 (1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

(2) During the moratorium period—

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein

(3) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

4.2.4 Effects of Moratorium:

- Moratorium under section 101(1) shall have effect for the period of 180 days from the admission of application or on the date Adjudicating Authority passes an order on repayment plan under section 114 whichever is earlier.
- The Moratorium ceases to have its effect by an order approving the repayment plan under section 114.
- The moratorium shall be operated against all the partners of the firm.

4.3 Decoding the provisions w.r.t. Insolvency Resolution and Bankruptcy for Individual and Partnership Firms

Part-III of Insolvency and Bankruptcy Code 2016 applies on Individual and Partnership Firms. The minimum amount of default is Rs.1000. This amount can be increased by the Central Government by way of notification but this minimum limit cannot exceed Rs.1,00,000. Adjudicating Authority for this part is DRT (Debt Recovery Tribunal).

This part is again divided into 7 parts which deals in-

A. Preliminary

B. Fresh start process

C. Insolvency resolution process

D. Bankruptcy order for Individuals & Partnership firms

E. Administration and distribution of the estate of the bankrupt

F. Adjudicating Authority for Individuals & Partnership firms

G. Offences and penalties

A. Fresh start process

Moratorium in Fresh Start: -

Fresh start application is filed by debtor himself when he is unable to pay his debts and

- His gross annual income is less than Rs. 60,000/-
- Aggregate value of assets is less than Rs. 20,000/-
- Aggregate value of qualifying debts is less than Rs. 35,000/-
- He is not an undischarged bankrupt
- Does not own an encumbered or unencumbered dwelling unit
- No fresh start process, insolvency resolution process or bankruptcy process is subsisting against him; and
- No fresh start order made in preceding 12 months of the application

Moratorium is divided in two parts in a complete fresh start process named ***interim moratorium*** and ***moratorium***.

Interim moratorium starts from the date of filing of fresh start application by the debtor and it will spread up to the date of admission/rejection of the application by Adjudicating Authority. Moratorium will be applicable on ***all the debts*** i.e. qualifying debt, excluded debt, debt to the extent it is secured and any debt which has been incurred three months prior to the date of application for fresh start process.

During the moratorium no new legal action or legal proceeding can be initiated against the debtor as well as the any legal proceeding pending will be deemed as stayed.

Moratorium

If the application for fresh start is accepted by the Adjudicating Authority then interim moratorium converts in moratorium and it will have the same effects as the interim moratorium have i.e. all the existing legal proceedings will remain stayed and no new proceeding against the debtor can be initiated by the any of the creditor.

Effect of moratorium

The moratorium also applies some restrictions on rights of the applicant debtor. These restrictions are-

(1) He will not be able to act as a director of any company directly, indirectly, take part in or be concerned in the promotion or formation or management of a company.

(2) Not dispose off or alienate any of his assets

(3) Inform his business partners that he is undergoing a fresh start process;

(4) Be required to inform prior to entering into any financial or commercial transaction of such value as may be notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process;

(5) Disclose the name under which he enters into business transactions, if it is different from the name in the application admitted under section 84;

(6) Not travel outside India without the permission of the Adjudicating Authority.

Cessation of moratorium:-

Moratorium ceases to have effect at the end of 180 days from date of admission of fresh start application i.e. the total tenure allowed for completion of fresh start process

Or

On revocation of order made under section 91(2).

B. Insolvency Resolution Process (IRP)

Insolvency resolution process is initiated either by the debtor himself or by the creditors on occurrence of default. In case the debtor is a partner of the firm all or majority of partners of the firm will file the application jointly. Once the application is filed interim moratorium commences and it comes to end on acceptance of the application.

On the date of acceptance of application of moratorium starts running. During the moratorium no new legal action or legal proceeding can be initiated against the debtor as well as any legal proceeding pending will be deemed as stayed.

Effect of moratorium: -

As the moratorium starts the debtor will not be allowed to transfer, alienate,

encumber or dispose of any of the assets of his legal right or beneficial interest therein.

If an order of commencement of Insolvency Resolution Process is made in relation to a firm, the moratorium shall operate against all the partners of the firm.

Rationale of moratorium against all the Partners:-

As per Partnership Act 1932, liability of partners are unlimited which means partner's private assets can be disposed off for the purpose of paying debts of the firm. Hence to keep all the partners on the same stage, moratorium has been applied on all the partners of the firm which prevents them to dispose off or alienate their personal assets other than paying debts of the firm.

Cessation of moratorium:-

Moratorium shall cease to have effect on earlier of the following: -

At the end of 180 days from the date of admission of IRP application or on the date the Adjudicating Authority passes an order on the repayment plan.

C. Bankruptcy Order

Application for bankruptcy order is filed by creditor/creditors jointly or by debtor himself to DRT if-

(1) Application for Insolvency Resolution Process filed by debtor or creditor is rejected by Adjudicating Authority on basis of report submitted by the resolution professional.

(2) Repayment plan submitted under Insolvency Resolution Process is rejected by Adjudicating Authority Or

(3) Repayment plan end prematurely.

Once the bankruptcy application is filed interim moratorium starts and shall cease to have effect on the bankruptcy commencement date. Interim moratorium shall operate against all the partners of the firm where application has been made in relation to a firm.

Effect of Bankruptcy Order :-

A creditor of bankrupt indebted in of any debt claimed as a bankruptcy debt shall not –

(i) Initiate any action against the property of the bankrupt in respect of such debt or

(ii) Commence any suit or other legal proceedings except with the leave of Adjudicating Authority.

D. Moratorium and Other Acts

Moratorium and Limitation Act:-

As per Limitation Act, 1963 "Period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act.''

In computation of limitation period, the period for which moratorium order has been passed will be excluded.

Moratorium and Partnership Act:-

Moratorium will be applicable on all the partners of a partnership firm if IRP or bankruptcy has been initiated against a firm.

Chapter-5
Penalty & Prosecution

Section 74. Punishment for contravention of moratorium or the resolution plan. -

(1) Where the corporate debtor or any of its officer violates the provisions of section 14, any such officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to three lakh rupees, or with both.

(2) Where any creditor violates the provisions of section 14, any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

(3)……..

Section : 186. Punishment for false information, concealment, etc., by bankrupt. -

If the bankrupt has contravened the restrictions under section 140 or the provisions of section 141, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, which may extend to five lakh rupees, or with both.

Chapter-6
Practical Aspects of Moratorium

The word moratorium has been explained at length through plain reading and interpretations of various provisions of the Code and reading of various judgements in specific situations as mentioned hereunder:

A. Effects of Moratorium when there is provisional attachment over property of corporate debtor under PMLA:

In the case of Company Appeal (AT) (Insolvency) No. 575/2019, NCLAT Principal Bench, New Delhi decided in the matter of *The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal, RP & Ors. Vide its judgement on April 9, 2021* that:

"Section 14 of IBC will affect the institution and continuation of proceedings before Adjudicating Authority under PMLA. The Corporate Insolvency Resolution Process will of course not affect prosecution before Special Court, till contingencies under Section 32A of IBC occur. [Para 39]"

".....even if the Authority issues order of provisional attachment, the institution and continuation of proceedings before the Adjudicating Authority for confirmation would be hit by Section 14 of IBC. [Para 40]"

"In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if Corporate Insolvency Resolution Process is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A.[Para 42]"

While analyzing various paras of order, it is clear that moratorium under section 14 of the Code shall prevail over any other law for the time being in force read with section 238 of the Code giving the overriding effect of the Code.

B. Effect of Moratorium when an institution or continuation of a proceeding under section 138/141 of Negotiable Instrument Act is taken against the Corporate Debtor

In the matter of *P. Mohan Raj & Ors Versus M/s Shah Brothers Ispat Private Limited (Civil Appeal No. 10355 of 2018), the Hon'ble Apex Court vide its*

judgement dated 1st March, 2021 decided some important aspects over moratorium as under:

(i) Period of Moratorium

Para 10 of the order clears that moratorium has the effect only from the date of the order declaring moratorium till the completion of the corporate insolvency resolution process which is time bound, either culminating in the order of the Adjudicating Authority approving a resolution plan or in liquidation.

"Moratorium as shield against pecuniary attacks:

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.[Para 25]"

The report of Insolvency Law Committee of February, 2020 throws some light on section 14 wherein Paragraph 8.2 suggests that intention of section 14 is to keep the assets of corporate debtor together and facilitate orderly completion of the processes while continuing company as a going concern.

Para 26 of the above-said order indicates that moratorium if seen in the context of individuals and firms the provisions of section 14 become even clearer.

Para 27 of the order states that, "When the language of Section 14 and Section 85 are contrasted, it becomes clear that though the language of Section 85 is only in respect of debts, the moratorium contained in Section 14 is not subject specific. The only light thrown on the subject is by the exception provision contained in Section 14(3)(a) which is that "transactions" are the subject matter of Section 14(1). "Transaction" is, as we have seen, a much wider expression than "debt", and subsumes it. Also, the expression "proceedings" used by the legislature in Section 14(1)(a) is not trammeled by the word "legal" as a prefix that is contained in the moratorium provisions qua individuals and firms. Likewise, the provisions of Section 96 and Section 101 are moratorium provisions in Chapter III of Part III dealing with the insolvency resolution process of individuals and firms, the same expression, namely, "debts" is used as is used in Section 85.

