SELECTIVE LITIGATION: THE TRUE PURPOSE OF I.B.C. MORATORIUM

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ABSTRACT

Since its entry in the field of insolvency resolution, moratorium has been a hot topic for discussion. The essential requirement is to know and be able to ascertain the right time within which the fiscal health of the concern could be decided and the optimal outcome for all could be achieved.

The paper briefly discusses the considerations that have been there since 1909, when the first Insolvency Act in India came into force. An understanding of how things stood and how they are today is indispensable for scrutiny of all the constructs. This discussion has been further augmented by the English practice of moratorium stays.

This paper at its core enquires into the nature of Section 14 of the Insolvency and Bankruptcy Code, 2016 in the light of recent decisions of the Supreme Court, various High Courts, and the National Company Law Tribunal, owing to the recent decisions of the N.C.L.T., High Courts and Supreme Court. This papers attempts to find the balance between the overriding interpretation of I.B.C. moratorium and a more moderated consideration of other references, such as the Sick Industrial Companies

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(Special Provisions) Act, 1985 and Banking Regulation Act, 1949. This question is more about dispute resolution than about the litigation.

1. INTRODUCTION

A main aim of an insolvency law is to reorganize a legal regime in which creditors' rights and remedies are suspended and to establish a process for the orderly collection and realization of the debtor's assets and the fair use of such assets according to creditor's claims.[1]

Insolvency and Bankruptcy Code, 2016 (hereby, IBC) was enacted to not just consolidate the scattered insolvency procedures, but also to encourage speedy resolution, and to provide the requisite support to the National Company Law Tribunal (NCLT), and create functionaries like Insolvency Professionals (IPs), Information Utilities (IUs), and Insolvency Resolution Professional Agencies (IPAs)[2], to support the functioning of the N.C.L.T. Unlike its predecessors, the central objective of this act is to reorganize the entities in debt and not to recognize the defaulters.

The crux of this written piece is the well-talked point of moratorium provided under the I.B.C. The basic consideration of moratoria earlier in the country was dominated by a distribution of powers to continue litigation in different fora. The I.B.C moratorium, on the other hand, has

[1] VANESSA FINCH, CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES 7 (2002).

[2] Shishir Mehta et al., *The Insolvency and Bankruptcy Code, 2016 — New Road and New Challenges*, MONDAQ (May 26, 2016), http://www.mondaq.com/india/x/495202/Insolvency+Bankruptcy/The+Insolvency+And+Bankruptcy+Code+2016+New+Road+And+New+Challenges.

been read to be overriding of all other provisions that can settle the non-payment of credit.

There are also mentions of English moratoriums and pre-IBC moratoriums, so as to further enable us to clearly see the advancement and changes that have been brought. Under the head of 'Pre-IBC Moratoriums' there is an analysis of all the moratoriums and their scope, that were incorporated before I.B.C. came into force.

The object of the paper is to discuss Section 14 of the I.B.C. which provides for moratorium, its scope and procedure. The consideration of what moratorium can override and what it shall not is dealt in detail. These discussions have been the mirrors to the judicial pronouncements we have had in the previous one and a half years, and they provide concisely of all the case laws that have shaped the insolvency resolution in India.

2. ESSENCE OF MORATORIUM IN INSOLVENCY LAW

Moratorium exists to focus on the interests of unsecured creditors and of the company itself rather than those of a specific secured creditor.[3] The Black's Law Dictionary defines moratorium as "an authorized postponement, a lengthy one, in the deadline for paying a debt or performing an obligation".[4]

It was never the purpose of moratorium that a company in an insolvent position should be allowed to continue its operation under the protection

[3] DAVID POLLARD, CORPORATE INSOLVENCY: EMPLOYMENT AND PENSION RIGHTS 17 (2d ed. 2000).
[4] *Moratorium,* BLACK'S LAW DICTIONARY (9th ed. 2009).

of the court, and that those who had dealings with the company should be prevented under the orders of the courts from seeking legal remedies to which they would be otherwise entitled.[5]

The purpose is to ascertain the truth, in any colour: whether there is a chance for revival or the creditors need to get their fair share as liquidation is inevitable. Insolvency mechanisms such as the United Kingdom (henceforth, U.K.) Insolvency regime have been enacted in order to achieve various end results including breathing space to attempt company rescue actions, such as restructuring.[6] This breathing space is defined by various names, such as 'moratorium' or 'stay' or administrative action to halt the other proceedings. The same is a very important aspect of all insolvency proceedings. This breathing space allows the adjudicatory bodies the time to ascertain the truth.

