INDIA'S FIRST MAGAZINE ON LEGAL AND CORPORATE AFFAIRS

LEX WITNESS

Volume 11 Issue 8 | March 2020

₹65 US $6 UK £4

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Impact of Limitation Act on Initiation of Corporate Insolvency Resolution Process - A Judicial Interpretation

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The legislature has introduced the Limitation Act, 1963 ("Limitation Act"), for seeking relief within the specified time or to lose any such right once the said period is expired. Therefore, the statute of limitation is a caution for those who are lethargic about enforcing their legal rights.

It has been 3 years since the Insolvency & Bankruptcy Code, 2016 ("IBC" or "Code") was introduced and the various amendments have made it evident that the Code is still at its evolving stage. The Code aims to achieve revival of a distressed company in a time bound manner. Hence, the timeline plays a very important role in the whole process under IBC.

The Limitation Act, constitutes a residuary Article i.e. Article 137 which states that any other application for which no period of limitation is provided elsewhere in the Act, the said limitation will be considered as three years from the date when the right to apply accrues.

It is very interesting to note that there were perplexities among the parties with respect to the relevancy of Limitation Act, 1963 for the "applications" filed under Section 7 or Section 9 of IBC. The Judiciary through a gamut of case laws, has duly understood, interpreted and explained the intention of Legislature regarding applicability of Limitation Act for initiation of Corporate Insolvency Resolution Process (CIRP).

In the case of B.K. Educational Services Private Limited v. Parag Gupta and Associates, the Apex Court held that "….since the Limitation Act is applicable to applications filed Under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred Under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

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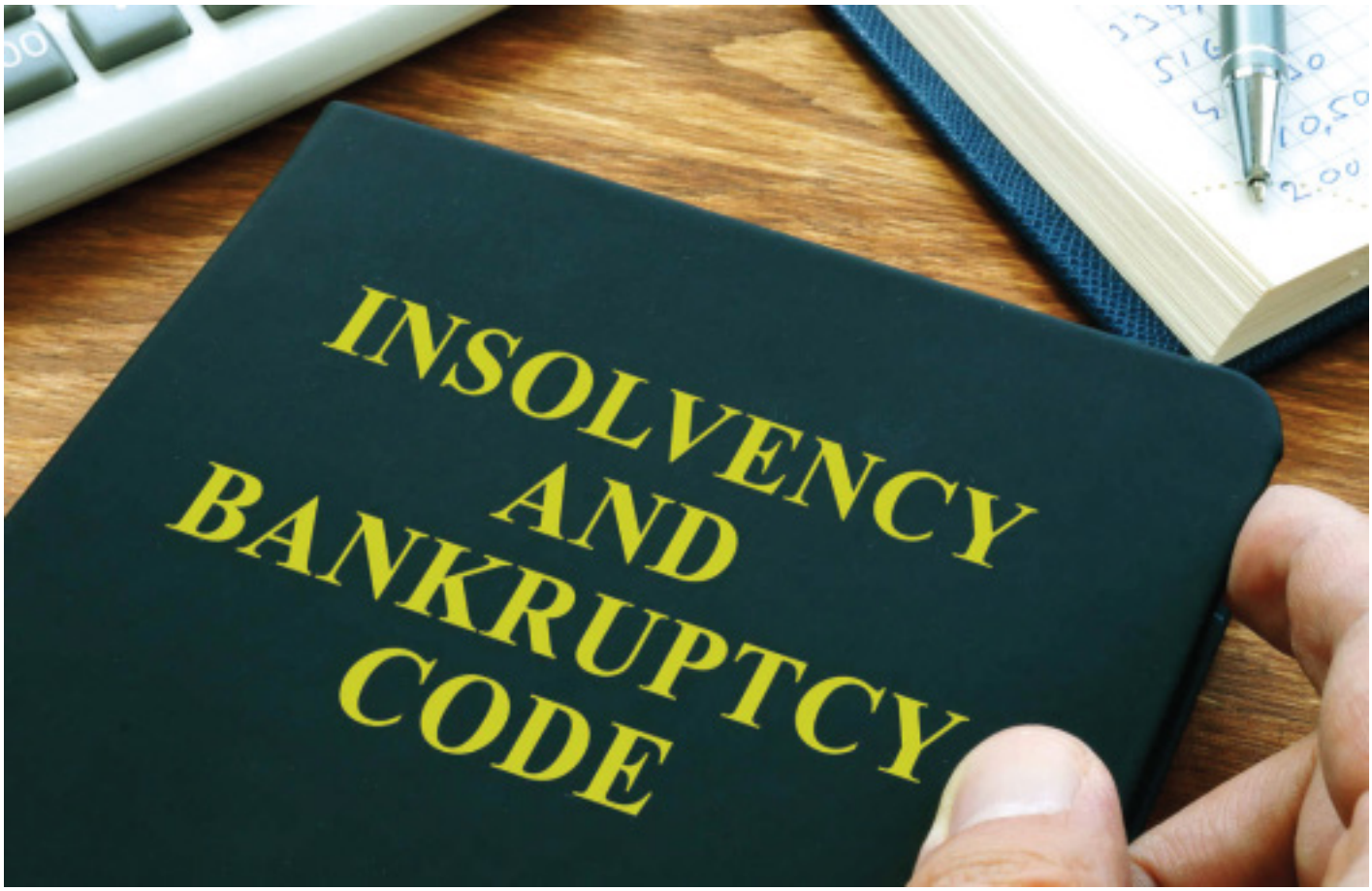

Therefore, as far as the Code is concerned, the intention of the legislature, from the very beginning, was to apply the Limitation Act to the National Company Law Tribunal ("NCLT") and the National Company Law Appellate Tribunal ("NCLAT") while deciding applications filed under Sections 7 and 9 of the Code and appeals therefrom. Section 433 of the Companies Act, which applies to the Tribunal and the Appellate Tribunal, expressly applies the Limitation Act to the Appellate Tribunal, the NCLAT, as well.