Section 138 of N.I. Act vis-à-vis Section 14 and 33 of Code

Para 53 of the Judgement makes it clear that quasi criminal proceedings i.e. content in Chapter XVII of the Negotiable Instrument Act would amount to a proceeding within the meaning of section 14(1)(a) of the IBC.

Section 35 gives power to the liquidator to institute or continue proceedings under section 138/141 of N.I. Act against a defaulting debtor of the company.

Looking at the above analysis It is clear that section 14 of the IBC would apply only to the corporate debtor and natural persons mentioned in section 141 of the Negotiable Instruments Act shall continue to be statutorily liable under chapter XVII of the N.I. Act.

C. Moratorium versus SARFAESI Act

Any recovery proceedings whether already pending or instituting a fresh proceeding under SARFAESI Act against corporate debtor is well covered under section 14. However, Banks or financial institutions shall be entitled to initiate proceedings against guarantor of the corporate debtor under SARFAESI Act even during continuation of Insolvency Resolution Process against the Corporate Debtor i.e. Principal Borrower.

D. Effect of Moratorium during continuation of a Contract

Explanations to the section 14(1) of the Code covers protection available to the Corporate Debtor that no order can be terminated during the period of Moratorium if resolution professional finds it necessary to preserve and protect the assets of corporate debtor. The same view has been taken by *Hon'ble NCLAT New Delhi in the matter of TATA Consultancy Services Ltd. V/s Vishal Ghisulal Jain (Company Appeal (AT) (Insolvency No.) 237 of 2020 dated 24th June, 2020.*

E. Effect of Moratorium and powers of Board of Directors or Partners of Corporate Debtor

Section 13 of the Code declares a Moratorium under section 14 and appoint an Interim Resolution Professional and section 17(1)(a) and 17(1)(b) explains that management of affairs of Corporate Debtor shall vest in the Interim Resolution Professional and powers of the Board of Directors or Partners of the Corporate Debtor shall stand suspended and be exercised by the Interim Resolution Professional.

The Interim Resolution Professional has to take over all the operations of the corporate debtor with immediate effect as soon as moratorium begins. Henceforth, any act of the ex-management of the corporate debtor shall become void or illegal, if done, without IRP knowledge and permission.

F. Effect of Moratorium under Joint Development Agreement

In the landmark Judgement of Hon'ble Supreme Court in the matter of *Rajendra Kumar Bhutta V/s Maharashtra Housing and Area Development Authority (MADA) (Civil Appeal No. 12248 of 2018) dated 19.02.2020*, it was decided that section 14(1)(d) of the Code speaks about property occupied by or in the possession of the corporate debtor. The Joint development agreement gives right to the developer upon the land to enter and demolish the existing construction and erect the new structures, therefore, in the said case, moratorium under section 14(1)(d) is well covered and protects the corporate debtor for restraining recovery of property by the landowner.

In another case decided by Hon'ble National Company Law Appellate Tribunal, New Delhi in the matter of Srei Infrastructure Finance Ltd. v. Sundresh Bhatt, [COMPANY APPEAL (AT) (INSOLVENCY) NO. 781 OF 2018] dated July 31, 2019 that when a corporate debtor was running its business even in the premises of a related party of the corporate debtor, the corporate debtor could not be ejected from the premises as per provisions of section 14(1)(d) of the Code.

G. Effects of Moratorium in the case of Class of Creditors

In the case of leading judgement by Hon'ble Supreme Court of India in the matter of *Vinay Kumar Mittal V/s Dewan Housing Finance Corporation Limited while decided civil appeal 654-660 of 2020 on 31st January, 202*0, it was opined by the Hon'ble Apex Court that claims made by the depositor would be considered by committee of creditors and administrator without being influenced by any order of any court intervening into the provisions of Insolvency and Bankruptcy Code.

It can be understood that any class of creditors shall be governed by the provisions of Moratorium and no other Court/Tribunal/Appellate Authority can intervene by challenging the process of law as referred in the Code.

H. Effects of Moratorium while alienating or disposing of the assets of corporate debtor

Section 14(1)(b) of Code clearly prohibits the corporate debtor to alienate or

dispose of its assets during the period of Moratorium. The Hon'ble Supreme Court of India, in the matter of *Anand Rao Corada V/s Varsha Fabrics Private Limited (Civil Appeal No. 8800-8801 of 2019) decided on 18th November, 2019* stated that during pendency of Moratorium even order of High Court to be proceeded with auction of property of corporate debtor shall be considered as breach of terms of moratorium and was to be set aside.

I. Effects of Moratorium post its cessation

Section 32A has been inserted by Insolvency and Bankruptcy Code, 2016 (Amendment) Act, 2020 with effect from 28.12.2019 extends protection to corporate debtor for an offense committed or the liability of corporate debtor prior to commencement of Corporate Insolvency Resolution Process. Once a creditor has filed its claims or abstained from filing its claim during the Corporate Insolvency Resolution Process and same has been taken into consideration by the committee of creditors and also by successful resolution applicant when treatment of the same has been given in the resolution plan approved under section 31(1) of the Code, such creditors cannot pursue any suit or arbitration proceedings for the same claim against the corporate debtor on completion of the moratorium.

Chapter-7
FAQs related to Moratorium under IBC

FAQ related to Moratorium under CIRP

Q1. What shall be the effect to admission of application under Section 7, 9 or 10?

A1. As per section 13, the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order –

(a) declare a moratorium for the purposes referred to in section 14;

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and

(c) appoint an interim resolution professional in the manner as laid down in section 16.

Q2. What is the effect of order of moratorium?

A2. Moratorium has been explained in Section 14 of the Code, during the moratorium period the following acts shall be prohibited as per sub section(1):

(a) The institution of suits or continuation of any 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 SARFAESI 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.

It has further been clarified for the purpose of this sub-section that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period

The provisions of sub-section (1) shall not apply to —

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

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.

Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process or passing of liquidation order whichever is earlier.

Q3. Whether the supply of the essential goods or services to the corporate debtor shall be terminated during moratorium period?

A3. No, as per Section 14 (2) & 2A of the Code, 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.

However, where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

Q4. On which transactions, moratorium shall not apply?

A4. As per Section, 14 of the Code, the provisions of section 14 (1) shall not apply to –

(a) Such transaction as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) A surety in a contract of guarantee to a corporate debtor.

Q5. When the moratorium shall cease to have effect?

A5. As per Section, 14 of the Code, the order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.

Also, if the Adjudicating Authority approves the Resolution Plan during CIRP period under section 31(1) or passes an order for liquidation of corporate debtor, the Moratorium shall cease to have effect from the date of such approval or liquidation order.

Q6. Is the period of moratorium excluded for the purpose of limitation?

A6. Yes, as per Section 60(6) of the Code, the period during which moratorium is in place shall be excluded in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made.

Q7. What is the punishment for contravention of moratorium?

A7. In accordance with Section 74, if the corporate debtor or any of its officer violates the provisions of Section 14 (Moratorium), any such

officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to three lakh rupees, or with both.

If any creditor violates the provisions of Section 14 (Moratorium), any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year but may extend to five years or with fine which shall not be less than one lakh rupees but may extend to one crore rupees, or with both.

FAQ related Moratorium under Fresh Start

Q8. What is interim moratorium and its impact and time limit under Fresh Start?

A8. This is the special protection which is not available under CIRP. When an application is filed under section 80 of the Code by the debtor, an interim-moratorium shall commence on the date of filing of the said application and shall cease to have effect on the date of admission or rejection of such application.

During the interim moratorium period –

(1) any legal action or legal proceeding pending in respect of any of his debts shall be deemed to have been stayed; and

(2) no creditor shall initiate any legal action or proceedings in respect of such debt.

The interim moratorium ceases to have effect on the date of admission or rejection of such application.

Q9. Is there any time limit for which moratorium shall be in force?

A9. Yes, if the application is admitted under section 84, a moratorium shall commence in respect of all the debts.

The moratorium ceases to have effect at the end of the period of one hundred and eighty days beginning with the date of admission unless the order admitting the application is revoked under section 91(2).

Q10. What is the effect of commencement of moratorium period?

A10. After the commencement of moratorium period as per Section 85 of the Code any pending legal action or legal proceeding in respect of any debt shall be deemed to have been stayed and the creditors shall not initiate any legal action or proceedings in respect of any debt, subject to section 86.

Q11. What are the restrictions imposed on a debtor during moratorium period?

A11. The following restrictions are imposed on debtor during moratorium period u/s 85(3) of the Code :-

(a) He shall not act as a director of any company, or directly or indirectly take part in or be concerned in promotion, formation or management of the company.

