

Pandemonium of Moratorium

Section 14 of the Insolvency and Bankruptcy Code, 2016 (“**Code, 2016**“) provides that moratorium shall be issued by the Adjudicating Authority thereby prohibiting institution of any suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order etc. against the Corporate Debtor and the moratorium shall continue till the date of completion of Corporate Insolvency Resolution Process.

The intent behind Section 14 of the Code, 2016 is that any pending proceedings on the date of the moratorium involving the Corporate Debtor cannot be proceeded further and an automatic stay is granted. This principle has been highlighted by the Supreme Court in the case of Alchemist Asset Reconstruction Company Ltd. Vs. M/s Hotel Gaudavan Pvt. Ltd. & Ors. bearing Civil Appeal No. 16929 of 2017 as well as the National Company Law Appellate Tribunal K.S. Oils Ltd. Vs. State Trade Corporation of India Ltd. & Anr. bearing Company Appeal (AT) Insolvency No. 284 of 2017 (NCLAT).

Furthermore, Section 18 of the Code, 2016 under sub section (b) casts a duty on the Resolution Professional to collect and collate all the claims which have been submitted by the creditors to him pursuant to the public announcements made under Section 13 and Section 15 of the Code, 2016.

From a conjoint reading of Section 14 and Section 18 of the Code, 2016 the question which arises is what happens to the claims of the persons(who are creditors) whose claims are under adjudication in any proceedings and where the amount has not been crystallized by the concerned Court/Adjudicating Authority/ Arbitrator before moratorium has been imposed on the Corporate Debtor by tribunal.

The problem becomes worse in view of role ascribed to the Resolution professional under Section 18(1)(b) of the Code, 2016 whereby he has been given only the administrative power to collate the claims without any power to individually assess the claims to submitted. The claims of such persons may not even be accepted being not the creditor of the company leaving them high and dry when the other creditors are getting a big piece in the pie being distributed by the successful resolution applicant as provided in the resolution plan.

Moreover, once the resolution plan is accepted, then such persons shall have no recourse to recover any money in view of the overriding effect of the provisions of IBC under section 238 of the Code, 2016. Therefore, in such a scenario, one last opportunity may be given to such persons to get their right adjudicated and file the claim obviously within the limited timeframe as permitted under the provisions of the Code.

Keeping in view the above stated dilemma the Learned National Company Law Appellate Tribunal has in the case of Jharkhand Bijli Vitran Nigam Ltd. Vs. IVRCL Ltd. & Anr.” bearing Company Appeal (AT) (Insolvency) No. 285 of 2018 wherein the Learned Appellate Tribunal permitted continuation of the arbitration proceedings in order to determine the claim and

the counter claim with however a direction that in case any amount is due from corporate debtor the same cannot be recovered during moratorium period. Similar view was expressed by the Delhi High Court in 2016 Civil Suit (Comm.) 470 of 2016 in the case of SSMP Industries Ltd. Vs. Perkan Food Process Pvt. Ltd.

However, the National Company Law Appellate Tribunal has recently in the case of Sobodh Kumar Agrawal v. EIH Ltd. bearing Company Appeal (AT) (Insolvency) No. 1122 of 2019,bruising aside its own order in the case of Jharkhand Bijli Vitran Nigam Ltd. (supra) held that:

“....The claim of the Respondent cannot be determined by the ‘Arbitral Tribunal’ during the period of ‘Moratorium’ passed by the Adjudicating Authority. In such situation, as it cannot be decided as to what amount can be taken, we hold that the ‘counter-claim’ filed by the ‘Corporate Debtor’ also cannot proceed.....”

The Hon’ble NCLAT has held that no proceedings can be continued even when there is Claim and Counter Claim against and by the Corporate Debtor, ignoring the settled law that Claim and Counter Claim are two separate proceedings.

If nothing else it definitely impedes upon the principles of certainty of law which gives the assurances to persons as to the consequences of transactions. The Hon’ble Supreme Court in several judgments have emphasized the importance of certainty of law. Once the law is settled, it should not be repeatedly changed as that itself causes confusion and litigation.