3. INSOLVENCY MORATORIUM IN ENGLAND

The U.K. Insolvency Act came into force in the year 1986, and it changed the contours of individual insolvency applications.[7] This legislation was partly overruled by the Insolvency Act, 2000 in U.K., and the both of these together control the insolvency regime in U.K. Schedule 1 of this Insolvency Act, 2000 provides for 'eligible companies' and only these eligible companies had the power to obtain moratorium, *de jure*

[5] M.L. TANNAN, BANKING LAW & PRACTICE IN INDIA 253 (C.R. Dutta & S.K. Kataria eds., 2015).
[6] *supra* note 4.
[7] JOHN PAGET, PAGET'S LAW OF BANKING 201 (Mark Hapgood ed., 2004).

them being the creditors. There are some other conditions too, to qualify for being 'eligible companies', provided in Section 247 of Companies Act, 1985 of England.

The real question is to answer the force this moratorium has. Once the debtor is under the moratorium period, there is a strain on the creditors, and all these creditors can seek various avenues to corner the debtor, for example, winding up petitions, contractual claims, arbitral proceedings, etc. Usually, the courts in England refuse the admission of winding up claims when the moratorium is in force.[8] However, the UK legislation gives the adjudicators power to consider cases individually and in cases where there is a necessity, no legal proceedings may be commenced or continued against the company except with the leave of the court or administrator.[9]

The moratorium cannot be side-lined due to factors such as, administrative orders or the action on the grounds of non-payment of rent, initiated by the landlord[10]; this setting is to make sure that the defaulter or the debtor gets the space to support his business to the greatest extent possible. Such non-payment to institutionalized bodies such as banks hinders the day to day life[11] and credit maintenance system. Yet, the moratorium is given importance for the sole reason of its temporary nature and the rights reinstated if the rescue of the debtor is successful, so that

[8] *In Re* Piccadily Prop. Mgmt. Ltd. [1999] 2 B.C.L.C. 145.
[9] Insolvency Act, 1986, c. 45, § 11(3) (d) (Eng.).
[10] Insolvency Act, 2000, c. 39, sch. A1 (Eng.).
[11] *supra* note 8, at 203.

nothing is lost[12]. The English law however does provide moratorium to be observed over foreign companies under the domestic company law.[13]

4. INSOLVENCY MORATORIUM IN INDIA (PRE-IBC)

There have been various legislations that provided for stays, come the time for debt realization. The first of such moratoriums were the ones under the Provincial Insolvency Act, 1920 (henceforth PIA) and Presidency Towns Insolvency Act, 1909 (henceforth PTIA). PIA and PTIA have been repealed now.[14] The PIA and PTIA moratoriums were for individual businesses and entities and categorically ousted corporations and banks[15], For these, reliance was directed to be placed on the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (henceforth SARFAESI)[16].

Under PIA, Section 29 stated that, any court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceedings, or allow it to continue on such terms as the Court may impose. There was a distinction in the adjudicating authorities, *i.e.* the Insolvency Court had the power to question the validity or otherwise of security of the secured credit, and the Insolvency Court's order shall be

[12] Philip R. Wood, *Principles of International Insolvency* [Part II], 4 INT'L INSOL. REV. 109 (1995).
[13] *In Re* Int'l Bulk Commodities [1993] Ch. 77; *In Re* Dalhold Estates (U.K.) [1992] B.C.C. 394.
[14] Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016.
[15] Nagendra Jain v. District Judge, Moradabad, (2001) 44 A.L.R. 243 (All.).
[16] I.O.B. v. Popuri Veriach, A.I.R. 2009 A.P. 170.

binding on him, and shall be final and implicative of *res judicata*.[17] The PIA, however, did not empower the Insolvency Court to stay pending litigation, but the Court can issue injunction if circumstances enumerated in Order 39 Rule 6 of C.P.C. are proved to exist, or it can pass an order in the exercise of its jurisdiction on the analogy of Section 94 of the PTIA.[18] On the other hand, the PTIA was restricted only to the entries that arose in the Presidency Towns. Section 18 of the PTIA provided for the stay of proceedings and Section 18A provides for control over Insolvency Proceedings.

