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**Workshop (Physical) on Insolvency Law – A Game Changer
organised by Lex Locum Consultants LLP, Delhi on 30.11.2019
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**Lecture on certain significant Anomalies in the provision
relating to Moratorium under Insolvency and Bankruptcy code**

The importance of The Insolvency and Bankruptcy Code (IBC) 2016 cannot be overstated. The Code was enacted as the Recovery of Debts Due to Banks and Financial Institutions (RDDB Act) and the Securitization (SARFAESI Act) have not been able to deliver the goods. The objective of the new Code is to unify and simplify the existing legal framework related to Insolvency and Bankruptcy and thereby establish a faster and more efficient framework for recovering dues from both corporate and non-corporate debtors by replacing the cumbersome and complex processes. Having regard to the growing NPA figures of Banks and Financial Institutions, this new Insolvency Law is really a game changer. In this view of the matter, it is of utmost importance that the stakeholders, including corporates, insolvency professionals, company secretaries and advocates have a deep and proper understanding of the Code. Lex Locum Consultants LLP has therefore done yeoman's service in organising this workshop on Insolvency Law.

I would begin my lecture by concentrating on certain significant anomalies in the IBC, relating to Moratorium under Section 14 of IBC.

When an application under Sections 7, 9 or 10 of IBC is admitted, Section 13 mandates that the Adjudicating Authority shall declare a moratorium in terms of Section 14, call for submission of claims and appoint an interim resolution professional (IRP).

In earlier acts like SICA also there used to be moratorium imposed under Section 22 of SICA, with the intention being to freeze the claim proceedings in respect of the Company on the date of admission of the proceedings.

However, when we look at Section 14(1) of IBC, we find a very peculiar aspect, which is that institution of 'new proceedings' (as distinguished from 'suits') does not seem to be barred as per the express wordings of the section.

Section 14(1) of IBC is set out as under:

"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."

If we look closely, **Section 14(1)(a)** prohibits –

- i. ‘The institution of suits’ or
 - ii. ‘continuation of pending suits or proceedings’
- against the corporate debtor.

Hence, the wordings of S. 14(1)(a) do not bar Institution of new ‘proceedings’ (as distinguished from Suit) or continuation thereof, against the Corporate Debtor (CD). Only continuation of pending proceedings is barred.

This distinction is highlighted when we read Section 33(5) IBC, Section 446 of the Companies Act, 1956 and Section 279 of the Companies Act, 2013, all of which provide that “...no suit or other legal proceeding shall be commenced/instituted...”

This aspect has been overlooked in para 5.1 to 5.4 of **Report of the Insolvency Law Committee, 2018**. The relevant extract is set out hereinbelow:

5. MORATORIUM UNDER SECTION 14

Scope of the moratorium

- 5.1 *Section 14 of the Code provides for a moratorium from the insolvency commencement date on inter alia “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”. The scope of the moratorium is broader than the moratorium in the repealed Sick Industrial Companies (Special Provisions) Act, 1986 (“SICA”) in two ways: first, under SICA, the actions barred could be instituted or continued with the consent of the Board for Industrial and Financial Reconstruction, and second, the language used in section 22 of SICA clarified that proceedings which affected the assets of the company or for recovery of money, etc. were barred. Thus, courts had interpreted that criminal proceedings could continue as determination of liability and payment of legally enforceable dues was not barred. On a plain reading, section 14 is wider in its ambit as firstly, any suit or proceedings cannot be instituted or continued with the*

consent of the NCLT, and second, the bar on “the institution of suits or continuation of pending suits or proceedings against the corporate debtor” is on first blush, not linked to the assets of the corporate debtor.

- 5.2 *The notes on clauses for section 14, read as follows (emphasis supplied): “the purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default” and “the moratorium on initiation and continuation of legal proceedings, including debt enforcement action ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the corporate insolvency resolution process.” Thus, the intent does not appear to be to debar only those suits or proceedings which affect the assets of the corporate debtor, as these appear to be only one of the components that is barred.*
- 5.3 *Having said that, it is well understood that a proceeding to assess or determine liability, and a proceeding to recover the assessed or determined liability stand at a different footing. The realisation of the dues is a consequence to the determination of liability. Such an amount determined by any court or authority during the moratorium period may not form part of the insolvency resolution process, as the claims by a IRP/RP are verified as “on the insolvency commencement date”. However, for such claims to be filed in liquidation, they should stand determined as on the liquidation commencement date. As per section 33(5) of the Code, in liquidation, no suit or other legal proceedings shall be instituted by or against the corporate debtor without the prior approval of the NCLT. Thus, it appears that suits or proceedings which were barred from being continued under CIRP can be re-started. However, since the claims in liquidation are determined as on the liquidation commencement date, the wider moratorium under section 33(5) may not be useful for a claim which could not be assessed due to the moratorium under CIRP.*
- 5.4 *Thus, if a purposive interpretation is given to section 14, a moratorium on the mere determination of the amount (and not its enforcement) may not have been the intent of the Code. However, the same was deliberated in the Committee and in light of absence of concrete empirical evidence of any hardship being faced by any authority or court in this regard, the Committee agreed that it may not*

be prudent to provide explicit carve-outs from section 14 without on-ground evidence, at this stage. The power of the Central Government under section 14(3) to notify transactions which may be exempt from the moratorium may be explored to address this issue on the basis of demonstrated hardship in the future.”

In the absence of such bar as aforesaid, proceedings for recovery under UP Public Moneys (Recovery of Dues) Act, 1972 and such like proceedings can be legally instituted against CD. Pl. see **Kailash Nath Agarwal Vs. Pradeshiya Industrial & Investment Corp. of UP Ltd. [(2003) 4 SCC 305]**. An amendment of S.14(1)(a) is thus called for in this regard.

Counter claim can proceed but suit cannot:

Another aspect which needs to be addressed is that u/s 14(1)(a) of IBC, there is no bar on the CD filing a suit or legal proceeding. Hence if the CD has filed a **counter claim** in a suit, the continuation of suit against the CD will be barred, but the counter claim of the CD may be proceeded with, since counter claim is treated as a separate proceeding. This also requires clarification.

Criminal proceedings including S. 138 of Negotiable Instruments Act can proceed

Since moratorium does not cover criminal cases, S.138 proceedings can be validly instituted and continued against the CD [Pl. see **Kusum Ingots Vs. Pennar Patterson (AIR 2000 SC 549)** in relation to SICA].

The Report of the Insolvency Law Committee takes note of the issue at para 5.1 (extracted above) when it says “...*Thus, courts had interpreted that criminal proceedings could continue as determination of liability and payment of legally enforceable*

dues was not barred” but does not address the same. This is an issue that needs to be specifically addressed.

Supply of Essential goods and services:

In **S.14(2)** of IBC provides –

“14(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.”

However, what happens if the period of resolution stretches beyond the time limit originally conceived under the Code? Does the essential service provider have to continue to maintain supply of the essential services even without payment of current charges, or whether the supply can be discontinued if current charges are not paid? Should the supplier of such essential services not be entitled to priority payment in the waterfall payments? Specific clarification is required as to these aspects.

Thank you.

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