

Insolvency and Bankruptcy Law in India

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Week 04

Lecture 18

Welcome to all.

Today, as part of the course on Insolvency and Bankruptcy Law in India, we are going to discuss the commencement of CIRP and that moratorium. So, before that, let us discuss what we discussed previously. In the previous lessons, we discussed who can initiate the CIRP process. So, three categories of persons can initiate this CIRP process: financial creditors, operational creditors, and the corporate debtor himself. In the previous classes, we have discussed how to make an application and the criteria for making an application by the financial creditor, operational creditor, and corporate debtor.

Once the application is admitted by the NCLT, the adjudicating authority, the moratorium will immediately take effect. Now let us discuss what the objective of the moratorium is. The Insolvency Law Committee report 2020 explains the reasons and objectives of the moratorium, which is critical for running the corporate debtor as a going concern during the CIRP. This is because when the CIRP process, that is, the insolvency petition, is filed before the adjudicating authority, the NCLT will declare the moratorium.

Once the moratorium is declared, no creditor or any other person can file a case against the company, so that the company can continue without being affected by legal disputes. The licenses, permits, quotas, concessions, registrations, or other rights that the corporate debtor enjoys form the basis for its business, without which it will not be possible to resolve the corporate debtor as a going concern. Please remember that when the moratorium is fixed, the licenses, permits, quotas, concessions, and whatever rights the corporate debtor has will all be in existence; no right will be suspended, so they can continue as a going concern; this is the basic objective of the moratorium. Once the moratorium is fixed and attracted, the licenses, permits, quotas, concessions, registrations, and all the rights will be with the corporate debtor only, and it will not impact the going concern of the corporate debtor. So, that is a basic objective of a moratorium.

Now, if you look at section 13, which provides for the declaration of moratorium and public announcement, according to section 13 subsection 1, the adjudicating authority, after the admission of the application under section 7, 9, or 10, finds that section 7 is for

financial creditors, section 9 is for operational creditors, and section 10 is for corporate debtors. Once the application is admitted, the adjudicating authority shall, by an order, declare a moratorium for the purpose referred to in section 14; thus, for the purpose of section 14, the adjudicating authority is going to declare the moratorium. Once the application for initiation of CIRP is admitted by the NCLT, an instant moratorium is imposed on the corporate debtor; therefore, the moratorium is imposed immediately and is automatic in nature. Now, let us discuss Section 14. So, section 14 is the fundamental section dealing with the moratorium.

Subject to the provisions of subsection 2 and subsection 3, on the insolvency commencement date, the adjudicating authority shall, by order, declare a moratorium prohibiting all of the following: once the moratorium is in effect, once the insolvency petition is accepted, and once the insolvency commencement date is notified; that is when the application is admitted, and that is considered to be the insolvency commencement date. Such a date is considered to be the insolvency commencement date. On the insolvency commencement date, the adjudicating authority shall, by order, declare the moratorium. He will declare the moratorium from that date onwards. What can they not do? The institution of suits or continuation of pending suits or proceedings against the corporate debtor, including the execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority.

The clause provides that you cannot initiate any legal proceedings, nor can you continue the legal proceedings. So, the first point, the institution of suits. That means you cannot initiate any legal proceedings. Continuation of pending suits means you cannot continue the pending suits either, okay? So, against the corporate debtor, it may include a judgment, decree, or order of the court. It can be a decree, order of the court, tribunal, arbitration panel, or any other award.

You cannot take any action against the corporate debtor, so that is the crux of this subsection. Then they cannot transfer, encumber, alienate, or dispose of any of its assets or any legal right or beneficial interest therein by the corporate debtor. Once the moratorium is fixed and decided, the corporate debtor cannot transfer, alienate, or dispose of any property; that is, they cannot sell any property. Why? Because once the moratorium is fixed, the CIRP process will be started. Then an interim resolution professional will be appointed.

Subsequently, a resolution professional will be appointed. Then he is going to maintain all the assets of the company, and in case the liquidation is ordered, all these assets will form part of the liquidation estate. So that's why to decide the actual value of the company, it is necessary to ensure that all the assets and all the property of the company are vested with the company only. So that's why it is prohibited to transfer, encumber, alienate, or dispose of any kind of assets in any manner. Whereby if the company is

parted, that is, the corporate debtor is parted with the assets of the company, that is prohibited.

