

APPLICABILITY OF LIMITATION ACT TO INSOLVENCY AND BANKRUPTCY CODE

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Editor's Note: Amidst the entire hullabaloo on applicability of the limitation law in matters of insolvency, the Hon'ble NCLAT, vide one of its order ruled that matters under the Insolvency Code are not subject to the limitation law. To undermine the importance of applicability of limitation law, or otherwise shall be a grave mistake as it forms one of the most pertinent question on grounds of which the application is accepted or rejected. The author in the note below made a respectful deviation to the order and was of the opinion that limitation law shall be applicable to the Code.

Subsequently, it was also clarified by the Hon'ble Supreme Court, in the matter of [B.K. Educational Services Private Limited v Parag Gupta And Associates](#), that IBC proceedings cannot be initiated based on time barred claims and that Limitation Act is applicable to IBC.

In a recent NCLAT ruling of Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd.⁷⁴ (11.08.2017), several issues with regard to the [Code](#) were discussed. One of the issues for consideration before the NCLAT was whether the application under Section 7 of the IBC is time barred, as the debt claim related to the years 2011, 2012 and 2013 and it was held that the [Limitation Act, 1963](#) (Limitation Act) does not apply to IBC. Below we discuss the ruling along with its analysis:

Brief Facts of the Case:

In the present case, an appeal was preferred by the Corporate Debtor (Appellant) against order dated April 21, 2017⁷⁵ passed by the Learned AA (NCLT), Mumbai Bench, wherein the Learned AA entertained the application preferred by the Financial Creditor (Respondent) under Section 7 of IBC and ordered moratorium, with further order to appoint an IRP.

The Appellant assailed the impugned order on several grounds, one of which being that time barred debt cannot be enforced by filing of application for CIRP. The Learned Counsel for the Appellant contended that the claim of Respondent is completed time barred as the Debenture Certificates were due for redemption as far back as in the years 2011, 2012 and 2013 respectively; consequently, the application filed in the year 2017 is hopelessly time barred.



⁷⁴ Company Appeal (AT) (Insolvency) No. 44 of 2017

⁷⁵ C.P.No.69/I&BP/NCLT/MAHA/2017

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However, NCLAT dismissed the appeal against bankruptcy proceedings, saying the reference to Limitation Act that prescribes a time limit to initiate recovery of loans is not applicable. NCLAT has taken a view that the ground taken on behalf of the Appellant, that the debt is barred by limitation as the debentures matured between the years 2011 and 2013 is not based on law and that there is nothing on record that Limitation Act is applicable to IBC. NCLAT further held that *"IBC is not an Act for recovery of money claim; it relates to initiation of corporate insolvency resolution process. If there is a debt which includes interest and there is a default of debt and having a continuous course of action, the argument that the claim of money is barred by limitation cannot be accepted."*

Discussion of Law:

It is a famous saying that time and tide waits for none. The Limitation Act prescribes a time limit for different suits within which an aggrieved party can approach the court. The object of limitation laws is as follows:

to compel a litigant to be diligent in seeking remedies in a Court of law; and

- a. to indirectly punish those who are not proactive i.e. who did not approach the Court and/ or did not take legal action to recover their dues.

The purport of the Limitation Act is not to destroy the rights but it is founded on public policy fixing a life span for legal remedy for general welfare. A person who did not promptly act to enforce his rights should lose them as stale claims leaves the court no time to attend promptly to more recent and urgent matters. The parties who seek to uphold their legal right cannot sleep over the matter and at a later stage seek to enforce their rights which is likely to cause prejudice to the other parties. The statute of limitation is, therefore, a statute of repose because it extinguishes stale demands and is based on the principle that long dormant claim have caused more of cruelty than of justice in them⁷⁶.

In *M/s. Bharat Barrel & Drum MFG. Co. v. the Employees State Insurance Corporation*⁷⁷, the Honourable Supreme Court held as under:

"The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a Court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dormientibus, jura sub-veniunt (the laws give help to those who are watchful and not to those who sleep). Therefore, the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims."

Part- III of the Limitation Act, deals with computation of period of limitation and Section 2(j) defines the term **"period of limitation"** to mean *"the period of limitation prescribed for any suit, appeal or application by the Schedule"*.

⁷⁶ A Court v. Cross (3) BEST

⁷⁷ 1971 (2) SCC 860

Section 433 of the Companies Act, 2013⁷⁸ provides for limitation, it reads as follows:

“The provisions of the Limitation Act shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.”

Further, Section 60(6) of IBC lays down:

“Notwithstanding anything contained in the Limitation Act or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

On the question whether Section 60(6) shall prevail over such a provision of the Limitation Act, the issue will be, whether the provision for excluding the moratorium period is inconsistent with the Limitation Act. The answer will be clearly negative. The intent of the Code is to provide a further extension to the limitation period- since

the creditor cannot take any action during the stand- still period. Therefore, it is quite logical that the limitation be extended by that period. In essence, therefore, the limitation will be still computed as per the Limitation Act, applying all the principles thereunder, and the limitation computed thereunder shall get further extended by the moratorium period⁷⁹.

Analysis:

Earlier when the applicability of the Limitation Act was judged upon by the National Company Law Tribunal (NCLT), they had held that the same would very much be applicable on the IBC.