These two are the first such provisions. However, following are the other laws which have provided for moratorium or like provisions:

4.1. SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

The prime objective of the Sick Industrial Companies (Special Provisions) Act, 1985 (henceforth SICA) was the timely detection of sick or potentially sick companies owning industrial undertakings, and their speedy revival, wherever possible, or closure thereof.[19]

Section 22 of SICA provided for moratorium, and once this moratorium is in operation no court or authority can proceed by

[17] S.B. MALIK, S KRISHNAMURTHY AIYAR'S LAW OF INSOLVENCY 49 (7th ed. 2013).
[18] *Id.* at 58.
[19] *Sick Industrial Companies (Special Provisions) Act, 1985 repealed and BIFR/ AIFR dissolved*, PWC INDIA, https://www.pwc.in/assets/pdfs/news-alert-tax/2016/pwc_news_alert_1_december_2016_sick_industrial_companies_act_1985_repealed_and_bifr-aifr_dissolved.pdf.

disregarding the mandates of the provisions.[20] Going by the name of 'Suspension of legal proceedings, contracts, etc.', Section 22 extensively covered legal proceedings, such as enquiries[21], schemes[22], and appeal[23] to be stayed till the time the board resolves the dispute of the survivable characteristic of the sick industrial company, overriding the M.O.A., A.O.A., and the Companies Act itself.

Based on the circumstances of each case under the SICA regime, the courts carved out exceptions to Section 22 of SICA. For example, in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*,[24] the Supreme Court said that Section 22 of SICA does not limit the prosecution of eviction proceedings filed against a sick company, when the sick company is a tenant, making the tenancy distinct from proprietary rights. Similarly, in the case of *BSI Ltd. v. Gift Holdings Pvt. Ltd.*,[25] the Supreme Court held that proceedings under Section 138 of the Negotiable Instrument Act, 1881 had no correlation to Section 22 of SICA and still the moratorium shall be respected. Section 22 of SICA provided immunity from proceedings not under Section 138 of the Negotiable Instruments Act

[20] Madura Coats Ltd. v. Modi Rubber Ltd., (2016) 197 Comp. Cas. 216 (S.C.); Rishabh Agro Indus. v. P.N.B. Capital Services, (2000) 5 S.C.C. 515.
[21] Sick Industrial Companies (Special Provisions) Act, 1985, No. 1, Acts of Parliament, 1986, § 16.
[22] *Id.* § 17 & 18.
[23] *Id.* § 25.
[24] Shree Chamundi Mopeds Ltd. v. Church of South India Trust Ass'n, A.I.R. 1992 S.C. 1439.
[25] BSI Ltd. v. Gift Holdings Pvt. Ltd., (2000) 2 S.C.C. 737.

only but also under all the sections of I.P.C.[26] Further, even the suit for eviction by a landlord of a sick company was not attracted under SICA's moratorium.[27]

The SICA regime gave the secured creditor some security as Section 28(6) of SICA leaves the secured creditor quite independent of the insolvency proceedings and gives freedom to choose his own remedy in realizing or otherwise dealing with his security.[28] Section 33 of SICA in a way, imposed serious restrictions on the rights of third parties against the filing of suits for taking coercive action against the industrial sick company,[29] as the same runs at the risk of criminally inflicting the complainant himself, if the allegation is not proved beyond reasonable doubt.

The general principle of law is that when there are two non-obstante clauses in two different statutes then the later non-obstante clause shall prevail, but since the SICA has a higher mandate to fulfil and Arbitration and Conciliation Act, 1996 is a general statute, the SICA moratorium was read over the Arbitral proceedings and award.[30] This is one of the few forward looking judgments that widened the scope of SICA moratorium.

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[26] VINOD KOTHARI & SHIKHA BANSAL, LAW RELATING TO INSOLVENCY AND BANKRUPTCY CODE, 2016 176 (2016).
[27] Sidramappa Abdulpurkar v. Lakshmi Vishnu Textiles, (2010) 5 Com. Cases 86.
[28] *supra* note 20, at 48.
[29] *supra* note 6, at 2807.
[30] Morgan Securities & Credit Pvt. Ltd. v. Modi Rubber Ltd., (2007) 136 Comp. Cas. 113 (S.C.); Jay Engineering Works v. Indus. Facilitation Council, (2006) 133 Comp. Cas. 670 (S.C.).

