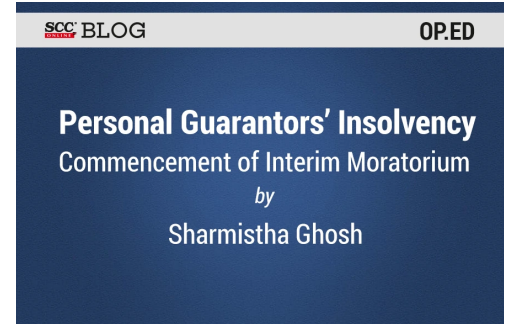


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Personal Guarantors' Insolvency: Commencement of Interim Moratorium

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The Insolvency and Bankruptcy Code, 2016¹ (the Code/IBC) has brought about a major reform in the Indian legal system. The Code provides for a framework for the insolvency resolution of corporate entities, partnership firms, and individuals. The Code is divided into several parts, and one of the most significant parts is Part III, which deals with the insolvency resolution of individuals and partnership firms.²

What is the reform all about?

The Code envisages two types of insolvency proceedings:

(1) corporate insolvency resolution process (CIRP); and

(2) personal guarantors' insolvency resolution process (PGIRP).

While CIRP is a well-established process under the Code, PGIRP is a relatively new process introduced in 2019. Unlike CIRP, which involves a moratorium from the date of admission of the application, the interim moratorium in PGIRP commences from the date of filing of the application under Section 95 of the Code.³ This is an important aspect of differentiation between the two processes.

Interim moratorium

Section 96⁴ of the Code provides for commencement of interim moratorium in PGIRP, from the date of filing of the application, applicable to all debts of the personal guarantor.

The significance of the interim moratorium can be interpreted as advantageous as it may provide breathing space for the personal guarantor to explore the possibility of settling his/her debts with the creditors or negotiating a settlement plan. During the moratorium period, no legal action can be initiated or continued against the personal guarantor, and the creditors are prohibited from enforcing any security interest created by the personal guarantor.

The commencement of the interim moratorium from the date of filing of the application is a significant benefit to the personal guarantor. It provides an opportunity for the personal guarantor to take control of his/her financial affairs and to negotiate with the creditors to settle the debts without the fear of additional legal action being taken against him/her. It also helps to avoid any multiplicity of applications against the same personal guarantor.

Differentiation

Personal guarantor insolvency

In the case of personal guarantor (PG) insolvency, the interim moratorium begins from the date of filing of the application under Section 95 of the Insolvency and Bankruptcy Code (IBC).⁵ In this case, the interim moratorium is granted against all the debts of the personal guarantor from the date of application. The appointment of the interim resolution professional (IRP) and the submission of the report by the IRP are made subsequently.

Corporate debtor insolvency

In the case of corporate debtor (CD) insolvency, the interim moratorium is granted after hearing of the application filed against the CD and admitting the application. The moratorium is granted vide the same order, by which an IRP is appointed. Moreover, multiple applications can be filed against the same CD, whereas in PG insolvency, there can

be no multiplicity of applications against the same personal guarantor.

Court's observations and judgments relied upon

In *Union Bank of India v. P.K. Balasubramanian*⁶, the National Company Law Appellate Tribunal (NCLAT), Chennai Bench observed that the interim moratorium in PGIRP commences from the date of filing of the application, and not from the date of allotment of the case number. The NCLAT, Chennai Bench relied on the scheme of Section 96 and the judgments of the Supreme Court and NCLAT in *Vidyawati Gupta v. Bhakti Hari Nayak*⁷ and *Krishan Kumar Basia v. SBI*⁸, respectively.

In this case, Union Bank of India filed an application under Section 95 on 31-12-2021, and SBI filed its application on 3-1-2022. The case number was allotted to SBI's application on 12-1-2022, while the case number for Union Bank of India's application was allotted on 9-2-2022. The interim moratorium commenced from the date of filing the SBI application. The NCLAT, Chennai Bench observed that even though Union Bank of India's application was filed prior in time, but the adjudicating authority had not been informed of the same. Therefore, NCLAT, Chennai Bench declined to turn back the clock, holding that no prejudice will be caused to Union Bank of India as the Code provides for interest of all creditors to be taken care of, by filing of claims, once PGIRP commences.

Key takeaways

The key takeaways from the decision in *Union Bank of India v. P.K. Balasubramanian*⁹ are as follows:

- (1) The interim moratorium in PG insolvency commences from the date of filing of the application under Section 95 of the IBC.
- (2) The said interim moratorium can be utilised by parties to settle the matter, as filing of multiple applications against the same PG is not contemplated under the IBC.
- (3) However, parties ought to be diligent. If a subsequent application is filed, the adjudicating authority must be immediately apprised of the existing application, thereby apprising them of the applicability of the interim moratorium.
- (4) The claims of all creditors are taken care of once the insolvency resolution process commences against the personal guarantor.

Conclusion

The NCLAT judgment¹⁰ correctly sets out the position of law regarding filing of the Section 95 application by one creditor, which provides for commencement of an interim moratorium. The judgment clarifies that the interim moratorium commences on the date of filing of the Section 95 application and not on the date of registration or numbering by the registry. This

ensures there are no controversies regarding the commencement of the interim moratorium. The judgment is a welcome step in avoiding multiple Section 95 applications being filed against one personal guarantor, in line with the ethos and intent of the IBC and the legislature.

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1. Insolvency and Bankruptcy Code, 2016.
2. Insolvency and Bankruptcy Code, 2016, Ss. 78–187.
3. Insolvency and Bankruptcy Code, 2016, S. 95.
4. Insolvency and Bankruptcy Code, 2016, S. 96.
5. Insolvency and Bankruptcy Code, 2016, S. 95.
6. Comp. App. (AT) (CH) (Ins.) No. 293 of 2022, dated 29-3-2023. [pending uploading]
7. (2006) 2 SCC 777.
8. 2022 SCC OnLine NCLAT 1619.
9. Comp. App. (AT) (CH) (Ins.) No. 293 of 2022, dated 29-3-2023. [pending uploading]
10. *Union Bank of India v. P.K. Balasubramanian*, Comp. App. (AT) (CH) (Ins.) No. 293 of 2022, dated 29-3-2023. [pending uploading]

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