

CONSTITUTIONAL POWERS IMMUNE FROM MORATORIUM UNDER IBC

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Editor's Note: An order for admission of CIRP is accompanied by orders for causing a public announcement, appointment of an interim resolution professional, and for moratorium. Section 14 of IBC envisages a 'calm period' that is, a time bound moratorium against debt recovery actions and institution of new suits and proceedings during the corporate insolvency resolution process. The calm period is inevitable, as during this period, the creditors and potential resolution applicants negotiate to arrive at a solution to revive the corporate debtor – meanwhile, the assets of the corporate debtor remain in the custody of an insolvency professional, protected against recovery actions.

Section 14 covers an array of actions which cannot be undertaken during corporate insolvency resolution process – institution of suits or continuation of pending suits or proceedings against the corporate debtor; transfer/alienation of assets by the corporate debtor itself; action under SARFAESI Act; and recovery of property by an owner/lessor, where such property is occupied by the corporate debtor. The section also provides for certain exceptions – such transactions as may be notified by the Government (in consultation with any financial sector regulator), and guarantors to the corporate debtor. Besides, though not explicitly stated, the provisions of section 14 cannot curtail the constitutional powers of the Supreme Court and the High Court under Articles 32 and 226 (respectively) of the Constitution of India; however, if the proceeding before the Supreme Court/High Court is not in the nature of those covered under the said Articles, the proceedings will be hit by section 14 of IBC – the same has been upheld by the judiciary. This article discusses one such ruling of NCLAT.

Ever since the Code was enacted, its overriding effect during the moratorium became the talk of the corporate town. It was yet to be tested whether the prohibition of any proceedings against the corporate debtor during the moratorium is a prudent step or not. While the cases started flowing in and came few judgments, it was established that the objective of the Code was to revive the entity at its core and not to be seen as another recovery tool. Under the light of such understanding, it was observed that the moratorium period was very much necessary for the corporate debtor so as to evaluate the possible option and ways for revival of the stressed entity. However, this write-up focuses on the recent judgment pronounced by National Company Law Appellate Tribunal (NCLAT) in the matter of *Canara Bank vs. Deccan Chronicle Holdings Limited*.

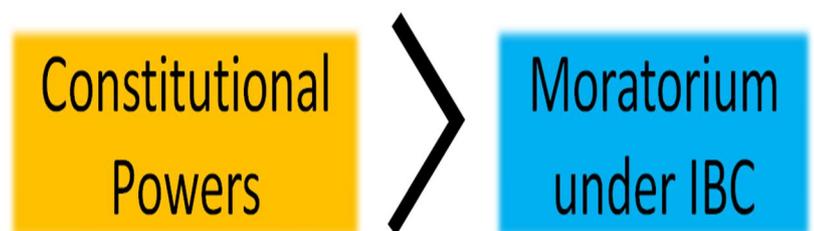


Figure 10: Constitutional Powers override powers under Moratorium

Brief facts of the case

In the present case, an application was filed by Canara Bank (hereinafter known as the 'Appellant') under Section 7 of the Code against Deccan Chronicle Holdings Limited (hereinafter known as "the Corporate Debtor"), which was admitted by the Hon'ble Hyderabad bench of NCLT, declaring Moratorium under Section 14 of the Code on 19th day of July, 2017. However, the Appellant was not content with the order of moratorium pronounced as it specifically excluded proceeding before High Court and Supreme Court from the purview of Moratorium.

Main contentions of the Appellant

The Appellant submitted that the Adjudicating Authority cannot exclude any court from the purview of Moratorium for the purpose of recovery of amount or execution of any judgement or decree, including the proceeding, if any, pending before the Hon'ble High Courts and Hon'ble Supreme Court of India against a 'corporate debtor'.

Relevant extract of Moratorium

Relevant extract of the Moratorium declared by the Hon'ble Bench which is the theme of the matter of discussion is as follows:

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(c) We hereby declared the following Moratorium by prohibiting the following actions: –

*1. The institution of suits or continuation of pending suits or proceedings **except before the Hon'ble High Court (s) and Hon'ble Supreme Court of India**, against the Corporate Debtor including execution of any judgement, decree or order in any court of law, Tribunal, arbitration panel or other authority;*

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Relevant provisions of the Code

Section 14 (1) (a)

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Moratorium – (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the 14. 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;

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Constitutional Powers Immune From Moratorium under IBC

Findings of the Bench

On Section 14 – Section 14(1)(a) does not exclude any Court, including the Hon’ble High Courts or Hon’ble Supreme Court of India.