SICA has now been repealed. Such repeal was initiated under the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, and the final notification[31] on the repeal came on November 25, 2016; strategically before the implementation of IBC.

4.2. BANKING MORATORIUM

Other kinds of moratorium include the banking moratorium, as has been specified in sections 37 and 45 of the Banking Regulation Act, 1949.

Section 45 provides power to order moratorium or reconstruction of the banking companies in the hands of the Central Government after an application is sent to the R.B.I. Since R.B.I. controls the banking ratios, such as C.R.R., Bank Rate and S.L.R. and plays the role of banker to the banks, it has in its knowledge the fiscal health and debts that the banks may have. Hence the task of determining and evaluating the bank's financial standing can be best done by R.B.I.

Non-payment of a debt of a bank is a bigger issue than that of another person under the I.B.C., and the same can impose a moratorium. Once a moratorium comes in force there are but only two ways forward. The first is, temporary proceedings under Section 37 of the Banking Regulation Act which leads to suspension of business. The other way is permanent, and has been provided under Section 38 (1), which leads to winding up of the

[31] http://www.egazette.nic.in/WriteReadData/2016/172799.pdf.

banking company.[32] Even if a banking company goes into the moratorium period, the question of winding up can still be sought.[33]

Section 35 provides for the suspension of business in the condition where, a "banking company is temporarily unable to meet its obligation".[34] Only High Court can pass any such orders or decisions in its wisdom, which contravenes this moratorium, which however does not extend to the writ jurisdiction of a High Court,[35] as a High Court under a writ can only look if the principles of law, reasonableness, and natural justice have not been followed or not.[36]

5. THE IBC MORATORIUM

IBC is not merely for insolvency proceedings, but it needs to address the restructuring needs at the appropriate time as well. The previous legislation, *i.e.* SICA had a myopic approach to this concept, as its definition of sickness was not in conformity to its preamble, even though both of the legislations' moratorium provisions had the same objective.[37] The SICA definition gives too much time to the adjudicating authorities, and requires at least a five-year prior registration of the debtor to qualify as sick. Because of this construct, there was no timely recognition of sick industries, making the restructuring difficult. There were other problems

[32] *In Re* Chotanagpur Banking Ass'n, (1959) 29 Com. Cases. 487.
[33] Matashri Khodiyarana Makhamakha v. State of Saurashtra, (1956) 26 Com. Cases 262 (Sau.).
[34] *supra* note 6, at 251.
[35] *supra* note 6, at 252.
[36] Maa Mangala Construction v. Indian Oil, (2002) 1 B.C. 390 (Del.).
[37] *supra* note 30, at 175.

with the SICA definitions as well, like they are 'backward' looking, were based on the historical book value of a firm's assets and not future earning potential or current realizable market value. The negative net worth criterion simply implies that the historical value of a company's assets is less than its cumulative liabilities.[38] Hence, the restructuring needs were incorporated under the IBC definition of 'default' under Section 3(12) of the IBC. Now, the purpose is not acknowledging the sick entities, but conducting insolvency "in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders".

Section 14 of IBC provides that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following namely 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.[39]

Section 14 of the IBC provides for moratorium, where the adjudicating authority is given only the facilitating powers, and the creditors decide the fate, if the business goes down the liquidator's path or continues

[38] REPORT OF COMM. ON INDUS. SICKNESS & CORPORATE RESTRUCTURING, *available at* http://reports.mca.gov.in/Reports/31-Goswami%20committee%20of%20the%20industriai%20sickness%20and%20corporate%20restructuring,%201993.pdf.

[39] Sanjeev Shriya v. State Bank of India, MANU/UP/2243/2017, ¶ 11.

operation.[40] The point of s.14 is to suspend all other proceedings and not dismiss[41], either way it is a bar on the creditors to sue the debtor.

S.12 of CPC reads as "Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies". Hence, Section 14 of the IBC is a subject related extension of the principle of 'Bar to initiate further suit' as provided in s.12 of the CPC.