(b) He shall not dispose of or alienate any of his assets.

(c) He shall inform his business partners that he is undergoing a fresh start process.

(d) He shall be required to inform prior to entering into any financial or commercial transaction of such value as maybe notified by the Central Government, either individually or jointly, that he is undergoing a fresh start process.

(e) He shall disclose the name under which he enters into business transactions, if it is a different name in the application admitted .

(f) He shall not travel outside India except with the permission of the Adjudicating Authority.

FAQ related to Moratorium under Insolvency Resolution Process

Q12. Whether interim moratorium is available for applications filed under section 94 or 95 of the Code.

A12. Yes. When an application is filed by the debtor under section 94 or by the creditor under section 95 of the Code, interim moratorium shall commence from the date of filing of the application in relation to all the debts and shall cease to have effect on the date of admission of such application.

Q13. What will be the effect of application of bankruptcy?

A13. When an application of bankruptcy is filed an interim-moratorium shall commence on the date of the making of the application on all actions against the properties of the debtor in respect of his debts and such moratorium shall cease to have effect on the bankruptcy commencement date.

Q14. What is the effect of beginning of an interim moratorium?

A14. During the interim moratorium period the following shall be the effect:-

(a) Any pending legal action or legal proceeding against any property of the debtor in respect of any of his debts shall be deemed to have been stayed.

(b) The creditors of the debtor shall not be entitled to initiate any legal action or legal proceedings against any property of the debtor in respect of any of his debts.

Where the application has been made in relation to a firm, the interim moratorium shall operate against all the partners of the firm as on the date of the application.

Chapter-8
Case Laws under the Insolvency & Bankruptcy Code, 2016 on Moratorium

IMPORTANT CASE LAWS

8.1 Orders pronounced by Hon'ble Supreme Court of India

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Alchemist Asset Reconstrution Company Ltd……. Petitioner(s)
Vs.
M/s. Hotel Gaudavan Pvt. Ltd. & Ors……. Respondent(s)

CIVIL APPEAL NO. 16929 OF 2017

Date of Order: 23-10-2017

Section 14 (1) (a) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Arbitration Proceedings can continue after imposition of Moratorium under the Code.

The Corporate Insolvency Resolution Process was initiated on 31.03.2017 on an application filed by the Financial Creditor under section 7 before the NCLT, Principal Bench, New Delhi and Moratorium was imposed under section 14 of the Code.

Meanwhile, despite the moratorium, Corporate Debtor invoked the arbitration clause between the Financial Creditor and the Corporate Debtor and then Corporate Debtor filed an appeal before the District Court of Jaisalmer, Rajasthan under Section 37 of the Arbitration and Conciliation Act, 1996 and the court passed an order on 06.07.2017 for registration of the appeal and a

notice for reply was issued. An appeal was preferred before the Hon'ble Supreme Court against the admission of this application.

The objective behind imposition of moratorium is that the moment an insolvency petition is admitted, it expressly prohibits institution or continuation of pending suits or proceedings against Corporate Debtor.

Hon'ble Supreme Court set aside the order of the District Judge dated 06.07.2017 and further stated that *"the effect of Section 14(1) (a) is that the arbitration that has been instituted after the aforesaid moratorium is non est in law."*

https://www.ibbi.gov.in/orders/supreme-court?title=Alchemist&date=

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Mr. Anand Rao Korada Resolution Professional (Appellant)
Vs.
M/s. Varsha Fabrics (P) Ltd. & Ors. (Respondents)

CIVIL APPEAL NOS. 8800-8801 of 2019

Date of Order: 18-11-2019

Section – 14 (1) (b) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether High Court can pass order for auction of property of the Corporate Debtor after declaration of Moratorium u/s 14 of the Code

The NCLT vide order dated 04.06.2019 admitted the insolvency petition, and declared a moratorium. During the pendency of the moratorium, Interim orders were passed by the Odisha High Court on 14.08.2019 and 05.09.2019 for carrying out the auction of the property of the Corporate Debtor in order to settle the claims of workmen and employees.

These Interim Orders were challenged by the Resolution Professional on the ground that since the Corporate Insolvency Resolution Process had commenced and moratorium had been declared, the proceedings before the High Court ought to be stayed.

Hon'ble Supreme Court set aside the impugned Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court, stating that parallel proceedings with respect to the main issue cannot take place in the High Court and held that in view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor once the proceedings under the IBC had commenced and an order declaring moratorium was passed by the NCLT.

The Apex Court overruled the decision of the High Court and held that if the assets of the Corporate Debtor are alienated under any other legal proceedings, during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders.

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IN THE SUPREME COURT OF INDIA

Malayan Banking Berhad.....Petitioner(s)
Vs.
Ushdev International & Ors.....Respondent(s)

SPECIAL LEAVE PETITION (CIVIL) Diary No(s).5960/2020

Date of Order : 15-10-2020

Section – 14 (1) (a) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether moratorium u/s 14 (1) (a) is applicable in case of suits filed by the Corporate Debtor

The Apex Court held that the provision of moratorium u/s 14 (1) (a) does not restrict the civil suits filed by the corporate debtor and is only applicable to civil suits filed against the corporate debtor.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Rajendra K. Bhutta (Appellant)
vs.
Maharashtra Housing and Area Development Authority and Anr. (Respondent(s))

Civil Appeal No. 12248 of 2018

Date of Order : 19-02-2020

Section 14 (1) (d) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Section 14(1) (d) of the Code is applicable on the property "occupied" under a Joint Development Agreement.

Section 14 (1) (d) provides for a moratorium on "the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor."

Maharashtra Housing and Area Development Authority (hereinafter referred to as 'the MHADA') executed a Tripartite Joint Development Agreement with the Corporate Debtor and a society representing the persons occupying 672 tenements.

The Corporate Debtor had availed credit facilities from Union Bank of India amounting to Rs. 200 crores and defaulted in the repayment of loan and therefore an insolvency application under section 7 was filed by the Financial Creditor.

The NCLT, Mumbai passed an order for initiation of Corporate Insolvency Resolution Process on 24.07.2017 and a moratorium in terms of Section 14 was declared. After imposition of the moratorium, MHADA issued a notice to the Corporate Debtor for termination of the Joint Development Agreement and handover of possession of the land including all structures thereon.

The Appellant contended that recovery of possession of land by MHADA was in derogation of moratorium under section 14 of the Code and filed an application under section 14 (1) (d) for restraining MHADA from taking over the possession of the land till the completion of Corporate Insolvency Resolution Process. This application was dismissed by the NCLT and also by NCLAT. The NCLAT held that land was handed over to the Corporate Debtor only for the development work and the Corporate Debtor had not acquired

any rights over the land. The land was not formally transferred in favour of the Corporate Debtor. Hence, it cannot be treated to be the asset of the Corporate Debtor for application of Section 14(1)(d) of the Code.

Against the dismissal of appeal by the NCLAT, further appeal was preferred before the Hon'ble Supreme Court. Referring to the various cases stated in the order, it was clarified that when recovery of property is to be made by an owner under section 14(1)(d), such recovery would be of property that is "occupied by" a corporate debtor.

The abstract of the judgment stated in the order would show "*that the expression "occupied by" mean with being in actual physical possession of or being actually used by, in contra-distinction to the expression "possession", which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession."*

Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the Corporate Debtor to enter upon the property and to do all the things mentioned in the agreement, it is concluded that after such entry, the property would be treated as "occupied by" the developer.

The objective of imposition of moratorium under section 14 of the Code is to alleviate corporate sickness while maintaining status quo so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused.

The Hon'ble Supreme Court answered the issue raised in the case in affirmative in favour of the corporate debtor and held that "*It is clear that Section 14(1)(d) of the Insolvency & Bankruptcy Code, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property*."

After considering all the facts presented, the Apex Court allowed the appeal and set aside the impugned order of the NCLAT and directed NCLT to dispose of the resolution professional's application accordingly by allowing the moratorium on Joint Development Agreement.

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

State Bank of India (Appellant)
vs.
V. Ramakrishnan & Anr. (Respondents)

CIVIL APPEAL NO. 3595 OF 2018

WITH

CIVIL APPEAL NO. 4553 OF 2018

Date of Order: 14-08-2018

Section 14 (3) (b) of the Insolvency and Bankruptcy Code, 2016

Issue - Whether Section 14 of the Code would apply to a personal guarantor of a corporate debtor

Section 14 (3) (b) provides that Moratorium provisions of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor.

M/s Veesons Energy Systems Private Limited, Corporate Debtor availed credit facilities from State Bank of India, Financial Creditor. Mr. V. Ramakrishnan, the Managing Director of Corporate Debtor had signed a personal guarantee to secure the credit facilities and the proceedings under SARFAESI were initiated by the Financial Creditor.

The Corporate Debtor filed an application under section 10 of the Code on 20.05.2017 to initiate the Corporate Insolvency Resolution Process against itself, which was admitted on 19.06.2017 and moratorium was imposed upon the Corporate Debtor.

