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APPLICABILITY OF THE LIMITATION ACT, 1963 TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 (Code) was enacted for a time bound insolvency resolution process with the primary aim of rehabilitating financially distressed entities while at the same time maximizing the value of assets of the financially distressed entities. Since the enactment of the Code on May 11, 2016, the regional National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) have churned out a number of judicial decisions in a timely manner that have clarified the interpretation, operation and applicability of several key provisions of the Code. It would hardly be far from the truth to state that the Code would not have proven to be the remarkable success that it already is without the timely contributions of the NCLTs and the NCLAT. While the jurisprudence under the Code is developing rapidly, there are notable gaps which are leading to confusion amongst stakeholders, which need to be resolved in a timely manner to keep the success story of the Code a continuing one.

Recently, by a judgment dated August 11, 2017 passed by the NCLAT in the case of Neelkanth Township and Construction Private Limited v. Urban Infrastructure Trustees Limited¹ (Neelkanth Judgment), the question of whether the provisions of the Limitation Act, 1963 (Limitation Act) are

applicable to the Code was answered by the NCLAT. Interestingly, the Neelkanth Judgment does not consider two earlier orders passed by the principle bench of the NCLT at New Delhi in the cases of M/s. Deem Roll Tech Limited v. M/s. R.L. Steel & Energy Limited² and Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd.³ by which it was held that the provisions of the Limitation Act would apply to proceedings under the Code.

Legal position prior to the Neelkanth Judgment

In the case of M/s Deem Roll Tech Limited⁴, the principle bench of the NCLT dismissed the insolvency petition inter-alia on the grounds of the debt being barred by limitation. The petitioner in this case was an operational creditor under the Code, and was claiming debts on account of non-payment against sale of goods to the respondent corporate debtor. The last payment received by the operational creditor was in the year 2014 and the outstanding amount became due and payable by the corporate debtor to the operational creditor in the year 2014 itself, without any further interest accruable thereon. In order to decide whether the claim of the operational creditor was time barred or not, the NCLT relied upon Section 255 of the Code and observed that even though various provisions of the Companies Act, 2013 have been

1. Company Appeal (AT) (Insolvency) No. 44 of 2017. Available at http://nclat.nic.in/final_orders/Principal_Bench/2017/insolvency/11082017AT442017.pdf (last visited on August 27, 2017)
2. C.A. No. (I.B.) 24/PB/2017, March 31, 2017. Available at http://nclt.gov.in/Publication/Principal_Bench/2017/Others/Deem%20Roll%20Tech%20Limited%20Vs.%20r.l.%20Steel%20Energy%20Ltd.pdf (last visited on August 27, 2017)
3. C.P. No. (IB)108(PB)/2017, May 25, 2017. Available at http://nclt.c2k.in/OtherNCLT/interim_orders/principal/25.05.2017/30.pdf (last visited on August 27, 2017)
4. *supra*, at 1

amended in terms of the eleventh schedule to the Code, Section 433⁵ of the Companies Act, 2013 (by which the Limitation Act is applicable to proceedings before the NCLT and the NCLAT) was not amended. Further, the bench also observed that there was no specific bar on the application of the Limitation Act under the Code. In view of the same, the NCLT held that the Limitation Act is applicable to proceedings under the Code and dismissed the debt of the petitioner as being time barred.

Similarly, in the case of Sanjay Bagrodia⁶, which was again a petition filed under Section 9 of the Code by an operational creditor on account of non-payment of salary, the preliminary question for consideration was whether insolvency process can be triggered in a matter where the default had occurred beyond a period of three years on the basis that the claim was time barred by operation of the Limitation Act. The operational creditor in this case, relied upon the case of L.S. Synthetics Limited v. Fairgrowth Financial Services Limited & Anr.⁷ and contended that the provisions of the Limitation Act cannot be read into statutes such as the Code unless the statute itself expressly provides for it. However, the NCLT distinguished the applicability of the principle in the Supreme Court's decision in L.S. Synthetics Limited as not being applicable to proceedings under the Code (which it held to be proceedings in the nature of recovery of dues and not for attachment of

properties as was the case in L.S. Synthetics Limited) and observed that the delay had been caused by the operational creditor itself in asserting its right and availing the remedies available within the prescribed period of time. Furthermore, the NCLT, Principal Bench invoked Section 60 (6)⁸ of the Code and observed that the said provision contains an implicit indication for the applicability of the Limitation Act to the Code since it provides that the period of moratorium (under section 14 of the Code) must be excluded for the purposes of computing the period of limitation specified for any suit or application by or against a corporate debtor. The NCLT held that therefore, it flows from Section 60 (6) of the Code that the claim made before the NCLT must also be within the period of limitation as prescribed by the Limitation Act. The bench also relied upon the case of State of M.P. v. Bhailal Bhai & Ors.⁹, wherein, in relation to the issue of limitation vis-à-vis writ petitions (which is not provided for by the Limitation Act), the Supreme Court held that the maximum period of limitation prescribed for filing of writ petitions would be similar to that prescribed for filing of a civil suit under the Limitation Act.

