LIMITATION ACT IS APPLICABLE TO THE INSOLVENCY CODE

The Hon'ble Supreme Court of India in a recent judgment in **B.K. EDUCATIONAL SERVICES PRIVATE LIMITED -VS- PARAG GUPTA & ASSOCIATES** decided on 11-10-2018 held that the Limitation Act is applicable to the Insolvency and Bankruptcy Code, from its very inception.

ISSUE BEFORE THE COURT:

Whether the Limitation Act, 1963 will apply to applications that are made under Section 7 or Section 9 of the Insolvency and Bankruptcy Code on and from its commencement on 01.12.2016 till 06.06.2018.

REASON WHY THE ISSUE SHOOT UP:

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 inserted Section 238A with effect from 06.06.2018 as below:

"238A. Limitation - The Provisions of the Limitation Act, 1963 (36 of 1963) shall as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

DECISION OF THE APPELATE TRIBUNAL:-

The Appellate Tribunal determined the subject matter of appeals on 07.11.2017 as below:-

The Limitation Act, 1963 does not apply between the period 01.12.2016 and 06.06.2018. Even on the assumption that Article 137 of the Limitation Act, 1963 is attracted to such applications, in any case, such applications being filed on or after the commencement of the Code on 01.12.2016, since three years have not elapsed since this date, all these applications, in any event, could be said to be within time.

In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of "Corporate Insolvency Resolution Process", we further hold that the Doctrine of Limitation and Prescription is necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

If it comes to the notice of the Adjudicating Authority that the application for initiation of "Corporate Insolvency Resolution Process" under Section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant.

THE ARGUMENTS OF THE APPELLANT BEFORE SC:-

The Amendment Act which introduced Section 238A into the Code was to clarify the law and thus Section 238A must be held to be retrospective.

The definitions of "debt" and "default" in Sections 3 (11) and 3 (12) respectively, refer to liablity or obligation in respect of a claim which is "due" and this being the case, a time-barred debt cannot be said to be "due" so as to trigger the code.

If one were to read the definition of "Adjudicating Authority" in Section 5 (1) of the Code, together with Sections 408, 424 and 433 of the Companies Act, 2013, it would become clear that proceedings before the National Company Law Tribunal arising under the Code would be covered by the Limitation Act, via Section 433 of the Companies Act from the very inception or commencement of the Code.

THE ARGUMENTS OF THE RESPONDENT BEFORE SC:-

The Judgment in **Innoventive Industries Ltd. Vs. ICICI Bank & Anr**., held that the code is a complete code dealing with insolvency and not debt recovery and that, therefore, the periods of limitation that are stated therein would show that the Limitation Act would not apply.

The Language used in Section 3 (11) is "due" and in Section 3 (12), "due and payable", it would be clear that a timebarred debt would be subsumed within the said expression as it is not a debt that is "due and recoverable" under the said provision.

Incongruous results would obtain if we were to hold that Section 433 of the Companies Act, would apply to provide a period of limitation to the NCLT deciding cases under the code.

Section 238A of the Code could not be retrospective as it would take away a vested right of the application filed under Section 7 or Section 9 to be decided without applying the Limitation Act pre 06.06.2018.

CONSIDERATION OF THE HON'BLE SUPREME COURT:-

The Report of the Insolvency Law Committee which introduced Section 238A into the code is as below:-

"**28. APPLICATION OF LIMITATION ACT, 1963**

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation is "to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or latches". Though the code is not a debt recovery law, the trigger being 'default in payment of debt' renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per Section 30(4) of the Code.

28.3 Given that the intent was not to package 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. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its owns debts for the purpose of CIRP and are not in the form of a creditor's remedy".

Section 5(1) of the Code "Adjudicating Authority", for the purpose of this Part, means National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013"

Section 408 of the Companies Act :- Constitution of National Company Law Tribunal - The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force."

Section 433 of the Companies Act:- 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 may be.

As per Section 434(1)(c) of the Companies Act, all proceedings under the Companies Act, including the proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date, before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before they are transferred. Each of these proceedings would directly be governed by the Limitation Act as they are proceedings before Courts. Obviously, upon transfer of such proceedings to the Tribunal, it cannot be stated that because these proceedings are now before the Tribunal, the Limitation Act will cease to apply. Also, in fresh applications that are made after the Code comes into force, it cannot be said that to such applications, the Limitation Act will not apply, but to applications that are transferred from the District court or the High court, the provisions of the Limitation Act will apply. In particular, winding up proceedings pending before a High Court are liable to be transferred to the NCLT for further decision by applying the Code and not the Companies Act.

Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016 - (1) All petitions relating to winding up of a company under clause (e) of Section 433 of Act, 1956, where the petition has not been served on the respondent shall be transferred to the Bench of the Tribunal established under subsection (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

> Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under Sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15th day of July 2017, failing which the petition shall stand abated:

COURT'S VIEW:-

As far as the Code is concerned, the intention of the legislature, from the very beginning, was to apply the Limitation Act to the NCLT and the 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.

DECISION OF THE COURT:-

The Limitation Act is applicable to applications filed under Sections 7 & 9 of the Code from the inception of the Code and 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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