An interim application for stay of proceedings was filed by the personal guarantor in which he took up the plea that section 14 of the Code would apply to the personal guarantor as well. The NCLT passed the order in favour of the Personal Guarantors and held that section 14 would apply to the personal guarantor as well.

The Financial Creditor filed an appeal with the NCLAT against the order of NCLT and the same was dismissed by the Appellate Tribunal also. By the impugned judgment, the Appellate Tribunal relied upon section 60(2) and (3) of the Code as well as section 31 of the Code and stated that the moratorium imposed under Section 14 would apply to the personal guarantor also.

Against the dismissal of appeal by NCLAT, Financial Creditor appeal was preferred before the Hon'ble Supreme Court. During the pendency of the appeal filed by the Financial Creditor, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was declared on 6 June 2018. By this amendment, amongst other changes, section 14(3) of the Code was substituted to read that the provisions of section 14(1) would not apply to a surety in a contract of guarantee to a corporate debtor.

The Report of the The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature.

Learned counsel appearing on behalf of the Financial Creditor argued that both the Corporate Debtor and Personal Guarantors are separate entities and their liabilities are also distinct and separate from each other and if any of them is undergoing the insolvency proceedings under the Code would not mean, that the other one would also have to go through the same process.

Section 96 and 101 of Part III of the Code was referred to during the proceedings, although it was not brought into force till that time. It was argued that if the insolvency process needs to be initiated against a Personal Guarantor, it can only be initiated under Part III of the Code and a separate moratorium provisions under section 96 and 101 would be attracted for Personal Guarantor under that Part only. It was mentioned that section 101 does not speak of a 'debtor' but speaks 'in relation to the debt' unlike section 14, which in all its sub sections speak only of Corporate Debtor.

Further, the amendment of 2018, makes it clear that section 14(3), is now substituted to read that the provisions of sub-section (1) of section 14 shall not apply to a surety in a contract of guarantee for Corporate Debtor.

Considering the above facts it was held by the Apex Court that the moratorium provisions under section 14 cannot apply to personal guarantors of the corporate debtor.

https://www.ibbi.gov.in/orders/supreme-court?title=ramakrishn&date=

8.2 Orders Pronounced by Hon'ble NCLAT

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Indian Overseas Bank (Appellant)
vs.
Arvind Kumar, Resolution Professional/Liquidator (Respondent)

Company Appeal (AT) (Insolvency) No. 558 of 2020

Date of Order: 28-09-2020

Section 14 (1) (c) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Performance Bank Guarantee is included in Security Interest and covered by Section 14 of the Code?

In this case the Appellant, Indian Overseas Bank, is one of the Financial Creditors of the Corporate Debtor M/s Richa Industries Limited. The Corporate Debtor had availed various loan facilities from IOB including an irrevocable Bank Guarantee and as a pre-condition the Corporate Debtor deposited margin money in the form of FDR to secure the said Bank Guarantee.

Thereafter, one of the OC filed an application for initiation of the Corporate Insolvency Resolution Process against the Corporate Debtor and the Application for initiation of Corporate Insolvency Resolution Process was admitted by order of the Hon'ble NCLT dated 17.12.2018 and Moratorium was declared under Section 14 of the I&B Code, 2016. The IRP was appointed on 21.12.2018.

Furthermore, the Bank Guarantee in question, which was issued in favour of M/s Tata Steel Processing & Distribution Limited was invoked and the payment was made to the beneficiary by IOB. The financial creditor, IOB, adjusted the total margin money of the Corporate Debtor lying with the bank along with the interest accrued thereon in honouring the bank guarantee.

Subsequently, as Corporate Insolvency Resolution Process had already commenced, the RP/Respondent demanded the aforesaid margin money from IOB for which an application was filed seeking direction against the

bank. The Hon'ble NCLT Chandigarh Bench vide order dated 29.04.2020 directed IOB to release the margin money amount to the RP of the Corporate Debtor.

Aggrieved by the order of NCLT, IOB moved an appeal before the Hon'ble NCLAT, the hon'ble NCLAT vide order dated 28.09.2020 set aside the order of NCLT.

The relevant part of the said order is reproduced hereunder for ready reference,

Para 10 "*14. **Moratorium** — (1) Subject to provisions of subsections "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 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 (54 of 2002)"*

"The expression "security interest" has been defined in sub-section (31) of Section 3 of the "I&B Code", which reads as follows:

*"3. Definitions. — (31) **"security interest"** means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee"*

The Appellate Tribunal held that, 'Security Interest' does not include the 'Performance Bank Guarantee' and accordingly, it is not covered by Section 14(1)(c) of the IBC,2016.

Issue: Does the Corporate Debtor have the right to claim the margin money after the invocation of Performance Bank Guarantee during Moratorium?

In the above mentioned case, Bank Guarantee was invoked during moratorium by a beneficiary and the margin money amount was used by IOB towards the payment of the Bank Guarantee. As the margin money was used to honour the bank guarantee, nothing remained with the Bank, and thus the

Respondent Resolution Professional cannot demand that amount of the margin money from IOB.

The NCLAT came to the conclusion that the Resolution Professional/IRP is only entitled to those payments to which the Corporate Debtor is entitled if no orders of Moratorium would have been passed under Section 14 of the Code. Also, the Corporate Debtor does not have the right to claim the margin money after the invocation of Bank Guarantee. Therefore, even the Insolvency Professional cannot claim the margin money, once that is used for the payment of Bank Guarantee by the bank.

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

State Bank of India (Appellant)

Vs

Debashish Nanda (Respondent)

Company Appeal (AT) (Insolvency) No. 49 of 2018

Date of Order: 27-04-2018

Section 14(1) (c) of the Insolvency and Bankruptcy Code, 2016

Issue: Can a bank or Financial creditor appropriate any amount deposited by any person in account of Corporate Debtor towards its own dues during the period of Moratorium?

Corporate Insolvency Resolution Process was initiated against a corporate debtor and an order of moratorium passed on 01.06.2017. SBI, Financial Creditor had adjusted some debit entries in the account of the corporate debtor after the moratorium was imposed. The RP filed an application and an order was passed by hon'ble NCLT on 25.01.2018 holding that once Corporate Insolvency Resolution Process is initiated, bank or any other Financial Creditor can only file claim with the Resolution Professional which will be considered along with other claims as per Law. The bank in no case can appropriate any amount received to set off the amount due to it from the Corporate Debtor on or after the date of commencement of Corporate Insolvency Resolution Process till Moratorium prevails.

An appeal was then filed by State Bank of India against the order of the Hon'ble NCLT Principal Bench, New Delhi and the Hon'ble NCLAT Passed an interim order stating as under:

"Prima facie, we are of the view that the appellant cannot debit any amount from the 'Corporate Debtor's account' after the order of moratorium, as it may amount to recovery amount in spite of the order of moratorium passed by the Adjudicating Authority in violation of Section 14 of the Insolvency and Bankruptcy Code.

However, it may be open to the 'Financial Creditor' to incorporate the interest against the appropriate head in a separate set of same account in terms with the 'RBI Guidelines', which should not be treated to be the amount debited for adjustment.

Further it appears that the Bank cannot freeze the account nor can prohibit the 'corporate debtor' from withdrawing the amount, as available on the date of moratorium for its day to day functioning through Resolution Professional."

Later, the Hon'ble NCLAT upheld the interim order passed on 21.03.2018 making it clear that no financial creditor can appropriate any amount received in the account of Corporate Debtor towards its own dues during the period of Moratorium.

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

ICICI Bank Ltd. (Appellant)

vs.

Gopalsamy Ganesh Babu (Respondent)

Company Appeal (AT) (Insolvency) No. 655 of 2019

Date of Order: 05-07-2019

After initiation of Corporate Insolvency Resolution Process against M/s. Subburaj Spinning Mills Pvt. Ltd., the IRP called for claims. In May 2018, the Appellant, ICICI bank was informed that it may file its claim, but the Appellant

did not file its claim either as 'Financial Creditor' or 'Operational Creditor' pursuant to such information given by the Resolution Professional. Subsequently claims which were received were collated and thereafter Information Memorandum was prepared and on the basis of the Information Memorandum, Expression of Interests were floated by Resolution Applicants. Thereafter, the Resolution Applicants submitted Resolution Plans while relying on the list of claims in the Information Memorandum and eventually the best resolution plan was approved by COC on 17.12.2018.

It is only after approval of the 'Resolution Plan' by the 'Committee of Creditors', the Appellant filed its claim before the Resolution Professional on 21.12.2018. As after approval of the resolution plan the Resolution Professional has no jurisdiction so it could not include the claim of the appellant.

In the meanwhile, the Resolution Plan was approved by the Adjudicating Authority on 12.03.2019. The Appellant thereafter moved before the Hon'ble NCLT Single Bench, Chennai, which by order dated 9.04.2019 rejected the claim. The Adjudicating Authority noticed that the Appellant has already moved before the Subordinate Court with respect to the same claim in O.S. No.308 of 2008 and the matter remained pending because of Moratorium. It was in this background also no relief was granted.