The provision speaks of halting all legal proceedings, unless they do not contravene the following two points:

1. The supply of services be essential to the extent these services are not a direct input to the output produced/supplied by the corporate debtor
2. The mandate under Section 14(2) will come into operation only in respect of the services not terminated before declaration of moratorium under Section 14 of the Code.[42]

The cost of essential goods or services will have to be paid in priority to other costs as a part of solution plan or during distribution of assets, in case of the corporate debtor goes into liquidation.[43] The moratorium will continue to be in effect till the completion of the corporate insolvency

[40] *supra* note 30, at 172.
[41] *supra* note 30, at 184.
[42] 2017 S.C.C. OnLine N.C.L.T. 7180
[43] REPORT OF INSOLVENCY LAW COMM., March, 2018, ¶ 5.14, *available at* http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf).

resolution process on the approval of a resolution plan by the adjudicating authority, or the resolution of the creditor's committee to liquidate the corporate debtor, whichever is earlier.[44]

Any action to disregard the moratorium period is punishable under Section 74 of the IBC. The punishments for debtor and creditor differ.

Now is the need to look into the legal actions that will be halted with the introduction of moratorium under IBC. These are institution and continuation of suits and proceedings, unsuitable action such as transferring and alienating of the assets by the debtor himself, and stay on any action to foreclosure, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under SARFAESI.[45]

The definitions of suit and proceeding are taken in their general sense. Suit is only curial and refers to a non-criminal proceeding[46] and does not include execution proceedings for purposes of stay.[47] Proceedings can't be narrow and are very different from the word 'suit'.[48] The word proceeding is a term of wide amplitude, which includes procedural steps to be taken.[49] The word includes proceedings in a court of law and tribunal.[50]

[44] *supra* note 30, at 171.
[45] *supra* note 30. at 181.
[46] B.S.I. India Ltd. v. Gift Holding Pvt. Ltd., Criminal Appeal No. 847 of 1999, Supreme Court of India; Kailash Nath Agarwal v. Pradeshiya Indus. & Inv. Cooperation of U.P., (2003) 4 S.C.C. 305.
[47] Madalsa Int'l Ltd v. Cent. Bank of India, (1999) 1 B.C. 333 (Bom.- D.B.).
[48] Maharashtra Tubes, 1993 (2) S.C.C. 144.
[49] Panda Leasing v. Hemant, (2005) 4 B.C. 52 (Ori.).
[50] Barar Indus. Ltd. v. Nagpur Engineering Co. (2008) 1 B.C. 1 227 (Ori.).

Another exception in the regard of essential goods and supply has been left totally in the hands of the Board defined under the IBC,[51] and the same has been defined in Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons). The list includes electricity, water, telecom services, and I.T. services.

5.1. THE PROCEDURE

With the admission of insolvency application, a moratorium in terms of Section 14 of IBC is declared by the adjudicating authority, which makes a public announcement about the same. Such announcement contains the last date for submission of claims and the details of the interim resolution professional. Section 17 of IBC vests the management aspects of the corporate debtor in the interim resolution professional, who manages the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of IBC, heeding to the conditions which make a person ineligible to be a part of the committee of creditors.[52] Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors, after considering its feasibility and viability according to the recommendations of the Insolvency and Bankruptcy Board of India. Under Section 28, the interim resolution professional is further given the power to carry out the resolution process, is given wide powers to raise finances,

[51] *supra* note 30 at 187.
[52] Insolvency & Bankruptcy Code, 2016, § 29 r/w Insolvency & Bankruptcy (Amendment) Act, 2017.

create security interests, etc., subject to prior approval of the committee of creditors.[53]

6. SCOPE OF THE IBC MORATORIUM

The period of moratorium has been instituted for the sole reason of distribution of the assets in a way equitable to the creditors as well as the debtor, but other provisions, such as breach of contractual obligation, initiation of arbitral claims, seeking of debt recovery by banking institutions, actions already initiated under the SAREFESI Act, and violation of Fundamental Rights provide for remedies which are not exclusively in the context of bankruptcy, and provide remedy for the action of non-payment of debt in a myopic sense.

With the existence of Section 238 of the IBC, the overriding effect of the IBC provisions has carved out an unexpected ease in the entire setting, allowing just two exceptions. The particular heads are dealt as under:

6.1. CONFLICT WITH OTHER MORATORIUM PROVISIONS

Till this point of time, moratorium has been issued in various forms but for the same reason. The reason is to provide a cooling period to the debtor to accumulate all his belongings and assets to dispose of all the loans he has, on an equitable basis.

The Supreme Court in the case of *Innoventive Industries Ltd. v. I.C.I.C.I. Bank,*[54] held that, if there is a direct clash with a state act's

[53] Innoventive Indus. v. I.C.I.C.I. Bank, 2017 S.C.C. OnLine S.C. 1025.

moratorium, then by the virtue of non-obstante clause in IBC, the IBC moratorium shall prevail.