The Neelkanth Judgment

In this case, an appeal was filed by the corporate debtor, namely, Neelkanth Township and Construction Private Limited against the order of

5. 433. Limitation: The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case maybe.

6. Supra, at 2

7. (2004) 11 SCC 456

8. s. 60(6): Notwithstanding anything contained in the Limitation Act, 1963 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, the period of moratorium provided for in section 14 of the Code shall be excluded.

9. (1977) 1 SCR 101

the NCLT, Mumbai, whereby an insolvency petition filed by the financial creditors (under section 7 of the Code), was allowed. The basis of the insolvency petition of the financial creditors were certain optionally convertible debentures issued by the corporate debtor, which carried nil or 1% p.a. interest rate thereon. The said debentures were due for redemption in the years 2011, 2012 and 2013 respectively. Therefore, the corporate debtor challenged the order of the NCLT, Mumbai inter-alia on the ground that the debt of the financial creditors was time barred by operation of the Limitation Act. However, the NCLAT dismissed the appeal of the corporate debtor, and ruled that there is nothing on record to show that the Limitation Act, was applicable to the Code, and further observed that the Code "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."

It appears from the reading of the above ruling that the NCLAT has made three primary observations on the point of the applicability of the Limitation Act, 1963 to the Code, being, (1) the process under the Code is not for recovery of a money claim; (2) there is no express provision under the Code which makes the Limitation Act applicable to the Code and the limitation period prescribed for recovery of loans cannot be made applicable for initiation of corporate insolvency process; and (3) debts which

include interest thereon shall have a continuing cause of action and will not be barred under the law of limitation. Although the NCLAT appears to have relied upon the above three propositions in arriving at its decision that the Limitation Act is not applicable to the Code, the NCLAT's decision in the Neelkanth Judgment suggests that the debt was not barred by limitation since it had a continuing course of action on account of accruing interest. With all due respect, this is a somewhat perplexing finding in that it suggests that if a debt is not of a continuing nature, it would be time-barred (it is another matter as to whether such debt would be time barred under the Limitation Act or some other law of law of limitation). The Neelkanth Judgment is also inconsiderate of the decisions of the principal bench of the NCLT in the cases of M/s Deem Roll Tech Limited and Sanjay Bagrodia, although in all fairness these decisions were not relied upon by the parties before the NCLAT.

The Neelkanth Judgment was appealed by the corporate debtor before the Supreme Court by way of a civil appeal¹⁰, the Supreme Court dismissed the appeal while keeping the question on the applicability of Limitation Act to the Code open, which once again leaves the question unanswered.

Conclusion

It is a settled position that the law of limitation is a matter of public policy, which fixes a life span for legal remedies and seeks to bury prior causes of

action which have not been agitated unexplainably and have become stale due to lapse of time. Before the commencement of the Code, for winding up petitions filed by creditors against debtor companies, under the Companies Act, 1956 also there was no period of limitation prescribed, various High Courts had settled that the said winding up petitions would be maintainable only if the 'debt' forming basis of such petitions was legal, subsisting and not time barred. Notably, the same

reasoning was followed by the principle bench of NCLT, at New Delhi in the case of Prowess International v. Action Ispat¹¹ wherein the NCLT, while determining the issue of whether a default was committed in making payment against an operational debt, considered whether such debt was time barred under the law of limitation since a stale claim would be unenforceable in law.

Therefore, the validity of a "debt" that is beyond the prescribed period for limitation for recovery of dues for the purpose of initiating insolvency proceedings under the Code cannot be ruled out entirely. The Neelkanth Judgment also has serious bearing^{*} for resolution professionals who are entrusted with the task of verifying claims of creditors in the corporate insolvency resolution process. Since the Hon'ble Supreme Court in the appeal filed against the Neelkanth Judgment, has not decided the question of the limitation being applicable to insolvency proceedings and kept the same open, there is presently no conclusive position on the controversy as on date. Until such

time that the question is answered by any ruling of NCLAT or the Supreme Court or a comprehensive amendment to the Code is carried out, the issue of limitation under the Code will be hotly debated.

11. C.P. No. (IB)18(PB)/2017, March 9, 2017. Available at http://nclt.gov.in/interim_orders/_principal/15.03.2017/Action%20Ispat%20and%20Power%20Private%20Limited%20Final.pdf (last visited on August 25, 2017)