The Appellant submits that in another appeal the 'Resolution Plan' was under challenge and pending consideration before this Appellate Tribunal. The Adjudicating Authority held it was not the sufficient ground to admit the claim after approval of the 'Resolution Plan' by the 'Committee of Creditors' or thereafter.

Hon'ble NCLAT held that, "When the period of Moratorium has expired, the Appellant may pursue the suit pending before the Subordinate Court in the light of Section 60(6) of the I&B Code."

https://ibbi.gov.in//webadmin/pdf/order/2019/Jul/5th%20July%202019%20In%20the%20matter%20of%20ICICI%20Bank%20Ltd.%20VS%20Gopalsamy%20Ganesh%20Babu.%20[CA(AT)(Insolvency)%20655-2019]_2019-07-10%2017:23:59.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Canara Bank (Appellant)

Vs.

Deccan Chronicle Holdings Limited (Respondent)

Company Appeal (AT) (Insolvency) No. 147 of 2017

Date of Order: 14-09-2017

Section 14(1)(a) of IBC, 2016 and Article 32 or 226 of Constitution of India

Issue: Whether suits pending before the Supreme Court or High Court can be excluded from the purview of Moratorium?

Corporate Insolvency Resolution Process was initiated against the Corporate Debtor under section 7 of the Insolvency and Bankruptcy Code,2016 and Moratorium was imposed, which prohibited institution of suits or continuation of pending suits or proceedings **except** before the Hon'ble High Court (s) and Hon'ble Supreme Court of India, against the Corporate Debtor.

The Appellant (Canara Bank) who was the financial creditor challenged this order of admission passed by Hon'ble NCLT, Hyderabad Bench. Canara Bank on the grounds that the Adjudicating Authority cannot exclude any court from the purview of Moratorium for the purpose of recovery of amount or execution of any judgement or decree, including the proceeding, if any, pending before the Hon'ble High Courts and Hon'ble Supreme Court of India against a 'corporate debtor'.

The NCLAT held that the moratorium will not debar any writ petition pending before the Apex Court or High Court under article 32 or 226 respectively, and will not affect the case where order is passed under article 136 (SLP). The relevant para of the order is reproduced hereunder:

Para 7 *"……. 'Moratorium' will not affect any suit or case pending before the Hon'ble Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136 of Constitution of India. 'Moratorium' will also not affect the power of the High Court under Article 226 of Constitution of India. However, so far as suit, if filed before any High Court under original jurisdiction which is a money suit or suit for recovery, against*

the 'corporate debtor' such suit cannot proceed after declaration of 'moratorium, under Section 14 of the I&B Code."

Therefore, the powers of Hon'ble Supreme Court under Article 32 of the Constitution of India and the powers of the Hon'ble High Court under Article 226 of the Constitution of India cannot be curtailed by Section 14 of the Insolvency and Bankruptcy Code, 2016.

https://ibbi.gov.in/orders/nclat?title=Canara+Bank+vs.+Deccan+Chronicle+Holdings+Ltd.&date=

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Jharkhand Bijli Vitran Nigam Ltd. (Appellant)

Vs

IVRCL Ltd. (Corporate Debtor) & Anr. (Respondent)

Company Appeal (AT) (Insolvency) No. 285 of 2018

Date of Order: 03-08-2018

Issue: Can a counter-claim be made against the corporate debtor in arbitration proceedings during the moratorium?

An issue was brought before the NCLAT whether the defendant of the arbitration proceeding may file a counterclaim against the corporate debtor and whether the determination of counter claim will be made by AA or Arbitral Tribunal. The Hon'ble NCLAT held that the counter claim may be filed and determined by the arbitral tribunal. However, in case the corporate debtor is liable to pay any sum then no recovery can be made during moratorium period. The relevant part of the order is reproduced hereunder:

3. *"As the claim of the Corporate Debtor can be determined only after determination of counter claim made by the Appellant in the same very arbitral proceeding and if counter claim or part of it is set off with the claim made by the Corporate Debtor, we are of the view that both the claim and the counterclaim of parties should be heard together by the Arbitral Tribunal in absence of any bar under Insolvency and Bankruptcy Code, 2016.*

4. *However on determination, if it is found that the Corporate Debtor is liable to pay a certain amount, in such case, no recovery can be made during the period of moratorium."*

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Commissioner of Customs, (Preventive) West Bengal (Appellant)

Vs.

Ram Swarup Industries Ltd. & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 563 of 2018

Date of Order: 20-06-2019

Section 14(1)(b) of the Insolvency and Bankruptcy Code, 2016

Issue: Can Statutory Authorities like Custom alienate transfer or sell to a third party the assets of the 'Corporate Debtor' during the period of 'Moratorium'?

When the Corporate Insolvency Resolution Process was initiated by an order dated 08.01.2018 and an order of Moratorium was passed by the Adjudicating Authority, it was not open to the Appellant, Commissioner of Customs or its authorities to issue an e-auction notice on 15.01.2018 and fixing date of auction of the goods on 19.01.2018.

Relevant part of the order is as under:

"**23**. *The aforesaid action on the part of the Appellant, officers of the Customs show that after their knowledge of the order of 'Moratorium' they intended to sell the machinery in question, though it was lying with the Customs Authority since 13th April, 2009 / 27th April, 2009.*

24. *In view of the aforesaid findings, no interference is called for against the impugned order dated 3rd July, 2018 passed by the Adjudicating Authority prohibiting the Customs Authority from selling the assets of the 'Corporate Debtor'."*

As such, during the period of Moratorium under section 14 of IBC,2016, the

assets of the Corporate Debtor cannot be alienated, transferred or sold to a third party.

https://ibbi.gov.in//webadmin/pdf/order/2019/Jun/20th%20June%202019%20In%20the%20matter%20of%20Commission%20of%20Customs%20Vs.%20Ram%20Swamp%20Industries%20Ltd.%20&%20Ors.%20[CA(AT)(Insolvency)%20563-2018]_2019-06-21%2017:51:57.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Dakshin Gujarat VIJ Company Ltd. (Appellant)

Vs.

M/s. ABG Shipyard Ltd. & Anr. (Respondents)

Company Appeal (AT) (Insolvency) No. 334 of 2017

Date of Order: 08-02-2018

Sub-section 2 of Section 14 read with Regulations 31 and 32 as appearing in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

Issue: Is the payment of current charges of essential supplies covered by Moratorium?

The question before the Hon'ble Appellate Tribunal was whether the order of 'Moratorium' would cover the current charges payable by the 'Corporate Debtor' for supply of water, electricity etc. or not. The Appellate Tribunal, after examining the position of law and while considering the section 14(2) of the Code held that, any cost incurred towards supply of the essential services during the period of Moratorium may be accounted towards Insolvency Resolution Process Costs and such cost can be paid during moratorium. Extracts of the order are replicated hereunder:

"From sub-section (2) of Section 14 of the 'I&B Code', it is also clear that essential goods or services, including electricity, water, telecommunication services and information technology services, if they are not a direct input to the output produced or supplied by the Corporate Debtor', cannot be terminated or suspended or interrupted during the 'Moratorium' period.

Hon'ble NCLAT held that, "However, from the provisions of 'I&B Code' and Regulations, we find that no prohibition has been made or bar imposed towards payment of current charges of essential services. Such payment is not covered by the order of 'Moratorium'. Regulation 31 cannot override the substantive provisions of Section 14; therefore, if any cost is incurred towards supply of the essential services during the period of 'Moratorium', it may be accounted towards 'Insolvency Resolution Process Costs', and law does not stipulate that the suppliers of essential goods including, the electricity or water to be supplied free of cost, till completion of the period of 'Moratorium'."

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IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

IN THE MATTER OF:

Varrsana Ispat Limited (Appellant)

Vs.

Deputy Director, Directorate of Enforcement (Respondent)

Company Appeal (AT) (Insolvency) No. 493 of 2018

Date of Order: 02-05-2019

Section 14 of the Insolvency and Bankruptcy Code, 2016

Issue: Is Section 14 of the Code applicable to criminal proceedings or penal actions taken pursuant to the criminal proceedings under PMLA,2002?

The Directorate of Enforcement of Central Government, New Delhi, had attached some of the properties of 'Varrsana Ispat Limited'- (Corporate Debtor) on 10.07.2018.

The 'Resolution Professional' filed an application before the Hon'ble NCLT, Kolkata for releasing the attached assets of the Corporate Debtor which was made by the Deputy Director of Enforcement.

In its order dated 12.07.2018, the NCLT observed that the attachment order was issued on 10.07.2018 which was prior to the order of declaration of the 'Moratorium' under IBC,2016. Therefore, an order to release the attached assets by the Directorate of Enforcement is not maintainable.

