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Moratorium - An Unresolved Paradox

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With the revival of Corporate Debtor **("CD")** being a sacrosanct of the Insolvency and Bankruptcy Code, 2016 **"I&B Code",** the creditors having disputed/contingent claims have been facing crimps on their financial strength due to lack of certainty and clarity in treatment of their claims in purview of Regulation 14 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 **("CIRP Regulation")**, which facilitates determination of amount of claim by envisaging that the interim resolution professional or the resolution professional **("IRP or RP")** , as the case may be shall make *the best estimate* of the amount of the claim based on the information available with him.

The IRP under Section 18 (b) of the I&B Code has a duty to receive and collate all the claims submitted by creditors, pursuant to a public announcement. By the words promulgated in Regulation 14 of the CIRP Regulation, it is certain that disputed/contingent claims could be admitted, however, there has been an acute silence with respect to the treatment and yardsticks for valuation of such claims.

In the landmark judgement of ***Committee of Creditors of Essar Steel India Limited (through Authorised Signatory) versus Satish Kumar Gupta & Ors. (Civil Appeal No. 8766-67 of 2019)*** **dated 15.11.2019**, Hon'ble Supreme Court **("SC")** upheld the viability of admitting the contingent claims notionally at INR 1 on the ground that disputes in respect of the claim amount was pending adjudication. This in turn had set up a vicious precedent.

With the said precedent and the current legislative regime being silent about the determination and valuation of contingent claims during moratorium, the creditors having such claims have been left deserted in mid-way. The blanket prohibition on the adjudication leaves such claims uncrystallised leaving it as an *alibi* for the IRP/RP to admit such claim at a nominal value and/or nil value with no consonance with the actual quantum of their claims.

Whereupon, *how far such Creditors (especially operational creditors) can sustain as going concern post admissibility of their claims at a nominal value and or even a Nil Value?*

In the case of ***P. Mohanraj & Ors. Versus M/s. Shah Brothers Ispat Pvt. Ltd. (MANU/SC/0132/2021) dated 01.03.2021,*** Hon'ble Supreme Court("Hon'ble SC") while emphasizing on the sweep of Section 14(1)(a) of the I&B Code, the Hon'ble SC interpretated that said provision is wide enough to include adjudication as well as execution of proceedings or award of arbitral panel. Thereon, Hon'ble SC also held that Section 138 proceedings (under Negotiable Instrument Act, 1881) that relates to debt of the CD would also be covered under the ambit of Section 14(1) (a) of the I&B Code. However, Hon'ble SC also by holding that "*moratorium provision would not extend to persons other that the corporate debtor..*" did provide a breather to the creditors to some extent.

Thus, a question arises as to *whether admission of Disputed/Contingent claims at a nominal and/or Nil value may further push such creditors towards insolvency proceedings?*

It won't be wide of the mark to state that admission of contingent claims at notional/nominal/nil value or admission at INR 1 is wednesbury unreasonable in nature. Even where the undisputed claims have been admitted at full value, time and again huge hair-cuts in payment of the such claims have been discussed and criticized over by the experts, however, creditors having huge outstanding monetary claims (contingent) and their claims having been admitted at a notional/nominal and/or nil value have worsen the situation further. The cause

and effect of such admission on their business operations and financial strength have been left in a complete state of *limbo*. At present, when prolong pandemic has adversely affected business entities such entities with admission of their contingent claims at such value would in all possibility drive them towards insolvency.

In the case of ***Ghanashyam Mishra And Sons Pvt. Ltd. vs Edelweiss Asset Reconstruction Company Limited and Ors.*** **[(2021) 9 SCC 657] dated 13.04.2021,** the Hon'ble SC in line with the intent of the I&B Code held that the approved Resolution Plan would be binding on all stakeholders and therefore all the claims that was not included in a resolution plan shall stand extinguished. This is also based on a doctrine of clean/fresh slate. Para 61 of the said judgement reads as "*..The legislative intent of making the resolution plan binding on all the stakeholders …no surprise claims should be flung on the successful resolution applicant. The dominant purpose is, that he should start with fresh slate on the basis of the resolution plan approved."*

Therefore under present legislative regime, in case, claims are not adjudicated/determined and admitted before the approval of resolution plan, such creditors are left practically in a remediless situation.

Though taking a different approach of Section 14(1)(a) of the I&B Code, in the case of ***SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd. [CS(COMM) 470/2016 & CC(COMM) 73/2017) dated 18.07.2019*** the Hon'ble High Court of Delhi while analyzing whether adjudication of counter claim shall be liable to be stayed in view of Section 14 of the I&B Code, pragmatically considering the interpretation of Section 14 held that *"… till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered."* Furthermore, in the case of ***Fourth Dimensions Solutions Ltd. v. Ricoh India Ltd. & Ors.*** ("**Fourth Dimension Case**") **[MANU/SCOR/09128/2022] dated 21.01.2022,** the Hon'ble SC did not permit the extinguishment of the ongoing arbitration proceedings even after the approval of Resolution Plan, thereon, facilitating the Creditor in question whose claim was admitted at a nil value to continue with the pending arbitration thus marking it as a progressive decision/precedent.

Therefore pursuing the above, it is rationally understandable that adjudication of both claim and counter claim does not act as a threat or have a tendency to endanger, dissipate or adversely affect the assets of the CD and therefore the same shall be allowed, so, on similar lines, in the interest of justice and equity a thought may be given to bar execution proceedings in purview of Section 14 (1)(a) of the I&B Code rather than barring the adjudication of the disputed claims as a whole.

It is also essential to discuss the recommendation made by the Standing Committee vide 5th Report of the Insolvency Law Committee dated 20.05.2022 wherein, vide para. 2.14 the Standing Committee has opined that "*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*" although, it is agreed that execution proceedings may create an additional stress, however, in all practicality, adjudication of a contingent/disputed claims would only serve the interest of justice.

Therefore, introspection is needed with respect to baring execution proceedings and not the adjudication of disputed claims as a whole in purview of Section 14(1)(a) of the I&B Code. Moreover, acknowledging the point that "debt resolution" differs from "debt recovery", a thought may be given to amend the provision.

To end with, possibility of admitting such claims post an efficacious adjudication and crystallization of claim amount but before the consideration of resolution plan ought to be explored to balance the equities considering that it is not merely CD whose interest is required to be protected at the cost of others inducing these entities to insolvency proceedings.