

MORATORIUM ON DISPOSAL OF PROPERTY OF PERSONAL GUARANTOR OF THE CORPORATE DEBTOR

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Extending the applicability of the moratorium declared under the Insolvency and Bankruptcy Code, 2016 (“**IBC Code**”) to the ‘personal guarantors’ acting as surety in a contract of guarantee to a corporate debtor, the National Company Law Appellate Tribunal (“**NCLAT**”) has in its recent decision in the matter of *State Bank of India vs Mr. V. Ramakrishnan and M/s. Veesons Energy Systems Pvt. Ltd1*, held that the “**‘Moratorium’ will not only be applicable to the property of the ‘Corporate Debtor’ but also on the ‘Personal Guarantor’.**”

The aforesaid decision follows from the appeal filed by the State Bank of India (“**SBI**”) the financial creditor, against the order of the National Company Law Tribunal, Chennai (“**NCLT Chennai**”) restraining them from proceeding against the property of a personal guarantor of the corporate debtor, a private limited company (“**Veesons Energy**”), under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, until the moratorium, declared in the insolvency proceedings initiated against Veasons Energy, is over. The personal guarantor in the present case was also a promoter director of Veasons Energy who had given personal guarantee and was the mortgagor of collateral securities of his assets with SBI, against the facilities availed by Veasons Energy. NCLT Chennai was of the view that if SBI would succeed against the personal guarantor, the personal guarantor would step into the shoes of the financial creditor and shall have all the rights that of a creditor against

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Veesons Energy which would be deemed to automatically create a charge over the property of Veesons Energy, which is specifically restricted under Section 14(1)(b) of the IBC Code and against the spirit of the provisions of moratorium as given under the IBC Code.

NCLAT in its judgement observed that if the creditor intends to initiate proceedings against the personal guarantor, separate bankruptcy proceedings can be filed against the personal guarantor before the same adjudicating authority hearing the resolution process of the corporate debtor. Relying on the provisions of Section 30 read with Section 31 of the IBC Code related to the approval of the resolution plan, the NCLAT further held that *"From the aforesaid provisions, it is clear that 'Resolution Plan' if approved by the 'Committee of Creditors' under sub-section (4) of Section 30 and if the same meets the requirements as referred to in sub-section (2) of Section 30 and once approved by the 'Adjudicating Authority' is not only binding on the 'Corporate Debtor', but also on its employees, members, creditors, guarantors and other stakeholders involved in the 'Resolution Plan', including the 'Personal Guarantor'.* Thus, since the resolution plan of corporate debtor binds the personal guarantor, the moratorium would also apply to such personal guarantor and not be restricted to the properties of the corporate debtor only.

The present decision of NCLAT has reversed the strict interpretation of Section 14 of the IBC Code, made by the National Company Law Tribunal, Mumbai² ("**NCLT Mumbai**"), where the moratorium declared by the authority was restricted to the property of the corporate debtor. In that case, NCLT Mumbai, while interpreting the word '*its*' as given in Section 14(1)(c) of the IBC Code, excluded from the purview of moratorium all such properties which were not owned by the corporate debtor and held that, *'Before I part with it is necessary to clarify my humble view that the SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not.'*

Extension of moratorium to the properties of the personal guarantor certainly gives relief to the personal guarantors and also reduces the uncertainties and conflicting outcomes due to multiplicity of proceedings by financial creditors against the corporate debtors and the guarantors. However, on the other hand, the benefit of moratorium is being increasingly resorted to thwart the recovering proceedings against not only the corporate debtors but also now against the personal guarantors (who are mostly the promoters of the insolvent companies and managing their affairs). In that sense, the purpose of having the guarantee to securitise the credit facility is being compromised and in turn jeopardising the rights of creditors.

Endnotes:

1 Company Appeal (AT) (Insolvency) No. 213 of 2017.

2 M/s Schweitzer Systemtek India Private Limited vs. Phoenix ARC Private Limited, T.C.P No. 1059/I&BP/NCLT/MB/MAH/2017, Order dated July 30, 2017.

Feedback

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