So that is a basic objective of this section. Then, 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 SARFAESI Act, means that the financial creditor, generally any financial institution, whenever they are giving a loan to the corporate debtor, can exercise rights under the SARFAESI Act. So, these actions, that is, any action for foreclosure, recovery, or enforcement of any security interest under the SARFAESI Act, are prohibited during the moratorium period. Then, the recovery of any property by the owners, that is, clause d: the recovery of any property by an owner or lessor where such property is occupied by or in the possession of a corporate debtor, cannot be made. Any owner cannot recover the property that is in the possession of the corporate debtor.

Whether a corporate debtor can recover the property from another person, yes, that is possible. So, the moratorium is applicable for the benefit of the company. The explanation is there under this section. For the purpose of this subsection, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, etc., that is given by the central government, state government, or any other sectoral regulator under any law for the time being in force, shall not be suspended.

What they are trying to say is that whenever you have any licenses or any kind of registration. These are all considered to be the rights of the company. That's why these licenses, quotas, and concessions will not be terminated because of the moratorium period. Subsequently, we are going to discuss with the help of the judgment. Then the supply of essential goods or services to the corporate debtor, as may be specified, shall not be terminated, suspended, or interrupted during the moratorium period.

This is another important concept. So, Section 14, Subsection 2 provides that whenever you are rendering any essential services, there is a definition of what is included in essential services. If you are providing essential services to the corporate debtor, then the They are not suspended; please remember. You can pay for the essential services. Essential services are required to maintain the company as a going concern.

The provision of electricity and water supply is considered an essential service or good. Next one: where an interior resolution professional considers the supply of goods or services critical to protecting and preserving the value of the corporate debtor and managing its operations as a going concern, the supply of such goods or services shall not be terminated. So, if the resolution professional is of the opinion that maintaining the company as a going concern, as well as the corporate debtor, requires the supply of certain critical goods or services to protect the company's interests, then such services or

the provision of such services or goods shall not be terminated to ensure that this clause is included to maintain the company as a going concern. Why? Because that is one of the basic objectives, the main objective of the IBC. The company should be maintained as a going concern, and the resolution professional is going to get the maximum out of the available assets.

That is the basic objective of the legislation. Then the proviso of subsection 1 shall not apply to such transactions, agreements, arrangements, or other arrangements as may be notified by the central government. The subsection, when there is a moratorium, shall not be applicable to certain transactions that are notified by the central government. One such transaction is a surety in a contract of guarantee to a corporate debtor. So, if any person is a surety for the corporate debtor, the moratorium will not apply.

Then, under subsection 4, the order of moratorium shall have effect from the date of such order till the completion of the CIRP process. The moratorium will be implemented, or it will be operative from the date of CIRP until it is completed. That is, if the adjudicating authority approves the resolution plan under section 31 or orders the liquidation of the corporate debtor under section 33. As we have already discussed, once the CIRP process is started, the resolution professional will ensure that the company is a going concern. Once the company is a going concern and he tries to manage the company, he will subsequently invite the resolution applicants to submit the resolution plans.

Then, COC will decide whether to approve the resolution plan or not. Once that is decided, the resolution plan will be implemented. That is one option. The second option can be that the COC is of the opinion that the resolution plan cannot be approved, or else no resolution applicant is willing to purchase the company or provide the resolution plan. In such a scenario, NCLT will give the order for the liquidation of the company.

Once you start the CIRP process, there can be two outcomes. The first outcome can be that you are coming up with the resolution plan and it is going to be implemented, or the second result can be that the resolution plan is a failure. So maybe you are unable to approve the resolution plan, which means COC is not approving it, or else you are unable to get the resolution plan. In both cases, NCLT will give the order for the liquidation of the company. Until that period, which is when the company approves or when the NCLT, the adjudicating authority, approves the resolution plan or when they give the order for liquidation, the moratorium will be in enforcement.

So, what is the meaning of a moratorium? A moratorium is a period during which no judicial proceedings for recovery, enforcement of security interests, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the corporate debtor. This is the basic meaning of a moratorium. When a moratorium is implemented during that period, no judicial proceedings can be enforced. Therefore, you

cannot file a case, and you cannot recover anything from the corporate debtor. That is the crux of the moratorium.