The above order was challenged by the RP while referring to overriding provisions of Section 238 of IBC,2016 over the provisions of the 'Prevention of Money Laundering Act, 2002'. It was submitted that during the period of Moratorium the creditors and all authorities causing any disruption in the Corporate Insolvency Resolution Process cannot be allowed to do so and the provisional order of attachment cannot be confirmed by ED during the period of Moratorium.

On the other hand, the counsel appearing on behalf of the Directorate of Enforcement argued that the provisions of 'Prevention of Money Laundering Act, 2002' including Section 2(1)(u) and Sections 3 & 4, the action of attachment of assets can be taken under PMLA, 2002 even during the period of Moratorium.

Para 8 of NCLAT Order dated 02.05.2019 is reprodued*, "Section 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds. The object of the 'Prevention of Money Laundering Act, 2002' is to prevent the money laundering and to provide confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto."*

In Para 12 of NCLAT order dated 02.05.2019, it was held that*, "From the aforesaid provisions, it is clear that 'Prevention of Money-Laundering Act, 2002' relates to 'proceeds of crime' and the offence relates to 'money-laundering' resulting confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the 'Prevention of Money Laundering Act, 2002' or provisions therein relates to 'proceeds of crime', we hold that Section 14 of the 'I&B Code' is not applicable to such proceedings.*

In so far as penalty is concerned, offence of money-laundering is punishable with rigorous imprisonment which is not less than three years and has nothing to do with the 'Corporate Debtor'. It will be applicable to the individual which may include the Ex-Directors and Shareholders of the 'Corporate Debtor' and they cannot be given protection from the 'Prevention

of Money Laundering Act, 2002' and such individual cannot take any advantage of Section 14 of the 'I&B Code'.

This apart, we find that the attachments were made by the Deputy Director of Directorate of Enforcement much prior to initiation of the 'Corporate Insolvency Resolution Process', therefore, the 'Resolution Professional' cannot derive any advantage out of Section 14.

As the 'Prevention of Money Laundering Act, 2002' relates to different fields of penal action of 'proceeds of crime', it invokes simultaneously with the 'I&B Code', having no overriding effect of one Act over the other including the 'I&B C."

https://ibbi.gov.in//webadmin/pdf/order/2019/May/2nd%20May%202019%20In%20the%20matter%20of%20Varrsana%20Ispat%20Ltd%20through%20the%20RP%20of%20Anil%20Goel%20VS%20Deputy%20Director,%20Directorate%20of%20Enforcement%20[CA(AT)(Insolvency)%20493-2018]_2019-05-06%2014:52:44.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Alpha & Omega Diagnostics (India) Ltd. (Appellant)

Vs.

Asset Reconstruction Company of India Ltd. & Ors. (Respondents)

Company Appeal (AT) (Insol.) No. 116 of 2017

Date of Order: 31-07-2017

Section 14(1) (b) of the Insolvency and Bankruptcy Code, 2016

Issue: Will moratorium apply to the personal properties of the promoters of Corporate Debtor?

An application under Section 10 of the Insolvency and Bankruptcy Code, 2016 was filed by the Corporate Applicant for initiation of Corporate Insolvency Resolution Process with the Hon'ble NCLT. NCLT admitted the application subject to some qualifications that Moratorium shall be declared for prohibiting any action to recover or enforce any security interest created

by the Corporate Debtor in respect of "its" property. The property not owned by the Corporate Debtor but which are personal properties of Promoters which are given as security to Financial creditors do not fall within the ambit of the Moratorium. Appeal against this was filed with NCLAT.

Hon'ble NCLAT upheld that view and held that SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonging to or owned by a Corporate Debtor, but SARFAESI proceedings can be initiated if property belongs to promoters of the Corporate Debtor during Moratorium.

*NCLAT held that, "On commencement of the insolvency process the "Moratorium" shall be declared for prohibiting any action to recover or enforce any security interest created by the 'Corporate Debtor' in respect of "**its**" property."*

https://ibbi.gov.in//webadmin/pdf/order/2017/Jun/DignosticsIndiaLtdVsAssetReconstructionCompanyofIndiaLtdOrsCompanyAppealATInsolNo116of2017.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Haravtar Singh Arora (Appellant)

Vs.

Punjab National Bank & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 567 of 2018

Date of Order: 20-09-2018

Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016

The Director of 'James Hotels Limited'- ('Corporate Debtor') appealed against the order dated 08.08.2018 passed by the Hon'ble NCLT Chandigarh Bench saying that during the period of 'Moratorium' cases pending against the 'Corporate Debtor' has not been stopped by the 'Resolution Professional'

Hon'ble NCLAT held that such submission cannot be accepted as in terms of Section 14 of the IBC, 2016, all the proceedings pending before all courts against the Corporate Debtor automatically comes to halt and the Resolution Professional is not required to take any further steps.

https://ibbi.gov.in//webadmin/pdf/order/2018/Sep/20th%20Sept%202018%20in%20the%20matter%20of%20Haravtar%20Singh%20Arora%20Vs.%20Punjab%20National%20Bank%20&%20Ors.%20CA%20(AT)%20No.%20567-2018_2018-09-26%2011:31:22.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Anju Agarwal Resolution Professional for

Shree Bhawani Papers Mills Ltd. (Appellant)

Vs.

Bombay Stock Exchange & Ors. (Respondents)

Company Appeal (AT) (Insolvency) No. 734 of 2018

Date of Order: 23-04-2019

Issue: Whether moratorium under section 14 of the Code is applicable on the dues of the Regulatory Authorities?

The Resolution Professional of Shree Bhawani Paper Mills Limited had challenged the order dated 10.09.2018 of NCLT, Allahabad Bench, holding that the Regulatory Authorities are not covered under Moratorium under section 14 of IBC, 2016.

In this case, Corporate Debtor was seeking exemptions from the statutory compliances as required by the Stock Exchange and Central Depository Services (India) Ltd. and National Securities Depository Services (India) Ltd.

Appellate Tribunal held that the statutory dues i.e. the dues to Central Government or the State Government arising under any law for the time being in force and payable come within the meaning of 'Operational Debt'. If penalty is imposed or amount is payable to the 'Securities Exchange Board of India' in such case, it may claim as an 'Operational Creditor' but cannot recover the same during the 'Resolution Process

https://ibbi.gov.in//webadmin/pdf/order/2019/Apr/23rdApril%202019%20In%20the%20matter%20of%20Anju%20Agarwal.%20R.P.%20for%20Shree%20Bhawani%20Paper%20Mills%20Ltd.%20VS%20Bombay%20Stock%20Exchange%20&%20Ors.%20[CA(AT)(Insolvency)%20734-2018]_2019-04-26%2015:08:12.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

IN THE MATTER OF:

Monnet Ispat & Energy Ltd. Resolution Professional for the Corporate Debtor) (Appellant)

Vs.

Government of India, Ministry of Coal (Respondent)

Company Appeal (AT) (Insolvency) No. 26 of 2018

Date of Order: 30-11-2018

The Corporate Insolvency Resolution Process was initiated on 18.07.2017 against Monnet Ispat Energy Ltd. under section 7 of the Insolvency and Bankruptcy Code, 2016. On 02.03.2015 (much before the filing of the application u/s 7 with Insolvency and Bankruptcy Code, 2016) the Government of India, Ministry of Coal had entered 'Coal Mines Development and Production Agreement' with the Corporate Debtor. A vesting order was also passed by the Government in favour of the Company on 23.03.2015 in respect of coal mines at Chhattisgarh.

After the initiation of Corporate Insolvency Resolution Process, the Government of India issued a notice on 30.12.2017 for termination of Coal Mines Development and Production Agreement (dated 02.03.2015) and vesting order (dated 23.03.2015) to which the Resolution Professional of the Corporate Debtor objected on the ground that it was against the provisions of section 14 of IBC, 2016 as Moratorium has been declared by Hon'ble NCLT, Mumbai Bench. Hon'ble NCLT held that it was not violative of Section 14(1)(d) of IBC,2016.

The NCLAT held that vesting of Coal mines in the Corporate Debtor was not complete in absence of any agreement with the State Government. They also held that the Government of India had issued a show cause notice to Corporate Debtor on 13.04.2017, which date is much before the insolvency commencement date (18.07.2017) and the Corporate Debtor had not acted in accordance with the terms of agreement as mentioned in the show cause notice.

Hence the order of cancellation of agreement passed by the Government of India on 30.12.2017 cannot be held in violation of section 14(1)(d) of the Insolvency & Bankruptcy Code.

https://ibbi.gov.in//webadmin/pdf/order/2018/Dec/30th%20Nov%202018%20In%20the%20matter%20of%20Monnet%20Ispat%20&%20Energy%20Ltd.%20vs%20GOI,%20Ministry%20of%20Coal%20CA%20(AT)%20(Insolvency)%2026-2018_2018-12-03%2018:04:31.pdf

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

IN THE MATTER OF:

Bharat Aluminium Co. Ltd. (Appellant)

Vs.