Further, in the case of Vashdeo R. Bhojwani v. Abhyudaya Co-operative Bank Ltd. and Ors., the Borrower was declared as Non-Performing Asset ("NPA") by the Cooperative Bank on 23.12.1999 and ultimately, a Recovery Certificate dated 24.12.2001 was issued. Later on, a Section 7 petition was filed by the Bank on 21.07.2017 before the NCLT and the same was admitted on 05.03.2018, stating that as the default continued, no period of limitation would be attracted. Further, an appeal was filed before NCLAT, which resulted in dismissal with similar observations. The NCLAT held that the Recovery Certificate of 2001 plainly shows a default and that there is no statable defence. Finally, an appeal was made to the Apex Court which relied upon the observations made in the case of Balkrishna Savalram Pujari and Others. v. Shree Dnyaneshwar Maharaj Sansthan and Ors. wherein it was observed that in order for Section 23 of the Limitation Act to be attracted, the wrongful act must have been a continuing wrong, thereby the Supreme Court held that "…when the Recovery Certificate dated 24.12.2001 was issued, this Certificate injured effectively and completely the Appellant's rights as a result of which limitation would have begun ticking."

Very interestingly, in the matter of Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Ors., the Borrower was declared as NPA on 21.07.2011 and the judgment of the Debt Recovery Tribunal proceedings

were given on 10.06.2016. Thereafter, an independent proceeding was initiated by Respondent No.1 on 03.10.2017, through a Section 7 application. The NCLT applied Article 62 of the Limitation Act, which states that to enforce payment of money secured by a mortgage or otherwise charged upon immovable property, the limitation period is 12 years from the time the money sued for becomes due. The NCLT concluded that, since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application.

However, the Apex Court considered the NPA date as the date of default and held that "...an application which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by learned Counsel appearing on behalf of the Appellant, time, therefore, begins to run on 21.07.2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr. Banerjee's reliance on para 7 of B.K. Educational Services Private Limited (supra), suffice it to say that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred."

Notably in, Jignesh Shah v. Union of India, the Hon'ble Supreme Court rejected the arguments of the Respondent that cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company. The Hon'ble Court observed that "...the trigger for limitation is the inability of the company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering the limitation for the filing of a winding-up petition. Though it is clear that a winding-up proceeding is a proceeding 'in rem' and not a recovery proceeding, the trigger of limitation, so far as the winding-up petition is concerned, would be the date of default...." Further the Apex Court also held that the "... Winding up Petition filed on 21.10.2016,

being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further."

In the matter of Sagar Sharma and Ors. v. Phoenix ARC Pvt. Ltd. and Ors, the Hon'ble Supreme Court upheld the decision given in the matter of B.K.Educational Society and held that "the date of coming into force of the IBC Code does not and cannot form a trigger point of limitation for applications filed under the Code. Equally, since "applications" are petitions which are filed under the Code, it is Article 137 of the Limitation Act which will apply to such applications."

While the above judgements of the Hon'ble Supreme Court clarify the intention of legislature as far as limitation is concerned for initiating an application under section 7 / Section 9 of IBC, the trigger point of the same is to be dealt with very diligently by an applicant. From the a conjoint reading of the judgements mentioned supra, it is evident that for the purposes of computing the period of limitation the date when the cause of action accrued is the trigger point. The issuance of Recovery Certificate which is pursuant to the date when the cause of action accrues in favour of the creditor, does not gives a fresh period of limitation in favour of such a creditor for computation of the period of limitation in terms of Article 137 of the Limitation Act. Further proceedings pending before Debts Recovery Tribunal, as initiated by a Secured Creditor, which eventually may result in the Recovery Certificate being issued, is not considered as a continuous cause of action and hence the same is not taken into consideration while calculating the limitation, as held by the Hon'ble Supreme Court.

In addition, one must also keep in mind the regime of Asset Reconstruction Companies ("ARC") wherein the Bank transfers the debt to an ARC, once the said debt becomes a NPA. Therefore, going by the recent judgements, ARCs in India will have to be more proactive and vigilant to protect their rights under IBC as practically when the debt is being assigned, the time to initiate an action against the Debtor under IBC may have already lapsed or a substantial time may have been lost. This may effect the ARC's business on the whole as the ARCs may be discouraged from actively taking up the old debts which are aged, lying with the Banks and whose NPA dates have already crossed 3 years' time. Even the banks and other Financial Institutions, in light of the law as laid down by the Hon'ble Supreme court for the time being are precluded from taking recourse to the provisions of IBC which envisages a timely resolution or in the alternative liquidation and are as on date being relegated to proceedings existing prior to coming into force of IBC. The earlier regime was clearly inadequate to ensure timely resolution and the current judicial trend in the said background failing to address the concerns of lenders having long outstanding recoverables. In conclusion, while describing the nature of Limitation Act, the Apex Court in Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Ltd. and Ors stated:

"... It is well settled that there is no equity about limitation – judgements have stated that often time periods provided by the Limitation Act can be arbitrary in nature."

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