It is quintessential to discuss the case of *Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd.*⁸⁰(25.05.2017), wherein the preliminary issue that was considered by NCLT, Principal Bench was whether insolvency process can be triggered in a matter where the default had occurred beyond a period of 3 (Three) years and the claim has become time barred on account of period of limitation prescribed by the Limitation Act or by virtue of rule of prudence developed by the Courts.

In this case, the default had occurred in respect of non-payment of salary for the period October, 2012 to September 20, 2013 and the petition was before this Tribunal on 12.05.2017. If the period of 3 (Three) years is applied, the limitation period expires on September 20, 2016. The claim was thus,

Limitation under:

Companies Act, 2013	Insolvency & Bankruptcy Code
Sec 433- The provisions of the Limitation Act shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be	Sec 60(6)- Notwithstanding anything contained in the Limitation Act or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded

⁷⁸ <http://www.indiacode.nic.in/acts-in-pdf/2016/201631.pdf>

⁷⁹ Taxmann’s Law Relating to Insolvency and Bankruptcy Code 2016 by Vinod Kothari and Sikha Bansal (Edition 2016)

⁸⁰ C.P. No. (IB)108(PB)/2017

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made long after the expiry of period of 3 (Three) years. The relevant extracts of the judgment are reproduced as follows:

Para 3. The learned counsel for the Operational Creditor argued that the aforesaid view was taken without any detail discussion of various judgments rendered by the Hon'ble Supreme Court laying down that NCLT(s) are creatures of a Statute and the Limitation Act cannot be read into the Statutes creating the NCLT(s) unless it is expressly provided. In support of his submission, learned counsel has placed reliance on the judgments of the Supreme Court in the cases of L.S. Synthetics Ltd. v. Fairgrowth Financial Services Ltd. & Anr.⁸¹ and M.P. Steel Corporation v. Commissioner of Central Excise⁸² and has argued that in the absence of any provision made by IBC incorporating the provision of the Limitation Act, no such provision can be read into the IBC. The learned counsel further pointed out that NCLT must perform its functions within the parameters laid down by IBC.

*** Para 10. There is broad indication implicit in the IBC for application of the Limitation Act itself. In that regard, Section 60(6) reads as:*

(6) Notwithstanding anything contained in the Limitation Act or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.



SC STAYS NCLAT ORDER THAT SAID LIMITATION ACT DOESN'T APPLY TO PROCEEDINGS UNDER IBC

A perusal of the above quoted provision would show that for computing the period of limitation specified for any suit or application by or against a corporate debtor, the period during which such moratorium has remained in operation is to be excluded. In other words, if the resolution of insolvency has failed then in case a suit or application is filed then moratorium period has to be excluded. If an Operational Creditor has approached the NCLT after 3 (Three) years or prescribed period of limitation then, how his claim in the suit or application could be within the period of limitation prescribed. The simple result flowing from the plain reading of Section 60(6) IBC is that the claim made before the NCLT must also be within the period of limitation as prescribed by the Limitation Act.

*Para 11. Even otherwise the rule of prudence would require that public policy of law must be given effect which is widely followed namely it does not come to the rescue of those who sleep over their rights. It come to the help of those who are vigilant. Before a Constitution Bench of the Hon'ble Supreme Court in the case of **State of M.P. v. Bhailal Bhai & Ors.**⁸³, the question arose whether any period of limitation can be implied for a litigant to file a writ petition. When the period of limitation was absent for filing of a writ petition, Hon'ble the Supreme Court has*

⁸¹ (2004) 11 SCC 456

⁸² (2015) 7 SCC 58

⁸³ AIR 1964 SC 1006

taken the view that the period of limitation as prescribed in the Limitation Act would be the maximum.

NCLT then questioned the counsel whether an application under IBC would be maintainable to recover the amount which fell due 50 years ago and then concluded by saying that that the Tribunal cannot be a flowering pot for claims which have become dead and are wholly time barred.

NCLT also referred to the case of *M/s. Deem Roll-Tech Limited v. M/s. R.L. Steel & Energy Ltd.*⁸⁴ (31.03.2017), wherein the Principal Bench had taken a view that the period of limitation would be applicable as the claim made by the Operational Creditor was barred by limitation and was being made after the expiry of period of 3 (Three) years. The views of the Principal Bench are evident from the following paras:

"Section 255 of IBC provides that the Companies Act, 2013 shall be amended in the manner specified in the eleventh schedule to IBC and a perusal of the eleventh schedule of IBC discloses the amendments made to the Companies Act of several provisions though not Section 433 of the Companies Act wherein specifically the provisions of the Limitation Act is made applicable and that it shall, as far as may be apply to the proceedings or appeals before the Tribunal or Appellate tribunal as the case may be."

Thus, it can be humbly stated that since IBC is silent on the time period from the date of default within which an application for insolvency resolution must be filed then of course in the absence of any specific bar in the IBC to the application of the Limitation Act read with Section 433 of Companies Act, the debt, which is barred by limitation, cannot be the basis for invoking IBC before NCLT/ NCLAT.

⁸⁴ Company Application No. (I.B.) 24/PB/2017