Now, let us discuss what the basic purpose of the moratorium is. The Supreme Court has commented in the case of *Indian Overseas Bank v. RCM Infrastructure Limited*. It is thus clear that after the CIRP is initiated, there is a moratorium on every action to foreclose, recover, or enforce any security interest created by the corporate debtor, so the Supreme Court has pointed out that once the CIRP is initiated, a moratorium is implemented; thus, once the moratorium is in place, you cannot foreclose any contract, recover anything, or enforce any security against the company created by the corporate debtor in respect of the property, even if the property is created as security under the SARFAESI Act. Once the security is created under the SARFAESI Act, the financial creditor, if it is a financial institution, can enforce the security interest, but that is not possible.

It is clear that once the CIRP is commenced, any action to foreclose, recover, or enforce any security is completely prohibited. Once the CIRP commences, a moratorium is implemented, and please remember that it is automatically implemented. Once it is done, there is a complete prohibition on the action to foreclose, recover, or enforce any security. This is the basic purpose of the moratorium: to ensure that the company is a going concern. Why? Because if there is no moratorium, the resolution professional will have to concentrate more on fighting the cases.

So, I mean defending the cases, so this will take a lot of time. To avoid these types of circumstances, the law has provided a provision where the resolution professional can concentrate on the CIRP process. If there is a moratorium, then during that period, you can continue the company as a going concern without any disturbances. This is the basic purpose of the moratorium. Please remember that a moratorium under section 14 is automatic.

Once a CIRP process is started, a moratorium will immediately be applicable. It applies to what? Under section 14, it applies to the assets of the company and litigation, so if there are any litigations against the company, then the moratorium will be applicable. Connected matters of the CD, which is the corporate debtor, are also included, so the moratorium will be applicable to all these matters. And please remember, a moratorium does not impose restrictions on the powers of any constitutional court to exercise its powers under the Constitution of India. It was held in the case of *Canara Bank versus Deccan Chronicle Holdings Limited* by NCLAT that, though a moratorium is imposed, the moratorium came into enforcement.

The rights under other legislations are banned; that is, they are barred, and you cannot exercise the rights under other legislations, but constitutional rights cannot be violated. So, you cannot impose any restriction on constitutional rights. The power of any

constitutional court to exercise its powers means it can always allow the petitions, maybe for contempt of court or for exercising its rights. So, you can always approach the court of law. So, your constitutional rights are not barred by section 14 of the IBC.

Automatic state of proceedings. So, now onwards, from now we are going to discuss various decisions. So, how moratorium is going to be implemented. Automatic state of proceedings. In the case of Falcon Tyres Limited versus Geodis Overseas Private Limited, the Madras High Court held that any proceedings to recover the property from the CD are barred.

So, you cannot file any cases. You cannot initiate any proceedings to recover the property that is in the hands of the CD. You cannot initiate any proceedings against the CD. So, all these things are barred. Any proceedings initiated prior to the declaration of moratorium are affected. Suppose we take the example that the moratorium is fixed today, meaning the CIRP started today.

There is a possibility that before this, one case was already pending. One proceeding has already been instituted. Therefore, any proceedings instituted prior to the declaration of moratorium cannot continue, as they are all stalled. You cannot continue against the CD, so you cannot file a case now.

You cannot continue the cases either. That is the effect of the moratorium. Then, arbitration proceeded, so the question was whether arbitration proceedings could continue. Thus, the Supreme Court in the case of Alchemist Asset Reconstruction Company Limited versus Hotel Gaudavan Private Limited held that arbitration proceedings could not be commenced on the imposition of a moratorium. You cannot continue the arbitration proceedings once the moratorium is imposed, and you cannot initiate them either. NCLAT, in the case of Tata Motors Finance versus Jordan International Private Limited, ruled that a financial creditor sold a hypothecated asset after the CD was admitted into CIRP.