6.2. ACTIONS UNDER THE SARFESI ACT AND CLAIMS IN DRT

The provisions of Section 14, read with Section 13, are almost entirely non-discretionary. The proceedings under SARFAESI ACT will also be put on hold.[55]

As it is clear that for a period of 180 days, as provided in sections above, and a conditional 90-day extension to this 180-day period on the leave from N.C.L.T., under I.B.C., the proceedings under the D.R.T. Act and SARFAESI Act remain suspended, without affecting the limitation period for filing the same, though an order to that effect must be passed by the respective Adjudicating Authority.

Considering the status of a secured creditor under the same, it can be said according to Section 33 of the I.B.C. that:

a) A secured creditor can choose to relinquish his/her security interest and be part of the liquidation process in terms of Section 53, in which case, the dues of the secured creditor will rank higher in preference of distribution; or
b) A secured creditor can choose to stay out of the liquidation process and enforce his/her security interest in accordance with Section 52 of the Code.

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[54] 2017 S.C.C. OnLine S.C. 1025, ¶ 55.
[55] *supra* note 30; Triveni Alloys Ltd. v. B.I.F.R., (2006) 132 Comp. Cas. 190 (Mad.).

In a case where the sale of an asset was challenged by the secured creditor on the ground of SARFESI act covering the said action, and still allowing the moratorium leniency, the N.C.L.T., Mumbai bench held that, the moratorium period was well defined and SARFESI Act could not tamper the same.[56]

I.B.C. shall have the effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force, including D.R.T. Act, 1993; SARFAESI Act, 2002; money suit, etc.[57]

6.3. ARBITRATION PROCEEDINGS

Staying is not a new construct that is recognized by the I.B.C. Similar provision of stay of legal proceedings can be found in Arbitration cases, such as the *Scott v. Avery Clauses* and Section 9 of U.K. Arbitration Act, 1996, which is taken from Article II of New York Convention,[58] where arbitration proceedings put a stay on the legal proceedings.

The Supreme Court has vehemently stated on the point that if the arbitration proceedings are being initiated after doing a narrow interpretation of the term 'proceedings', to be exclusive of arbitration proceedings, then such a faulty initiation of arbitration mechanism is *non est* in law.[59]

[56] J.M. Financial Asset Reconstruction Co. v. Indus Finance Ltd., 2017 S.C.C. OnLine N.C.L.T. 11466.
[57] Unigreen Global Pvt. Ltd. v. Punjab Nat'l Bank, MANU/NL/0192/2017.
[58] LORD MUSTIL & STEWARD BOYD, COMMERCIAL ARBITRATION 268 (2d ed. 2001).
[59] Alchemist Asset v. Hotel Gaudavan, 2017 S.C.C. OnLine S.C. 1362.

7. EXCEPTIONS

Even though the definition prima facie suggests that there cannot be any other legal proceeding for the same cause, yet the precedents have carved out the following exceptions:

7.1. PROCEEDINGS IN FAVOUR OF THE DEBTOR

A special situation arose in the case of *Power Grid v. Jyoti Structures*,[60] where an arbitration proceeding was already initiated but the same saw issuance of moratorium period during the pendency of the proceedings of setting aside an arbitral award. Since an award was already passed and further litigation was not touching the aspect of the financial strength and standing of the respondent company, the arbitration proceedings were allowed, stating that Section 14 of the Code would not apply to the proceedings, which are in the benefit of the corporate debtor. This case not being an example of a 'debt recovery action' and its conclusion would not endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner whatsoever, poses no harm to the objective and result of moratorium.

This case is a different discussion under the head of arbitral proceedings. This particular case also saw an initiation of proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, however, the Hon'ble High Court of Delhi relied not on the setting aside proceedings of the impugned award, but the fact that the ongoing

[60] 2017 S.C.C. OnLine Del. 12189.

proceedings were favouring the debtor and that would have become a boost for the restructuring.

7.2. ORIGINAL JURISDICTION CONSTRAINTS

The other exception that has been carved out is in favour of the High Court and the Supreme Court exercising their writ powers or the Supreme Court exercising its special power to grant leave.

