

Exception to Limitation Act in an IBC process

written by Avani Sinha | March 8, 2019

A

division bench of the NCLT Mumbai in its recent judgement in the case of TJSB Sahakari Bank Ltd. Vs. M/s. Unimetal Castings Ltd.[1] has held that, a debt that is barred by limitation can be proceeded against under provisions of the Insolvency and Bankruptcy Code (IBC), 2016 if it is evident that the debt is continued in the balance sheet of the corporate debtor.

Background of the case

- The TJSB Sahakari Bank Ltd. (“Financial Creditor/Petitioner”) sought CIRP of M/s. Unimetal Castings Ltd. (“Corporate Debtor”) u/s 7 of Insolvency and Bankruptcy Code(IBC), 2016 on the ground that the Corporate Debtor committed default in repayment of loan facilities granted to the Corporate Debtor.
- The Corporate Debtor raised objections to the petition on ground of being an MSME as well as on the ground that petition is barred by limitation.
- The NCLT rejected the contentions of the Corporate Debtor in view of Section 7 of the IBC, the ratio decidendi of the case being “the moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted”.

Issue Involved

Whether the period of limitation would run from the date of default i.e from June, 2015 or a fresh limitation would be considered

from the date when there is an acknowledgement of liability on part of the Corporate Debtor.

Contentions of the

Parties

The

Financial Creditor contended that the Corporate Debtor committed default in repayment of loan facilities granted to the Corporate Debtor and sought Insolvency u/s 7 read with rule 4 of the IBC, 2016.

Contrarily,

the Corporate Debtor raised several objections to the petition. It was contended that Corporate Debtor is a medium enterprise as defined under the Micro, Small and Medium Enterprises Development Act, 2006 (‘MSMED Act’). The declaration of the account of the Corporate Debtor as Non-Performing Asset (‘NPA’) w.e.f. 30.06.2015 is illegal, void and non-est. There is no due payable by the Corporate Debtor.

The

Corporate Debtor further contended that, the petition is barred under Article 137 of the Limitation Act, 1963 as the date of default was on 30.06.2015 whereas the insolvency petition was filed on 23.08.2018 i.e. 3 years after the

debt converted into a due. To support this contention, Corporate Debtor relied on the decision of Hon'ble Supreme Court in the "B.K. Educational Services Pvt. Ltd. vs. Parag Gupta & Associates"[2].

The Petitioner submitted that the loan was evinced in the balance sheet of the Corporate Debtor which is an acknowledgment of liability and hence the debt is not barred by limitation. When the liability is evinced in the balance sheet that is a clear acknowledgement of debt by the Corporate Debtor. It was therefore argued that the period of limitation would continue in view of such admission of debt.

Judgment

Exception

to applicability of The Limitation Act, 1963

Distinguishing the

present case from the Supreme Court decision in *B.K. Educational Services Private Limited v Parag Gupta And Associates*, Hon'ble Bench observed that the acknowledgment

of liability was shown in the balance sheet of the Corporate Debtor which is an acknowledgment of liability and hence the debt is not barred by limitation.

However, Corporate Debtor has not disputed the fact that the loan was shown as a liability in its balance sheet.

When

the liability is shown in the balance sheet that is a clear acknowledgment of debt by the Corporate Debtor. Hon'ble Bench relied on several citations wherein the debt shown in the balance sheet is an acknowledgment of liability. In view

of this, the contention of the Corporate Debtor that the debt is barred by limitation will not hold water. Thus the adjudication authority having

satisfied with the fact that the Corporate Debtor defaulted in making payment towards the liability to the Petitioner, the petition deserves to be admitted.

Analysis

In a remarkable judgment namely *B.K. Educational Services Private Limited v Parag Gupta And Associates*, Hon'ble Supreme Court has held that the Limitation Act is applicable to insolvency petitions filed under Section 7 and 9 of the IBC from the commencement of IBC on 01.12.2016. The Supreme Court had elucidated that insolvency proceedings cannot be initiated based on time barred claims. Observing that an application

filed after the IBC came into force in 2016 cannot revive a debt which is no longer due as it is time- barred.[3]

The amendment of Section 238A would not serve its object unless it is construed

as being retrospective. Otherwise, applications seeking to invigorate

time-barred claims would have to be allowed, not being governed by the law of limitation.[4] It

is clear from a reference to the Insolvency Law Committee Report of March, 2018[5],

that the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of IBC.

The expression "debt due" in the definition

sections of IBC has already been interpreted by the Hon'ble Supreme Court to mean debts that are "due and payable" in law, i.e., the debts that are not time-barred.[6] In this regard, the Hon'ble Supreme Court has referred to its judgment

in *Innoventive Industries Ltd. v. ICICI Bank & Anr.*, wherein it

had held that "*a debt may not be due if it is not payable in law or in fact*" Since the Limitation Act is applicable to petitions for insolvency

filed under Sections 7 and 9 of IBC from the inception of IBC, Article 137 of the

Limitation Act gets evoked.

Article 137 of the Limitation Act

renders the period of limitation in case of "*any other application for which no period of limitation is provided elsewhere*" as three years from the time when the right to apply accrues.[7]

"The right to sue", therefore, emanates when a default occurs. If the default had occurred for more than three years prior to the date of filing

of application under IBC, the application would get barred under Article 137 of

the Limitation Act, 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.

In the present case, the Hon'ble Bench carved out the

exception to the applicability of the limitation period while holding that the

limitation period shall stand extended in cases where creditor produces an evidence of continuing cause of action against the debtor. The debt remains due

and payable in case where period of limitation stands extended on the account of acknowledgment or continuing cause of action.

Thus the Supreme Court judgment elaborated above does not

hold good in situations wherein the period of limitation may be extended by proving acknowledgment on part of the corporate debtor.

Conclusion

This is certainly a prudent judgment for the operational and financial creditors to initiate insolvency process against defaulters. This judgment ensures that the corporate debtors cannot escape from their liability merely by incorporating Article 137 of The Limitation Act, 1963 thereby protecting the interests of the petitioners mending resolution to their affliction.

Contributed by - Avani Sinha, Associate

[1] CP (IB)-3622/I&BP/MB/2108

dated 25-01-2019.

[2] B.K.

Educational Services Pvt. Ltd. vs. Parag Gupta & Associates 2018 SCC Online SC 1921

[3] Para 12 of Judgment

[4] Para 15 of Judgment

[5] http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf

[6] Para

28 of the judgment of the Hon'ble Supreme Court in *Innoventive Industries Ltd. v. ICICI Bank & Anr.*, (2018) 1 SCC 407

[7] The relevant provision of the Limitation Act is Article 137 of The Schedule to the Limitation Act which provides limitation in case of any application for which no period of limitation is provided elsewhere as three years from the date on which right to apply accrue

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