After the CD was admitted into the CIRP, the financial creditor who owned the property or who controlled the hypothecated property sold it. Then, it was held that such a transfer is void because you cannot alienate or transfer any company asset. That's why once the CIRP process is started, the moratorium is in enforcement, so any transfer is void. Then, in another case law, the NCLAT permitted such a creditor to deposit the money realized from such a sale in the CD. The financial creditor in the Tata Motors finance case sold the hypothecated property.

The transfer is void, but the sale has already been completed. Therefore, the proceeds of the sale must be deposited with the CD. Thus, the NCLAT held that they must be deposited with the CD. Then the arbitral tribunal passed an order prior to the admission of the CIRP, but it was not executed. In the case of NCLAT, in the case of Sri

Satyanarayana versus Vasudevan, NCLAT held that if an arbitral tribunal passed an order prior to the admission of CIRP, which means that CIRP had not yet started, but before that, the arbitral tribunal had already passed the order.

But that is not yet executed, so passing the order is given differently, and after passing an award or giving an award, you have to execute; you have to file a petition for execution. So, the award is passed, but it is not yet executed. Then what is the scenario? So, how to deal with that? In the case of Satyanarayana versus Vasudevan, the NCLAT held that such an award should be treated appropriately under the resolution plan because it is not yet executed. Anyway, once the CIRP process has started, you cannot execute it immediately, so that's why, depending on the resolution plan, you have to consider the award, and then you have to treat the award accordingly in the resolution plan.

So, you cannot immediately execute the arbitral award. Then, in another case, V Nagarajan Resolution Professional v. Meenakshi Energy Limited held that the Arbitral Tribunal passed an order for the production of the document. The arbitration proceedings are ongoing. In the process, the arbitral tribunal passed an order to submit the documents for consideration of the evidence; they have given the order for the production of the documents. So, is it valid? Can the arbitral tribunal pass an award or give an order to submit the document? The NCLAT held that it is valid because it does not determine rights or affect anything.

Here, the arbitral tribunal is only asking for the production of documents. The moratorium does not extend to subsidiary companies. Another question is whether a CIRP process initiated against the holding company will result in a moratorium. Once the CIRP process starts against the holding company, a moratorium will automatically be implemented, and it will affect the parent company. Now the question is whether it is applicable and if it is extended to the subsidiary company or not.

In one of the case laws, Axis Bank Limited versus Alok Infrastructure Limited, the NCLAT held that the initiation of CIRP against the holding company does not prevent the initiation of CIRP proceedings against the subsidiary company, as both companies are separate legal entities. Therefore, if you are initiating the CIRP process against the holding company, you can also initiate the CIRP process against the subsidiary company because both companies are different. So, it does not prevent the initiation of CIRP proceedings against the subsidiary company; that is different, and this is different. The CIRP process can be initiated and continued in parallel against both the holding company's subsidiary and, in another case, the Telangana High Court held that there is Indu Eastern Province Projects Pvt. Ltd. versus Telangana Housing Board. In this case, the Telangana High Court held that the possibility of the CIRP process being initiated against both the holding company and the subsidiary company in parallel is valid, so both are different cases.

Accordingly, you can continue the cases against both companies in parallel; that is also possible. Now, all the creditors are prevented from appropriating any money from the CD. Once the moratorium is enforced, it becomes applicable. All creditors are prevented from appropriating any monies from the corporate debtor. Suppose we take the example of a person who is liable to make a payment and also entitled to receive the money, as he is a creditor as well as a debtor. So, can you appropriate the payment? Can you set it off? Or else, can you use the money that is there with the financial creditor, which belongs to the corporate debtor? Can you appropriate it? No. You are not supposed to appropriate any money that belongs to the corporate debtor. In the case of Indian Overseas Bank versus Dinakar T. Venkatram Subramanian, a professional for Amtech Auto Limited, the NCLAT held that once the moratorium has been declared, it is not open to any person, including the financial creditor and the bank, to recover any money from the CD account.

Even the bank cannot deduct any money; they cannot appropriate any money from the corporate debtor. Therefore, all transactions are prohibited. In another case, Vijay Kumar V Iyer versus Bharati Airtel Limited, the NCLAT held that the amount due to the operational creditor prior to the date of CIRP cannot be appropriated during the moratorium period. So, before the CIRP process is started, if any amount is due to the operational creditor, such amount cannot be appropriated during the moratorium period. That means you cannot impose liability or adjust it; that is also impossible.

