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RBI's Guidelines for Interoperability

Creating A Blindspot for PPIs?

P08

expert speak

Ashima Obhan
Senior Partner,
Obhan & Associates

Pooja Katara
Associate,
Obhan & Associates

P46

Niraj Singh
Partner, RNS Associates

P50

Dr. Manoj Kumar
Founder, Hammurabi & Solomon

P39

expert speak

Sourav Ghosh
Partner,
S. Jalan & Co.

Jayanta Kar
Partner,
S. Jalan & Co.

P42

ipr corner

Lucy Rana
Managing Associate,
S.S. Rana & Co.

Isheta Srivastava
Associate,
S.S. Rana & Co.

P14

let's arbitrate

S. Ravi Shankar
Sr. Partner, Law Senate

P36

TechIPedia

Garima Sahney
Partner, Saikrishna & Associates

P17

expert speak

Varsha Banerjee
Partner,
Dhir & Dhir Associates

Pragya Khaitan
Principal Associate,
Dhir & Dhir Associates

P21

expert speak

Hardeep Sachdeva
Senior Partner,
AZB & Partners

Prateek Batra
Senior Associate,
AZB & Partners

P30

expert speak

Sangeeta Goel
Founder, Sim & San

Sidhant Goel
Partner, Sim & San

P26

IBC Barred by Limitation or Not?

■ Varsha Banerjee & Pragya Khaitan

The aspect of applicability of the Limitation Act, 1963 (Limitation Act) to the proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) has been a subject matter of various proceedings under IBC. The Limitation Act was enacted with the object of consolidating and amending the law for the limitation of suits and other proceedings.

The law has been fine-tuned and developed on the basis of various judgments which interpreted it across multiple statutes.

The applicability of the Limitation Act for initiating recovery proceedings has undergone several amendments. The aspect of applicability of the law of limitation also arises in proceedings under IBC.

Any new development, as introduced by any new enactment, requires time as the same is to be interpreted, analyzed and implemented. The coming into force of IBC has resulted in remarkable changes that have had an impact on the existing legal framework. The applicability of the Limitation Act to IBC was a lacuna that needed cognizance by the judiciary to avoid any obstacles in the smooth functioning of the Code.

The National Company Law Appellate Tribunal (NCLAT), in an attempt to plug the gap, passed a common order in the matters of Speculum Plast Private Limited v PTC Techno Private Limited, Parag Gupta & Associates v BK Educational Services Private Limited and Ashlay Infrastructure Private Limited v LDS Engineers Private Limited.

The NCLAT held that IBC is a comprehensive code and is independent of the application of other laws as is evident from the observations in the matter of Innoventive Industries Limited vs. ICICI Bank & Anr. The NCLAT held that even in the absence of an explicit provision excluding the applicability of Limitation Act in proceedings under IBC, it is

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open for the courts to scrutinize the provisions of IBC to conclude whether the Limitation Act is excluded. The NCLAT also held that several sections of IBC provide timelines for the various stages of the Corporate Insolvency Resolution Process (CIRP), which are not the same as the timelines prescribed under the by virtue of Section 255 read with the Eleventh Schedule. Further, it was held that the Limitation Act cannot be made applicable in an application for insolvency by a corporate debtor under Section 10 of the Code, as such applications do not carry specific claim or debt, the same being voluntary. Another interesting observation made by the NCLAT was that Article 137 of Part II of the Limitation Act prescribes a limitation period of 3 years from the date that the right to apply accrues.

The NCLAT gave the Adjudicating Authority under the Code, absolute authority to decide whether or not a claim is belated and/or barred by limitation. The NCLAT ruling would have resulted in increased number of insolvency applications as well as the appeals against them, which is why Section 238A was inserted vide the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 which came into effect from June 06, 2018. Section 238A of the IBC clearly stated that the provisions of the Limitation Act would apply to the proceedings or appeals before the NCLT, NCLAT, DRT and DRAT.

However, even with coming into force of the Amendment Act, the aspect of whether the application of the Limitation Act to IBC would be prospective or retrospective, that is to say whether the applicability of the Limitation Act to IBC would be from 01.12.2016 or not continued to remain a grey area.

The Hon'ble Supreme Court vide its judgement in the matter of B.K. Educational Services Private Limited vs. Parag Gupta and Associates addressed the intricacies involved qua the applicability of the Limitation Act and opined on the following aspects:

REPORT OF THE INSOLVENCY LAW COMMITTEE OF MARCH 2018

The crux of the Insolvency Law Committee Report, March 2018 was that since the intent of the Code was not to array the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. It is evident from the language of the report that the Code did not intend to resuscitate stale and dead claims.

READING IBC WITH THE COMPANIES ACT, 2013

According to the combined reading of the Companies Act, 2013 with IBC, it is evident that the NCLT was meant to discharge such powers and perform such functions and duties that are conferred on it not merely by the Companies Act, 2013 but also under any other law for the time being in force.