M/s J.P. Engineers Pvt Ltd. & Anr. (Respondents)

COMPANY APPEAL (AT)(INSOLVENCY) NO.759 OF 2020

Date of Order: 26-02-2021

Section 14(3)(b) the Insolvency and Bankruptcy Code, 2016

Issue: Whether bank guarantee can be invoked during moratorium period?

Facts of the case were that the applicant had entered into a sale and purchase agreement of aluminium products with the corporate debtor and the payments were guaranteed by Andhra Bank. In the meantime, an application to initiate Corporate Insolvency Resolution Process of the corporate debtor was admitted and moratorium was imposed. Thereafter the applicant invoked the bank guarantee but the bank denied citing the provision of the moratorium. Later on an application was filed before the NCLT to direct the bank to encash the bank guarantee but the NCLT held that moratorium would apply to the bank guarantee. Aggrieved by the order, appeal was made before the NCLAT.

The Appellate Tribunal held that the AA has failed to consider the amended provision under section 14(3)(b) of the Code which clarifies that the moratorium does not apply to sureties in guarantee contracts and hence, the bank guarantee in question can be invocated/encashed even during the moratorium period under section 14 of the IBC against the Corporate Debtor

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8.3 Orders Pronounced by Hon'ble National Company Law Tribunal (NCLT)

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH

Axis Bank Limited (Financial Creditor)

Vs.

Alok Infrastructure Limited (Corporate Debtor)

CP (IB) -2047/MB/2018

Date of Order: 24-10-2018

Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016

Issue - Whether Corporate Insolvency Resolution Process need to be stayed against the subsidiary of Corporate Debtor under section 14 (1) (a)

An insolvency application under section 7 of the Code, 2016 was filed by the Financial Creditor (Axis Bank Ltd.) to initiate Corporate Insolvency Resolution Process against the Corporate Debtor, M/s Alok Infrastructure Ltd.

It is pertinent to mention that M/s Alok Infrastructure Ltd. is a subsidiary company of M/s Alok Industries Ltd. The Corporate Insolvency Resolution Process was already undergoing for Alok Industries Ltd. in the NCLT, Ahmedabad Bench vide order dated 18.07.2017. Further, a resolution plan for Alok Industries Ltd. was approved by the Committee of Creditors and was pending for approval before NCLT.

It was submitted by the counsel of Alok Infrastructure Ltd. that initiation of CIRP against a subsidiary of the holding company which is already under CIRP amounts to coercive action and is hit by provisions of section 14 (1) (a) and he appeals for rejection of the application for initiation of CIRP filed by the Axis Bank Ltd.

As mentioned in the Code, 2016, section 14 (1) (a) speaks about moratorium prohibiting "*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.*" It does not speak about initiation of Corporate Insolvency Resolution Process against the subsidiary of the Corporate Debtor.

On the basis of the arguments done and facts presented by both the parties, the outcome is that both the Corporate Debtor and its subsidiary are separate legal entities and it will not be untrue to conclude that **section 14 (1) (a) does not put a stay** on the initiation of Corporate Insolvency Resolution Process against a subsidiary of a Corporate Debtor (undergoing Corporate Insolvency Resolution Process).

For the initiation of Corporate Insolvency Resolution Process what is required is that there should be a debt and there should be a default. NCLT passed an order for initiation of CIRP.

An appeal against the order was filed with the NCLAT on the submission that the insolvency resolution process of 'Alok Infrastructure Ltd' should not continue till the CIRP of 'Alok Industries Ltd.' is decided under section 31. However, such submission was not accepted by the Hon'ble NCLAT and the appeal was disposed of with the direction of continuance of CIRP against M/s Alok Infrastructure Ltd.

https://ibbi.gov.in//webadmin/pdf/order/2019/Jan/24th%20Oct%202018%20in%20the%20matter%20of%20Alok%20Infrastructure%20Limited%20CP%20(IB)%20-2047-MB-2018_2019-01-07%2016:21:08.pdf

NCLAT Order Link
https://ibbi.gov.in//webadmin/pdf/order/2019/Mar/16th%20Jan%202019%20in%20the%20matter%20of%20Ashok%20B.%20Jiwrajka,%20Director%20of%20Alok%20Infrastructure%20Ltd.%20Vs.%20Axis%20Bank%20Ltd.%20CA%20(AT)%20(Insolvency)%20No.%20683-2018_2019-03-07%2012:10:16.pdf

NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH

In the matter of

Sterling SEZ and Infrastructure Ltd. (Applicant)
vs.
Deputy Director, Directorate of Enforcement, (Prevention of Money Laundering Act)

M.A 1280/2018 in C.P. 405/ 2018

Date of Order: 12-02-2019

Section 14 (1) (a) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Moratorium is applicable on attachment order passed under Prevention of Money Laundering Act on properties of Corporate Debtor

An insolvency application under section 7 was admitted by the Tribunal on 16.07.2018 and moratorium imposed. The Directorate of Enforcement has provisionally attached the assets of Corporate Debtor vide order dated 29.05.2018 and corrigendum dated 14.06.2018 initiated as a part of certain proceedings.

The Resolution Professional intimated the Enforcement Directorate on 05.09.2018 about initiation of Corporate Insolvency Resolution Process and moratorium imposed and requested for withdrawal of the attachment of assets belonging to the Corporate Debtor. The Resolution Professional filed an appeal before NCLT for relief in this issue.

It was submitted by the Resolution Professional that under section 18 of the Code, Interim Resolution Professional is required to take control and custody of the assets including those which may not be in possession of the Corporate Debtor.

After going through the pleadings and judgements and submissions made, Hon'ble bench opined that " *the IBC will provide solution at the earliest to the Corporate Debtor as well as to the Creditors* . ***The quantum of the amount locked in the assets of the Corporate Debtor can be released at the earliest when resolution is found through IBC instead of taking a long route under PMLA".*** *As per the provisions of Section 14(1)(a) of IBC, where moratorium on any kind of proceedings is imposed by the Adjudicating Authority, particularly this attachment is a legal proceeding which squarely falls under the ambit of the said Sections of IBC."*

Further, section 63 of the Code provides that, "*no* ***Civil Court or Authority*** *shall have jurisdiction to entertain any suit or proceeding in respect of any matter on which NCLT or NCLAT has jurisdiction under this Code."* Ruling by the Appellate Authority under PMLA in "Bank of India vs Deputy Directorate Enforcement, Mumbai" supra, held the proceedings before Adjudicating Authority under PMLA in respect of attached properties as civil proceedings and thus Adjudicating Authorities under PMLA does not have jurisdiction to attach the properties of the Corporate Debtor undergoing Corporate Insolvency Resolution Process.

The Tribunal considered the overriding effect of IBC under section 238 of the Code and settled that the "*attachment order issued by Directorate of Enforcement and as confirmed by Adjudicating Authority under PMLA Court is a nullity and non-est in law and hence will not have any binding force.*" The Tribunal further held that "*the Resolution Professional can proceed to take charge of the properties and deal with them under IBC as if there is no attachment order."*

An appeal was made with NCLAT against the said order by the Directorate of Enforcement which was dismissed vide order dated **09.04.2021**(CA (AT) (Insolvency) No. 575/2019).

NCLAT held "*In our view, there is no conflict between PMLA and IBC and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of IBC till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A."*

https://ibbi.gov.in//webadmin/pdf/order/2019/Feb/12th%20Feb%202019%20in%20the%20matter%20of%20Sterling%20SEZ%20and%20Infrastructure%20Limited%20M.A%201280-2018%20In%20C.P.%20405-2018_2019-02-15%2012:23:46.pdf

IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH

M/s Schweitzer Systemtek India Private Limited (Applicant/Debtor)

vs.

Phoenix ARC Private Limited (Respondent/ Creditor)

T.C.P. NO. 1059/I&BP/NCLT/MB/MAH/2017

Date of Order: 03-07-2017

Section 14 (1) (c) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Moratorium is applicable to the properties owned by the Personal Guarantor also u/s 14 (1) (c)

Section 14 (1) (c) provides for moratorium on "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 (54 of 2002)"

An application to initiate insolvency was filed by Schweitzer Systemtek India Private Limited, Corporate Debtor under section 10 of the Code. The Corporate Debtor had availed credit facilities from Dhanlaxmi Bank and Standard Chartered Bank. Thereafter, Dhanlaxmi Bank assigned and transferred the debts to M/s Phoenix ARC Pvt. Ltd. The properties mortgaged with Dhanlaxmi Bank and after assignment with Phoenix ARC Pvt. Ltd. were not reflected in the balance sheet of the Corporate Debtor. After analysis of the financials of Corporate Debtor, the outcome was that the property mortgaged belonged to the Promoters.

The learned counsel mentioned that *"the term **"its"** is significant in section 14 (1) (c). The plain language of the section is that on the commencement of the Insolvency process the 'Moratorium' shall be declared for prohibiting any action to recover or enforce any security interest created by the Corporate Debtor in respect of **"its"** property."*

"Its" denotes the property owned by the Corporate Debtor. The property not owned by the corporate debtor does not fall within the ambit of the Moratorium." The Moratorium shall prohibit the action against the properties reflected in the balance sheet of the corporate debtor. The Moratorium has no application on the properties beyond the ownership of Corporate Debtor.

