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# 'Moratorium' under IBC 2016 & Relevant Pending Matters - Impact Assessment

■ Varsha Banerjee & Kunal Godhwani



The Insolvency and Bankruptcy Code 2016 is enacted by the parliament with an objective to consolidate and amend laws relating to reorganization

and insolvency resolution of eligible Business Entities, Partnership Firms and Individuals. Section 14 clearly defines the provisions of moratorium favouring the Corporate Debtor with no doubt at all. However, the fact that whether the moratorium shall be suspended or stay all the proceedings against the Corporate Debtor is under speculation. Before this is deliberated further upon or considering the interpretation adopted by the tribunals, it is necessary to understand the intent of the legislature behind such moratorium. It could be aimed towards a grant of calm period for

insolvency resolution where a Debtor can negotiate in the assessment of viability without any fear of recovery enforcement mechanisms adopted by the Creditors.

## UNDERSTANDING THE INTERPRETATION BY NCLT & NCLAT

The interpretation, scope and extent of are indeed debatable. However, the tribunals have had the occasion to deal with such issues in the recent past. This arose in the matter of Schweitzer Systemetek<sup>1</sup>, wherein NCLT, Mumbai held that moratorium will not be applicable to the Guarantors as they are not covered in Section 14 of IBC. The same viewpoint has also been expressed by the Appellate Tribunal<sup>2</sup>. Yet another instance is the matter of Veasons Energy Systems Pvt.<sup>3</sup> Ltd. , wherein the NCLT, Chennai passed an



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order restraining the Financial Creditor from proceeding against the Guarantor of the Corporate Debtor during the moratorium period. One might argue that the judgments passed in both the matters are conflicting. However, if we examine the facts, both the judgments operate in completely different spheres. Here is an elaboration for a better insight.

In the matter of Schweitzer Systemetek, the properties held by the Guarantors of the Corporate Debtor were also being attached pursuant to the admission of an Insolvency Petition against the Corporate Debtor. Therefore, the NCLT, Mumbai concluded that in terms of moratorium, the properties held by the Guarantor of the Corporate Debtor is not liable to be attached. On the other hand, in the matter of Veasons Energy Systems, the Tribunal in an application filed by the Guarantor of the Corporate Debtor had restrained the Financial Creditor in proceeding against such Guarantor during the moratorium on the premise that it will result in creating a charge on the assets of the Corporate Debtor which shall amount to encumbering the properties of the Corporate Debtor and in violation of Section 14(1) (b) of the IBC.

The reasoning adopted by the Tribunal in the matter of Veasons Energy systems may be questioned because in case a Creditor recovers money from the Guarantor, then Guarantor only to that extent steps into the shoes of the Creditor and has all the rights, which Creditor already had against the Corporate Debtor. Therefore, the same does not result in creation of any further charge. On the contrary, it results only in transfer of rights vis-à-vis Creditor and Guarantor. If the Creditors proceed against the Guarantors then there could be an element of thwarting the discussion or decision on revival of the Corporate Debtor and shifting the primary liability from Corporate Debtor to the Guarantor.

Additionally, once a resolution plan is sanctioned, approved by Committee of Creditors and affirmed by NCLT, then as per Section 31(1) of the IBC, the Resolution Plan is binding on the Corporate Debtor and its Employees, Members, Creditors, Guarantors and other Stakeholders involved in the resolution plan. It is significant to state that the terms and conditions of the Resolution Plan are also very important as they decide the future course of action. If a Creditor consents for a waiver of a part of the debt in the resolution plan then automatically, the liability of the Guarantor will also be considered as waived off or if, a Creditor schedules a repayment plan with the principal borrower then until and unless there is a default as per the repayment plan, the liability of Guarantors cannot be not invoked. It was on the same grounds that, in order to avoid any prolixity or overlapping, the Allahabad High Court also in the matter Sanjeev Shriya V. State Bank of India & Ors.<sup>4</sup> stayed the proceedings against the Guarantors until the finalization of Corporate Insolvency Resolution Process or till the time NCLT approves of the resolution plan under sub section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be. Therefore, the moratorium should be absolute and apply to all cases where the primary liability is that of the Corporate Debtor.

Proceedings to be initiated under Section 14 of the IBC require judicial assessment. The Appellate Authority has carved out an exception to the moratorium in the matter of Deccan Chronicle and has held that the moratorium even in favor of the Corporate Debtor is also not absolute and it will not affect the proceedings before the Hon'ble High Court and Hon'ble Supreme Court under Article 32, 136 and 226/227 of the Constitution of India.<sup>1</sup>



**Varsha Banerjee** is an Associate Partner and has been in practice for the last 7 years and represents corporate entities, institutional creditors, shareholders etc. She focuses her litigation practice on corporate restructuring and insolvency matters with expertise in the rehabilitation of distressed entities, issues pertaining to recovery of debt, securitization-related matters and commercial disputes arising out of other contractual matters, civil suits and arbitration law arising in cases of distressed entities.



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<sup>1</sup>M/s Schweitzer Systemetek India Private Ltd. V. Phoenix ARC Pvt. Ltd., T.C.P.No. 1059/ I&BP/NCLT/MB/IMAH/2017.

<sup>2</sup>Phoenix ARC Pvt. Ltd V. M/s Schweitzer Systemetek India Private Ltd, Company Appeal (AT) (Insolvency) No. 129 of 2017.

<sup>3</sup>Mr. V. Ramakrishnan Vs. M/s Veasons Energy Systems Pvt. Ltd. & State Bank of India IA 05/2017 in CP/510/IB/CB/2017.

<sup>4</sup>Sanjeev Shriya V. State Bank of India, Writ - C No. - 30285 of 2017.