The same has been exhibited in the following two decisions:

7.2.1. Paharpur Cooling Towers Ltd. v. Basal Steels and Power Pvt. Ltd.[61]

IBC itself confers jurisdiction on the High Court by virtue of notifications issued under Section 239 and 255 in regard to pending winding up proceedings where notices were already served on the respondent-company prior to December 15, 2016, it cannot be said that by virtue of Section 238, the High Court's jurisdiction gets taken away.

Coming to the Moratorium order announced by the N.C.L.T. invoking Section 14(1) (a), the court considered that the term “any Court of law” cannot be interpreted as inclusive of a High Court and hence such a moratorium order cannot direct a High Court to discontinue a winding up proceeding pending.

[61] MANU/AP/0574/2017, ¶ 11-12.

7.2.2. Canara Bank v. Deccan Chronicle Holdings Limited[62]

Article 131 of the Constitution of India provides for recovery in a money suit, where the dispute is between the Governments at State Level and the Union Government in any prescribed order. 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 power cannot be curtailed by any provision of an Act or a Court. This view propounded that moratorium cannot override the aspect of fundamental rights that is protected by the writ jurisdiction. The Court also included Article 136 in the same purview and gave the decision as a moratorium cannot put any restriction on the ongoing Article 136, Article 32 or Article 226 cases.

8. CONCLUSION

Approaching conclusion, one thing must be borrowed from the first paragraph of this piece, and that is the institutionalization provided under the IBC. Till date the insolvency laws in the country were scattered and had a lot of restraints on themselves, such as Contravention of other laws, difficulty in approaching adjudicating authorities and timely intervention from the highest court in the respective state and the country. Now, the charge to determine the existence of loan documents, claims for declaration of insolvency and adjudication of the entire insolvency case has been given to N.C.L.T., and appellate powers vest in N.C.L.A.T.

[62] 2017 S.C.C. OnLine N.C.L.A.T. 255, ¶ 7.

Since there is an amendment made to Section 424(2) of the Companies Act, 2013 by the IBC, the N.C.L.T. (adjudicating authority for insolvency proceedings) has now got the powers of civil court, so the ends of justice can be easily met, if the situation demands so.[63] With additional powers in the competition field also given to N.C.L.A.T., N.C.L.T. has successfully taken over the Company Law Board and has been doing a more commendable and salutary job. Company Law Board was a temporary setting and only a phase before N.C.L.T. and N.C.L.A.T. could spring up, and now with rightful powers in the hands of N.C.L.T. and N.C.L.A.T., the work being done is surely optimistic.

Another important point is the timely arrival of the non-obstante clause. The general practice says that the later legislation's non-obstante clause overrides the prior legislations. This provides far more space for constructive and purposive interpretation of the IBC and in turn moratorium can be implemented as a certainty. With moratorium being a statutory mandate, the prime purpose of IBC shall revolve around restructuring of companies and individuals facing bankruptcy. The part of IBC on the regulation of bankruptcy proceedings for LLPs and individuals has not been notified yet.

Addressing the elephant in the room, we have noticed that IBC moratorium is usually restrictive on all actions except those which attract the original jurisdiction of the High Courts and Supreme Court and the litigation/arbitration that favours the debtor. The explanation to this setting

[63] *supra* note 30, at 190.

is simple. It is not the fact that the purpose of insolvency moratorium is higher than any other legal procedure, but it is certainly a more logical approach to first tend to the need and then to utilize the benefits that can come. IBC has structured and accordingly restored or liquidated 2,100 companies who were facing loan repayments of the quantum of 83,000 Crores rupees.[64]

Even though the measures have been stringent, they have been for the achievement of better results. IBC isn't a commentary on where to litigate and who should hear, but it's more than litigation; it's solving the dispute of value of debtor's estate in a manner which gives the maximized value to creditors, maximum promotion to the entrepreneurial aspect of the debtor. The stay of moratorium is a definitive aspect of the equality that the creditors observe and respect. This stay is the crucial as it makes the entire creditor's body collective in responsibility,[65] and puts them in the driving seat to realize their inputs.

[64] Siddhartha, *Over 2,100 Companies Settle Rs. 83,000 Crores Bank Dues*, TIMES OF INDIA (May 23, 2018), https://timesofindia.indiatimes.com/business/india-business/owners-settle-rs-83k-crore-bank-dues/articleshow/64279946.cms.
[65] SUMANT BATRA, CORPORATE INSOLVENCY: LAW AND PRACTIC*e* 242 (1st ed. 2017).