

NCLT moratorium: Invoking guarantees of promoters legally tenable

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The decision of lenders to invoke the personal guarantees of promoters, even during the moratorium under the insolvency proceedings, is legally tenable, legal experts told FE. The issue came up for consideration before banks decided to independently invoke the guarantees of promoters of Essar Steel, sources told FE. They added that since the company and the personal guarantor are separate entities, moratorium in one does not apply to the other. Further, banks would invoke their respective guarantees independently. According to Karan Kalra, head of Financial Services at Nishith Desai Associates, there is a bit of ambiguity in the law on whether this can be done or not. “However, given the basic premise that the assets of a guarantor are

different from the assets of a borrower, courts should allow proceedings to be commenced against a guarantor,” Kalra said. He added that this may complicate the overall bankruptcy resolution process to some extent and accordingly due safeguards would need to be considered.

Meanwhile, the National Company Law Appellate Tribunal (NCLAT) had, in July last year, upheld an order by the Mumbai Bench of the National Company Law Tribunal (NCLT), which said that properties not owned by the borrower does not fall within the moratorium. The tribunal had said this while hearing an insolvency application of Alpha & Omega Diagnostics (India). “The moratorium indeed is an effective tool, sometimes used by the corporate debtor to thwart or frustrate the recovery proceedings, as happened in this case,” the NCLT order had said. The order had added that the admitted position is that the flats (of the borrower in Alpha & Omega) are not under the ownership of the borrower. “Even in the balance sheet of the corporate debtor, these flats are not reflected. It is further evidenced that....the personal properties of the promoters have been given as a security to banks,” the order said. Other experts concurred that as per the regulations, personal guarantees can be invoked. “What the IBC law says is that if there is any insolvency proceedings against the personal guarantor in some other court then that would be clubbed with the NCLT proceedings,” said Anand Bhageria, partner at Singhi Advisors.

In August, the National Company Law Tribunal (NCLT) had appointed Satish Kumar Gupta as the interim resolution professional (IRP) for Essar Steel. The company is among the 12 that Reserve Bank of India (RBI) had asked banks to refer to the bankruptcy court. On June 13 last year, it had asked banks to refer 12 large stressed accounts, with loans close to `2.4 lakh crore, to the NCLT. Essar Steel, which has a steel-making capacity of 9.7 MTPA, owes more than `45,000 crore to lenders.