

L E X

WITNESS

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let's arbitrate



S. Ravi Shankar
Sr. Partner,
Law Senate

P54

expert speak



Shumi Wasandi
Associate,
Singh & Singh Law Firm

P30

rendezvous



Raju Misra
Partner,
King Stubb & Kasiva -
Advocates & Attorneys

P22

the pondering pill



Krishna Venkat
Co-founding Partner,
Anoma Legal

P24

Battle Over Invincible Ayodhya: Constitutional Contentions to Complete Justice

P08

expert speak



Dr. Manoj Kumar
Founder,
Hammurabi & Solomon

P42

expert speak



Rajeev Parashar
Of Counsel, TMT Law Practice
Shilpa Gannani
Associate, TMT Law Practice

P36

expert speak



Jayashree Shukla Dasgupta
Partner, Dhir & Dhir Associates
Swati Sharma
Sr. Associate, Dhir & Dhir Associates

P15



Impact of IBC on Proceedings before Debts Recovery Tribunals

■ **Jayashree Shukla Dasgupta & Swati Sharma**



The Insolvency and Bankruptcy Code, 2016 ('IBC') was brought into effect with an intent to consolidate laws relating to reorganisation and insolvency resolution of companies, firms and individuals. Since its promulgation, IBC has witnessed various amendments in order to clarify and facilitate a better mechanism for insolvency resolution. While the Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms¹ is yet to be notified, the Insolvency Resolution and Liquidation for Corporate Persons² is in effect.

On the other hand, recovery of debts by Banks and Financial Institutions is governed by the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDB Act'). RDB Act provides for establishment of Tribunals for adjudication and recovery of debts by Banks and Financial Institutions. Another Act which was promulgated for the assistance of Banks and Financial Institutions was the SARFAESI Act, 2002. The said Act was brought into force for enforcement of security interest.³ These are the two enactments under which the Debts Recovery Tribunals ('DRTs') function.

When an Insolvency Proceeding is initiated under the provisions of IBC, Section 14 of the Act comes into play. The said Section provides for a Moratorium for prohibiting the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor. There are situations where a suit/ original application is already pending against a Corporate Debtor before DRT. In such situations, the suit/ original application as against the Corporate Debtor has to be kept in abeyance.

At initial stages of the IBC, the question whether the proceedings qua Guarantors will also be stayed under the provisions of Section 14 of IBC was determined and dealt with by various Courts and Forums. The National Company Law Appellate Tribunal ('NCLAT') vide its orders passed in *Alpha & Omega Diagnostics India Ltd v. ARCIL*⁴ and *Schweitzer Systemtek India Pvt. Ltd. v. Phoenix ARC*⁵ took a view that the Moratorium under Section 14 of IBC would apply only to the assets of the Corporate Debtor and not to the assets of the Guarantors. The said view of NCLAT was divergent from the view expressed by the Allahabad High Court in the matter titled *Sanjeev Shriya & Ors v. State Bank of India*⁶. The Allahabad High Court formed an opinion



D-55, Defence Colony,
New Delhi-110 024.
Tel: 91(11) 42410000,
Fax: 91 (11) 42410091
E:expertsspeak@dhirassociates.com



that when proceedings under IBC are pending against the Corporate Debtor, the dues of the Corporate Debtor not having been crystallised; proceedings against the Guarantors before DRTs should also not continue.

Pursuant to the judgment of the Allahabad High Court, Bombay High Court in the matter of *Sicom Investments and Finance Ltd v. Rajesh Kumar Drolia & Ors*⁷ gave a contrary opinion to state that the provisions under IBC would not apply to the Guarantors.

The issue of Moratorium qua Guarantors reached the Hon'ble Apex Court and was settled by the Supreme Court in the matter of *State Bank of India v. V. Ramakrishnan & Anr*⁸. The Supreme Court clarified and held that the provisions of IBC in so far as Section 14 is concerned, are applicable only to the Corporate

Debtor and the effect / benefit of the same will not trickle down to the Guarantors. It is also incumbent to point out that before the decision of the Supreme Court, the Legislature brought about an amendment⁹ in the statute and amended Section 14 of IBC to provide that the moratorium will not apply to the Guarantors. Thus, the issue stands settled. Apart from the said issue, the judgment also dealt with a question of initiation/ continuation of Individual Insolvency. Being mindful of the fact that Chapter III of IBC dealing with insolvency of Individuals and firms has not been notified as on date, the Hon'ble Supreme Court has advised the stakeholders to pursue such proceedings under the laws already in existence.