Section 434(1)(c) of the Companies Act, under which all the proceedings pending, including winding up proceedings, before any High Court or District Court would stand transferred to NCLT and then NCLT may proceed with the said proceedings from the stage at which they stand transferred. The thing to be considered at this point is that the above-mentioned proceedings, being proceedings before the High Court and/or District Court would definitely come under the purview of the Limitation Act. Thus, it is evident that the application of the Limitation Act would continue upon the said proceedings as it would be absurd to assume that just by virtue of being transferred to NCLT, the doctrine of limitation would cease to apply to the said proceedings. Further, it would be prejudicial to interpret the said provision to mean that the fresh filings before NCLT would be exempt from the bar imposed by the Limitation Act but the transferred proceedings cannot avail the same. Thus, in view of the aforesaid and Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the provisions of Section 433 of the Companies Act would apply to NCLT even while deciding applications under Sections 7 and 9 of the Code.

RETROSPECTIVE EFFECT

The next point of contention was that Section 238A being procedural in nature and providing a clarification of law, must be retrospective in its application. The Supreme Court relied upon the judgement of Thirumalai Chemicals Limited vs. Union of India to arrive at the conclusion that limitation being procedural in nature would ordinarily be applied retrospectively, save and except the fact that any amendment to the existing law and/or a new law cannot revive a dead remedy.

The Supreme Court also relied upon the judgement of Allied Motors (P) limited vs. CIT to arrive at the conclusion that it is clear that the insertion of Section 238A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time barred claims would have to be allowed, not being governed by the law of limitation.

SECTIONS 60 & 61 OF THE INDIAN CONTRACT ACT, 1872

The Apex court also made a reference to Sections 60 and 61 of the Indian Contract Act, which led to the conclusion that limitation merely bars the remedy and not the right. It is noteworthy that Section 60 uses the phrase ".....actually due and payable to him....."whether its recovery is or is not barred by the limitation law. It is pertinent to note that the word "actually" makes it clear that in

fact a debt must be due and payable notwithstanding the law of limitation. Thus, it is impossible to conclude from the same that in the context of Contract Act, the expression "due and payable" by itself would connote an amount that may be due even though it is time barred, for otherwise, it would be unnecessary for Section 60 to contain the word "actually" together with the words "whether its recovery is or is not barred by the law for the time being as to the limitation of suits".

INTENT OF THE LEGISLATURE

The Supreme Court also relied upon the judgement of Andhra Pradesh Power Coordination Committee & Ors. vs. Lanco Kondapalli Power Limited & Ors. to conclude that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in and allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time barred much earlier, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instantly removing of the present Board of Directors of the corporate debtor permanently, which may ultimately lead to liquidation. This being the case, the expression "debt due" defined inthe Code would obviously refer to the debts that are "due and payable" in law, i.e, the debts that are not time barred. This view is also illustrated in the judgement of Innoventive Industries Limited vs. ICICI Bank Limited.

SECTION 60(6) OF IBC

The Supreme Court also referred to Section 60(6) of the Code, stating that the said provision would have been wholly unnecessary if the Limitation Act was otherwise excluded either by reason of the Code being complete in itself or by virtue of Section 238 of the Code. Both Sections 238A of the Code as well as Section 433 of the Companies Act, 2013 would apply the provisions of the Limitation Act as far as may be.

CONCLUSION

It is clear that the provisions of the Limitation Act will be applicable to IBC, including the applications filed under Section 7 and 9. It will have retrospective effect from 01.12. 2016. Thus, it is safe to conclude that if the creditor attempts to file an application in lieu of a debt, wherein the default had occurred three years prior to the date of filing, the said application would attract the provisions of Article 137 of the Limitation Act and thus be barred. The only exception would be where Section 5 of the Limitation Act may be applied to condone the delay, due to appropriate reasons.

The present Supreme Court ruling succeeds in curbing situations where, due to the nonexistence of a fixed formula for assessing limitation, the forum of NCLT and NCLAT were used as a pressure tactic by the lenders. Further, in light of the decision of the Hon'ble Supreme Court, the situation wherein the lenders sought remedy of time barred claim is also avoided in as much as debts which are now barred by law of limitation cannot now be relied upon to initiate proceedings under IBC. The idea behind the applicability of the Limitation Act to most statutes is to ensure that age old debts that have already been laid to rest are not revived after its time has lapsed. This principle also functions on the adage that one cannot benefit from one's own wrong. It is to be understood that in the event that a creditor has not acted upon the recovery of a debt for an extended period of time, then the said creditor is barred from doing the same and ensure that the creditor does not try to buttress the amount of interest that would have built up over the years. Thus, the Hon'ble Supreme Court through its judgment has plugged the lacuna under IBC and brought IBC in line with the law of limitation.

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