The Tribunal held that on the basis of above facts and findings, the property owned by the Personal Guarantor would not fall within the ambit of moratorium imposed on the Corporate Debtor.

https://ibbi.gov.in//webadmin/pdf/order/2017/Jun/Schweitzer_Systemtek_India_Pvt_Ltd.pdf

IN THE NATIONAL COMPANY LAW TRIBUNAL
"CHANDIGARH BENCH, CHANDIGARH"

In the matter of:

Corporation Bank. (Petitioner/Financial Creditor)

Vs.

Amtek Auto Limited. (Respondent/Corporate Debtor)

CA No.142/2017 IN CP (IB) No.42/Chd/Hry/2017

Date of Order: 13-10-2017

Section 14 (1) (b) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Bank can set off dues from funds lying in the current account of the Corporate Debtor against ad-hoc limit issued during the period of moratorium

An insolvency application filed under section 7 by the Corporation Bank, Financial Creditor was admitted by the Bench and moratorium was imposed.

The Corporate Debtor had a current account with another Financial Creditor, Indian Overseas Bank (hereinafter referred as IOB). An ad-hoc limit was also availed by the Corporate Debtor from the IOB. Intimation about initiation of Corporate Insolvency Resolution Process alongwith the instructions to freeze the debit transactions were given to IOB by the Resolution Professional.

The IOB treated the amount lying in the current account with them as not the assets of the Corporate Debtor and hence set off the amount towards the dues payable to them. They informed about this adjustment to the Resolution Professional.

The Resolution Professional pleaded that the adjustment of dues with the amount lying in the current account is in violation of provisions of moration and thus an application was filed with the Adjudicating Authority for issue of necessary directions to the IOB for the refund of the amount appropriated.

After hearing the learned counsel for the parties and perusation of records, it was held by the Chandigarh Bench of NCLT that " *Any amount lying in the current account of the corporate debtor has to be placed at the disposal of the resolution professional without any scope of adjustment.*"

The outcome of the facts presented and order pronounced by the NCLT is that the Financial Creditor could not set off the dues and was directed to deposit the amount back, which was lying in the current account of the corporate debtor.

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IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH

In the matter of

ICICI Bank
vs.
Innoventive Industries Ltd.

MA 157 in CP 01/I&BP/2016

Date of Order: 23-08-2017

Section 14 (2), Regulation 32 of the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016

Issue – Whether supply of electricity for manufacturing activities of the company is an essential service or not

As per Regulation 32 of the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016, electricity, water and telecommunication services and Information Technology services are to be considered as essential as long as these services are not a requirement to the output produced or supplied by the Corporate Debtor. Under this regulation, an illustration was also given saying that water is to be considered an essential service as long as it is used for drinking purposes and sanitization purposes but not for hydro-generating electricity.

Whenever any illustration is given, it will be given to have an understanding about the provision of law. If supply of water for drinking and sanitization purposes is an essential service, the supply of electricity is also deemed to be limited for lighting purposes and other domestic purposes, which are in modern days considered as essential service. If the same electricity is used as input for manufacturing purposes then the supply of electricity is considered to be used as input for manufacturing purposes to get output from the factory.

Essential service is a service for the survival of humankind, but not for making business and earning profits without making payment to the services used. When a company is using it for making profit, then the company owes to make payment to the services/goods utilized in manufacturing purposes.

The tribunal held that on the basis of the facts of the case, the supply of electricity for manufacturing activity would not fall under the category of an essential service.

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NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH

In the matter of

Canara Bank (Appellant/ Financial Creditor)
vs.
Deccan Chronicle Holdings Limited (Respondent/ Corporate Debtor)

CP No. IB/41/7/HDB/2017

Date of Order: 19-07-2017

Section 14 (2) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether printing ink, printing plates, printing blanket, solvents etc. can come under the purview of exemption for a Corporate Debtor in the business of publishing newspapers and periodicals

The Corporate Debtor is in an important business of Print Media which employs thousands of people directly or indirectly. Considering the importance of the media industry, IRP was advised to ensure the status of going concern of the entity.

It was held by the Hon'ble Bench that considering the nature of industry, goods/services viz. Water, Electricity, printing ink, Printing plates, Printing Blanket, Solvents etc. should also come under the purview of exemption as essential services and such services should not be terminated or interrupted during the moratorium period.

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NATIONAL COMPANY LAW TRIBUNAL, CHANDIGARH BENCH

M/s. Sun Pharmaceutical Industries Ltd. (Appellant)

In the matter of

Weather Makers Pvt. Ltd. (Petitioner/Operational Creditor)

v/s.

Parabolic Drugs Ltd. (Respondent/Corporate)

CA 206/2019 in C.P.(IB)-102/CHD/2018

Date of Order: 26--04-2019

Section 14 (1) (d) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether Raw Material in possession of the Corporate Debtor should be returned back on commencement of moratorium.

An application for initiation of Corporate Insolvency Resolution Process was filed under section 9 by the Operational Creditor, M/s Weather Makers Pvt. Ltd. against Parabolic Drugs Ltd., Corporate Debtor for which order for initiation of Corporate Insolvency Resolution Process passed and moratorium imposed.

As agreed in the "Manufacturing and Supply Agreement" entered into between the Corporate Debtor and another Operational Creditor, M/s Sun Pharmaceutical Industries (Applicant), the Corporate Debtor had to manufacture a drug in turn of the raw material supplied by the Applicant. After the imposition of the moratorium, the applicant demanded back the raw material from the corporate debtor, which was a chemical of perishable nature but neither the drug was supplied nor the raw material was returned to the applicant. Aggrieved by this, an application was filed with NCLT for the return of raw material.

It was argued by the counsel of the applicant that "*an asset owned by a third party but in possession of the Corporate Debtor* ***which is held under a trust or under a contractual arrangement*** *shall be out of the clutches of the provisions of 18(1)(f) as well as section 14 of IBC*"

In opposition to the above argument, counsel of the Resolution Professional held *"that once the Moratorium u/s 14 of IBC is in operation, then the recovery of any property by any owner which is in possession of the Corporate Debtor is prohibited, referred section 14(1)(d) of the Code."*

As per the explanation of section 18(1)(f), an asset owned by a third party however, in possession of the Corporate Debtor held under a trust or under contractual arrangement would not constitute an Asset.

It was held by the bench that as per section 18(1) (f) with this explanation, the raw material supplied by the Applicant was in possession of the Corporate Debtor under a contractual agreement and was liable to be returned back. The Resolution Professional therefore was not allowed to take custody and control over the raw material.

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NATIONAL COMPANY LAW TRIBUNAL, GUWAHATI BENCH

IN THE MATTER OF:

Kitply Industries Limited (Appellant/ Corporate Debtor)

Vs.

Assistant Commissioner of Income Tax

(TDS) & Anr.(Non- Applicants)

I.A. No. 54/2018 in C.P. (IB)/02/GB/2018

Date of Order: 15-11-2018

Section 14 (1) (a) of the Insolvency and Bankruptcy Code, 2016

Issue – Whether the Income Tax Department has to unfreeze the bank accounts which were lien marked/frozen even before initiation of Corporate Insolvency Resolution Process

Section 14 (1) (a) of the Code, prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement/decree/order in a court of law, tribunal, arbitration panel or any other authority.

The application filed by IDBI Bank, one of the Financial Creditors under section 7 was admitted by an order dated 01.05.2018 and moratorium imposed under section 14.

It is important to note that even before initiation of Corporate Insolvency Resolution Process, the Income Tax Department sent a letter to the Corporate Debtor seeking realisation of outstanding dues and had also written letters to banks for freezing the bank accounts. In this connection, the Resolution Professional addressed a letter to Assistant Commissioner of Income Tax (TDS) and informed him about initiation of Corporate Insolvency Resolution Process and also requested for unfreeze of the bank accounts to which the department never responded.

After considering the submissions made by the counsel, NCLT held that the "*proceedings before the Income Tax Department which had resulted in freezing of the bank accounts is a proceeding of quasi-judicial nature and being so, such a proceeding is a "proceeding before any other authority" and as such, continuation of the same during the period when the moratorium is in operation is illegal in view of the prohibitions, rendered in section 14 (1) (a) of the Code and therefore, same becomes untenable in law."*

Accordingly, it was held by the Bench that all those bank accounts in the name of the Corporate Debtor have been freezed is/are hereby declared illegal. The concerned Income Tax Department, if so advised, may move an application before RP/COC/CD, as the case may be, seeking realization of the aforesaid statutory dues and on such an application being made, the RP/COC/CD would dispose of such application in accordance with law. The Income Tax Department can not freeze the bank accounts of the Corporate Debtor after imposition of moratorium as the same would amount to "continuation of the proceeding" under section 14 (1) (a) of the Code.

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