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### DELHI HIGH COURT CARVES ANOTHER EXCEPTION TO THE MORATORIUM UNDER THE INSOLVENCY CODE

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#### Introduction

Section 14 of the Insolvency & Bankruptcy Code 2016 (as amended) (IBC) imposes a moratorium on the institution of suits or continuation of pending suits or proceedings against a corporate debtor undergoing Corporate Insolvency Resolution Process (CIRP) under the IBC. While many of the issues surrounding the scope of this moratorium have been resolved through authoritative judicial pronouncements, the applicability of the moratorium to proceedings involving counterclaims against a corporate debtor was yet to be entirely settled. A Single-Judge Bench of the Hon'ble Delhi High Court (the Court) comprising Hon'ble Ms. Justice Prathiba M. Singh, in its Order dated 18 July 2019 in *SSMP Industries Ltd. v Perkan Food Processors Pvt. Ltd* (CS(COMM) 470/2016 & CC(COMM) 73/2017) has provided an answer to this question, and expressly added credence to the position adopted by the National Company Law Appellate Tribunal (NCLAT) in *Jharkhand Bijli Vitran Nigam Ltd. v IVRCL Limited & Anr.* (C.A. (AT) (Insolvency) No. 285/2018) (Jharkhand Bijli), decided in August 2018.

#### Facts

The proceeding in question was a commercial civil suit on the Original Side (Commercial Division) of the Court. SSMP Industries Ltd (Plaintiff / Plaintiff-Corporate Debtor) had placed an order with Perkan Food Processors Pvt Ltd (Defendant) for delivery of certain goods. A dispute arose, and the Plaintiff sued the Defendant for recovery of approximately INR 1.61 Crores. The Defendant filed a counter-claim along with its written statement, raising claims of approximately INR 59 Lakhs on the Plaintiff while denying that the Defendant was liable to pay any sum. Thereafter, on 27 August 2018, CIRP was commenced with respect to the Plaintiff by Bench-III of the National Company Law Tribunal, New Delhi on an application filed by a different operational creditor of the Plaintiff.

#### Legal Issues & Finding

The Court framed the question it sought to answer in the following terms - "*whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Code.*"

In this light, the Court commenced its analysis on the footing that the adjudication of the plaint and counter-claim are interlinked with each other, and that the outcome of the same is uncertain. The Court thereafter placed reliance on the Order of the Hon'ble Delhi High Court in *Power Grid Corporation of India v Jyoti Structures Ltd.* ((2018) 246 DLT 485) (Power Grid), and drew from it the conclusion that "until and unless the pending proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of the corporate debtor, it would not be prohibited under Sec. 14(1)(a) of the Code" (emphasis supplied). The Court also placed reliance on the Order

of the NCLAT in Jharkhand Bijli, where the NCLAT permitted the continuation of a counterclaim against the corporate debtor undergoing CIRP on the ground that the claim by the corporate debtor could be determined only after determination of the counter claim made against the corporate debtor.

The Court concluded its analysis with the finding that though a counter-claim would strictly speaking be covered by the moratorium under Sec. 14 IBC, it would be purposive and efficacious for a counter-claim to be adjudicated comprehensively by the same forum in case the counter-claim was integral to the recovery sought by the corporate debtor and related to the same transaction.

As regards the possibility of the counter-claim succeeding and a judgment-debt being created against the Plaintiff-Corporate Debtor, the Court stated simply that Section 14 of the IBC could be triggered to protect the Plaintiff-Corporate Debtor's assets at the stage of execution of such a decree.

### Comment

The fact that the proceedings (both claim and counter-claim) were permitted to continue despite the real possibility of a judgment-debt being created against the Plaintiff-Corporate Debtor is an important aspect of this Order. It also distinguishes the present case from the decision in Power Grid Corporation, relied upon in the present judgment, where the nature of the proceeding was an application under Section 34 of the Arbitration and Conciliation Act 1996 for the setting aside of an arbitral award that granted the claims of the corporate debtor. Unlike in the present case, proceedings for setting aside an arbitral award could not have resulted in a decree against the corporate debtor, and would at best have meant the remand of the matter back to the arbitral tribunal.

The Court in the present case, like the NCLAT in Jharkhand Bijli, seems to have allowed the proceedings to continue basis the pragmatic consideration that it may result in a recovery for the Plaintiff-Corporate Debtor, and thereby strengthen its presumably weak financial position.

As stated earlier, this was supported by the rationale that there was no threat of dissipation of the Plaintiff-Corporate Debtor's assets from the mere determination of the claims. This rationale is in line with the observations of the Insolvency Law Committee in its Report of March 2018 (Paragraphs 5.3 and 5.4). However, it is pertinent that the Insolvency Law Committee, despite acknowledging the logical merit of barring only enforcement proceedings under the moratorium, concluded that the language of the IBC did not create a distinction between enforcement and non-enforcement proceedings, and that it would not be prudent to provide explicit carve-outs from the wide language of Section 14 of the IBC at that stage. However, with this decision it appears that the Hon'ble Delhi High Court has seen some merit in carving out an exception along these lines.

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