Recovery suits in High Courts and Supreme Court – There is no provision to file any money suit or suit for recovery before the Hon’ble Supreme Court except under *Article 131* of the Constitution of India where dispute between Government of India and one or more States or between the Government of India and any State or States on one side and one or two or more States is filed. Some High Courts have original jurisdiction to entertain the suits, which may include money suit or suit for recovery of money.

Certain Powers of High Courts and Supreme Court – The Hon’ble Supreme Court has power under *Article 32* of the Constitution of India and Hon’ble High Court under *Article 226* of Constitution of India which cannot be curtailed by any provision of an Act or a Court.

Judgment passed by the Hon’ble Bench

In view of the above observations, ‘Moratorium’ will not affect any suit or case pending before the Hon’ble Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136 of Constitution of India. ‘Moratorium’ will also not affect the power of the High Court under Article 226 of Constitution of India.

However, so far as suit, if filed before any High Court under original jurisdiction which is a money suit or suit for recovery, against the ‘corporate debtor’ such suit cannot proceed after declaration of ‘moratorium, under Section 14 of the I&B Code.

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The Hon’ble Bench of NCLAT disposed of the matter by clarifying the language of Moratorium (supra) as declared in the above case, without suggesting any changes therein and neither rejecting nor accepting the appeal filed by the appellant.

Our Analysis

There are few important points of discussion that can be highlighted by this judgment, discussed briefly below:

- Moratorium declared is within the *constitutional ambit* of the Code. The Code is a Central Act, passed by the parliament by exercising the powers granted under the Constitution of India.
- There are *certain powers* directly bestowed upon the High Courts and the Supreme Court of India by the Constitution of India. Such powers with the respective judiciary bodies are immune of any provision of any law in the Country, be it Central law or State law.

- *Article 32* gives power to Supreme Court to issue directions, writs or orders with respect to right to constitutional remedy.
- *Article 226* gives power to High Courts to issue writs for enforcement of rights given under Part III of the Constitution of India.
- *Article 136* of the Constitution deals with the power to allow a special leave to appeal to person who files an application under this article.
- All the above mentioned powers are exclusive to the two judiciary bodies and therefore Moratorium under the Code shall not affect such powers.
- However, even if the Moratorium as declared in this case excludes suits or proceedings with High Courts, the exclusion does not extend to suits or proceedings with a High Court under original jurisdiction where the suits pertains to recovery of money and therefore will be affected by the period of Moratorium.
- Moratorium is a legal right for the benefit of both the Corporate Debtor and the Creditor and also the judiciary to put a temporary hold/stay on everything else and deal with the case in hand, *ceteris paribus*. The right is however, bestowed by a Central Act; Few powers that are rested upon top two highest judiciary bodies in the country by the supreme law, are untouched of any other right under any other law in the country including the Moratorium period under the Code.

Impact of Judgment and Conclusion

Moratorium is a stay on any action being taken against the Corporate Debtor. On one side, the judgment clarifies the supreme powers of the Supreme Court and High Courts and on the other side, adds more clarity to provisions of Section 14 of the Code. Interestingly, the provisions of Section 14 do not provide any exceptions to Moratorium, as clarified by the judgment in the given case.

NCLT being a quasi-judicial body, formed under an Act of Parliament, cannot override the constitutional powers resting with the Apex judiciary.

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The judiciary has interpreted section 14 as being benevolent to the corporate debtor. For instance, as held by the Delhi High Court in *Power Grid Corporation of India v. Jyoti Structures Limited* section 14 would not apply to the proceedings which are in benefit of the corporate debtor inasmuch the proceedings are not 'debt recovery' actions and its conclusion would not 'endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner whatsoever and hence shall be in sync with the purpose of moratorium'. The interpretation has been broad enough – not only to stop recovery proceedings, but also any proceeding which might have an adverse impact on the assets of the corporate debtor. The Calcutta High Court, in *Unilever Industries Private Limited v. Kwality Limited* stayed interlocutory proceedings in relation to intellectual property as continuation of such proceeding might lead to affectation of the intellectual property rights of the debtor.

As to properties of the guarantors of the corporate debtor, initially there was a lot of debate as to whether such properties will be protected by the moratorium. The guarantors (mostly promoters of the corporate debtors) sought refuge under section 14 to protect their personal assets against recovery action of lenders. However, in landmark judgement of *State of Bank of India v. Ramakrishnan & Anr.*, the Supreme Court settled that moratorium provisions cannot apply to personal guarantors of the corporate debtor. Later, section 14 was amended to explicitly provide for the same.

Section 14 also does not impact criminal proceedings, e.g. under section 138 of the Negotiable Instruments Act, 1881.