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INSOLVENCY & BANKRUPTCY

Creditors Can Move Against Personal Guarantor of Corporate Debtor Under IBC-NCLAT

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The law of Insolvency and Bankruptcy Code ("I&B Code") is at its nascent stage and there are several legal issues, which still puzzle stakeholders. Applicability of order of moratorium, passed in the insolvency resolution process against corporate debtor, to personal guarantors of the corporate debtor is one of such dilemma. The delay in notification of Part-III of I&B Code, which deals with insolvency resolution and bankruptcy of individual and partnership, adds to this dilemma.

The National Company Law Appellate Tribunal ("NCLAT") delivered a landmark judgment on initiation of insolvency resolution process against personal guarantor while the order of moratorium on corporate debtor is pending in *State Bank of India Vs. D. S. Rajendra Kumar,* Company Appeal (AT) (INS.) No. 87 of 2018.

The matter arose out of an application filed by the State Bank of India ("SBI"), before the National Company Law Tribunal, Chennai ("NCLT"), against personal guarantors of its corporate debtor under section 7 read with section 60(2) of I & B Code seeking resolution process against personal guarantors. The corporate debtor, for whose behalf the personal guarantees have been given, is already going through resolution process under I&B Code before the NCLT.

NCLT dismissed the said application relying upon judgment of Hon'ble Allahabad High Court in *Sanjeev Shriya and Ors. Vs. State Bank of India and Ors*[1], where it was held that upon commencement of resolution process against corporate debtor, recovery proceeding pending against personal guarantors of the corporate debtor in debt recovery tribunal will be stayed. Relying on this judgment, NCLT held that moratorium declared against a corporate debtor, upon initiation of resolution process under I&B Code, would be extended to initiation or continuation of any proceeding against personal guarantor of the corporate debtor as well. Accordingly, no proceeding can be continued or commenced against the personal guarantors till the moratorium period applicable to the corporate debtor comes to an end or till the adjudicating authority approves a resolution plan or passes an order for liquidation of the corporate debtor.

In the appeal, National Company Law Appellate Tribunal (NCLAT) considered its own judgment in *State Bank of India V/s. V. Ramakrishnan & Ors****[2]*** where it was held that appropriate forum for a financial creditor, for initiating any proceeding against the personal guarantors of corporate debtor under I&B Code, is the same adjudicating authority (i.e NCLT), where insolvency resolution process against the corporate debtor has been filed. NCLAT further observed that though Part III of I&B Code has not yet been notified, NCLT is vested with all the powers of debt recovery tribunal as contemplated under Part III of I&B Code by virtue of Section 60 (4) of the Code. NCLAT also held that moratorium under I&B Code will be applicable no only to corporate debtor, against whom resolution process has been commenced, but also to the personal guarantors of the corporate debtor.

In the current appeal, though NCLAT didn't interfere on its own judgment regarding the applicability of moratorium on personal guarantor, made it clear that such moratorium will not be applicable for filing resolution process against personal guarantor under 60(2) of I&B Code. In other words, NCLAT made it clear that "*order of 'Moratorium' will be applicable only to the proceedings against the 'Corporate Debtor' and the 'Personal Guarantor', if pending before any court of law/Tribunal or authority but the order of 'Moratorium' will not be applicable for filing application for triggering 'Corporate Insolvency Resolution Process' under Sections 7 or 9 or 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code") against the 'Guarantor' or the 'Personal Guarantor' under Section 60(2).*"

The NCLAT clarified that even though Part III of the Code has not yet been notified, Section 60(2) of the Code, which falls under Part II, has been notified. Hence, "*if 'Corporate Insolvency Resolution Process' has been initiated against the 'Corporate Debtor', the Insolvency and Bankruptcy Resolution Process against the 'Personal Guarantor' can be filed under section 60(2) before the same Adjudicating Authority (National Company Law Tribunal) and not before the Debt Recovery Tribunal (DRT).*"

The clarification provided by the NCLAT opens door of the NCLTs for initiation of resolution process of the personal guarantors under section 60(2) of I&B Code.

IndiaLaw LLP, Delhi office represented SBI in this matter.

[1] Writ-C Nos.30285 and 30033 of 2017

[2] Company Appeal (AT)(Insolvency) No. 213 of 2017