If money is deposited into the court, maybe there is a possibility that the court of law can give an order that you have to deposit the money with the bank. Then, in such cases, such an order can be enforced. So, if any money is deposited into the court on account of any order of the court, such an amount does not constitute an asset of the company because the amount is there with the court. So once the court gives the order that you have to deposit so and so money, then until the exact rights are decided by the court of law, the money does not belong to the company. That's why, in the case of Reliance Communication Limited versus Rajendra P. Bansal, the Mumbai High Court held that once the money is deposited into the court on account of any order given by the Honorable Court, then the money that is there with the court does not belong to the company. It does not constitute, nor does it form part of, the assets of the company. The moratorium does not prevent proceedings that are for the benefit of CD. So, it is interesting that we have to understand that a moratorium does not prevent all proceedings from being barred, but you cannot initiate any proceedings against the company. Suppose any transaction or proceedings are beneficial to the CD, that is, the corporate debtor.

Will they be allowed? The Delhi High Court in the case of Power Grid Corporation of India Limited versus Jyoti Structures Limited. So, in your petition under Section 34 of the Arbitration Conciliation Act, where the proceedings are for the benefit of the CD and there is no liability on the CD, then such proceedings can continue. In this case, the Delhi High Court held that when you are filing a petition under Section 34 of the Arbitration

and Conciliation Act to enforce your rights, and the proceedings are for the benefit of the CD, the CD is going to receive some money, and you are not going to impose any liability because of such proceedings. In such cases, if any proceedings are beneficial to the CD, then you can continue such proceedings. Then, in another case, Ram Ratan Kanungo, RP of D Thacker Construction Private Limited, versus VAPCOS Limited, the NCLT held that it ordered refunds and repayments to the CD.

If the CD is entitled to receive any money or refund, then in such cases, the CD can recover the money. In simple language, I can say that if you are receiving any money for the CD, then it is allowed; if you are making the CD liable, then that is prohibited. Always remember that imposing liability on the CD is not allowed. Then, in another case, SSMP Industries Limited versus Perkan Food Processors Private Limited, the Delhi High Court permitted counterclaim proceedings to continue against the CD, but an award or decree in such counterclaim cannot be executed.

In this case, there are some pending cases. The opposite party was claiming some counterclaims. So, when party A is claiming an amount, maybe imagine 100 rupees, the opposite party is claiming that yes, we are liable to pay 100 rupees, but we are also entitled to receive 50 rupees. That is a counterclaim they are making. Then will it be allowed or not? Yes, a counterclaim can be allowed. Why? Even though they are allowed to claim the counterclaim, the total process is not completed.

So, you cannot set off the amount. That's why an award or decree in such a counterclaim cannot be executed. Though the order is given, you cannot execute it immediately because there is a moratorium period, but a counterclaim can be submitted. When the resolution professional assesses the corporate debtor's assets or turnover, he can clearly understand the company's assets. Therefore, a counterclaim becomes a liability for the corporate debtor. That's why he can assess the exact real picture of the company, and that is why they allowed counterclaims.

But the award and decree in such a counterclaim cannot be executed. You cannot execute the award or decree. So, there is a logic behind it. In the present class, we have discussed the objectives of the moratorium. What is the objective behind the moratorium? We have discussed that in this class. We have also discussed Section 13 and Section 14, where, under Section 14, the court has the power to impose a moratorium.

Once the application, that is, the CIRP application, is admitted by the adjudicating authority, the adjudicating authority will immediately issue the order for the moratorium. Then we discussed the purpose of the moratorium. Then we learned that once the moratorium is announced, all the cases against the company will be stayed, resulting in an automatic stay of proceedings. That means no one can file a case against the corporate

debtor, and all cases pending before any other court of law will be stayed. Then we discussed the concept of whether the moratorium extends to subsidiary companies.

So, we learned that the moratorium does not extend to the subsidiary companies. Then, whether a moratorium prevents proceedings for the benefit of the corporate debtor has been discussed, and we have learned that if any proceedings are for the benefit of the corporate debtor, such proceedings need not be stopped. Therefore, it does not prevent the proceedings for the benefit of the corporate debtor we have discussed.

Thank you.