It is imperative to also mention that the NCLAT in the matter of *Standard Chartered Bank v. Satish Kumar Gupta*,

*R.P of Essar Steel Ltd*¹⁰ has laid down that where a Personal Guarantee is executed for clearance of dues of the Corporate Debtor, the same comes to an end when a Resolution Plan is passed. The said findings of the NCLAT would, in effect mean that separate proceedings against the Personal Guarantors for recovery of monies would come to an end. It is imperative to point out that against the order passed by the NCLAT, the Committee of Creditors approached the Hon'ble Supreme Court which passed an order whereby status quo has been directed to be maintained¹¹.

It can be stated that there is still no clarity on the issue as to whether the proceedings against Guarantors will continue during the period of Corporate Insolvency Resolution Process ('CIRP') and the effect of passing of a Resolution Plan on the Guarantors. Along with the above

mentioned fact, there are certain practical concerns that still remain unanswered.

First and foremost issue is that of harmonising the various laws to deal with the concept of Debt Recovery. There may arise a situation where CIRP is going on and simultaneous steps have been initiated by Banks and Financial Institutions under the SARFAESI Act and RDDB Act as against the Guarantors/ Assets of Guarantors. It is a settled law that liability of a Borrower and that of a Guarantor is joint and several. However, is it equitable to allow a Bank or Financial Institution to recover monies under various enactments and what will be the scope of accountability of different measures? Interplay between IBC and SARFAESI Act / RDDB Act needs to be fully addressed, especially in light of the *Standard Chartered Bank v. Satish Kumar Gupta, R.P of Essar Steel Ltd*¹² judgment which provides that liability of a Guarantor ceases to exist in case a Resolution Plan qua a Corporate Debtor is approved. However, the said judgment is under challenge before the Hon'ble Supreme Court and the matter is sub-judice. Further, at present, since Chapter III of the IBC has not been notified, the filing of insolvency proceedings qua Individuals before the NCLT is not permissible in law¹³.

Apart from the aforementioned facts, it is also to be seen that once the Insolvency

Resolution and Bankruptcy for Individuals and Partnership Firms is brought into effect, the DRTs will assume the role of Adjudicating Authorities. More than the issue of lack of infrastructure and the already existing pendency before the DRTs, the Fora for determination and adjudication of debt will also increase. The Corporate Debtor will be before the NCLT, the Personal Guarantor may be before the DRT (Adjudicating Authority) and there may be a third category of Corporate Guarantors against which suits/ original applications for recovery will still be in place. Further, there is a provision in the IBC which provides that if insolvency proceedings against Corporate Debtor is pending then insolvency of individual cannot be initiated before the DRT. Thus, for a single transaction, there can be multiple proceedings. In such situations, it is imperative that the Resolution Plan which is approved under IBC or the liquidation of assets that takes place ought to be accounted for in the proceedings pending before DRTs. What remains a grey area is whether DRTs should allow pleadings to be amended to incorporate the change in circumstances, and recovery of monies under the provisions of IBC. Till the time, proper guidelines are brought into effect to synchronize the laws under IBC vis-a-vis SARFAESI Act/ RDDB Act, there will remain uncertainty in the minds of both the Creditors as well as the Debtors including Borrowers and Guarantors alike. **W**



Jayashree Shukla Dasgupta is a Partner at Dhir & Dhir Associates. Her professional experience spans nearly 20 years in the area of Banking and Finance, Arbitration, Consumer and Land Acquisition Laws. She has expertise in handling civil litigations and is currently heading the litigation team of the Firm dealing with Banking Dispute Matters. Jayashree is also a qualified Insolvency Professional.



Swati Sharma is a Senior Associate with over six years' experience. She practices in banking and finance laws, securitization related matters, recovery of debts and defamation suits. She has practiced before various Consumer Fora/Commissions and has experience of civil litigation before various trial courts. She is regularly appearing in Banking matters before various DRT and DRATs.

¹Part III of the IBC, ²Part II of the IBC, ³Security Interest is defined under Section 2 (zf) of the SARFAESI Act. It is also defined under Section 3(31) of the IBC, ⁴Company Appeal (AT) (Insolvency) No.116/2017 dated 31.07.2017, ⁵Company Appeal (AT) (Insolvency) No.129/2017 dated 09.08.2017, ⁶[2017] 144 SCL 545(AI) dated 06.09.2017, ⁷Commercial Suit No. 44 of 2010 dated 28.11.2017, ⁸Civil Appeal No.3595/18 dated 14.08.2017, ⁹Amendment dated 06.06.2018, ¹⁰Company Appeal (AT) (Insol.) No. 242 of 2019 dated 04.07.2019, ¹¹Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Anr., Civil Appeal Dy. No.24417/2019, ¹²Supra Note 10, ¹³Punjab National Bank v. Carnation Auto India Pvt Ltd. & Anr, Company Appeal (AT) (Insol) No.139 of 2019 dated 07.05.2019