I. Case Reference

Case Citation	:	[2018] ibclaw.in 32 SC
Case Name	:	B.K. Educational Services Private Limited Vs. Parag Gupta And Associates
Appeal No.	:	Civil Appeal No.23988 Of 2017 And 439/2018, 436/2018, 3137/2018, 4979/2018, 5819/2018, 7286/2018.
Appellant(s)	:	B.K. Educational Services Private Limited
Respondent(s)	:	Parag Gupta And Associates
Date of Judgment	:	11-Oct-18
Tribunal/Court	:	Supreme Court of India
Full text	:	**Click here**

II. Brief about the decision

The present case are concerned with Section 238A of the Insolvency and Bankruptcy Code, 2016 ("Code"), which was inserted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 with effect from 06.06.2018.

Question of Law:

Whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018. In all these cases, the Appellate Authority has held that the Limitation Act, 1963 does not so apply.

The question raised by the appellants in these appeals is as to whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018. In all these cases, the Appellate Authority has held that the Limitation Act, 1963 does not so apply. Even on the assumption that Article 137 of the Limitation Act, 1963 is attracted to such applications, in any case, such applications being filed only on or after 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.

Reason for the introduction of Section 238A into the Code:

The Report of the Committee would indicate that it has applied its mind to judgments of the NCLT and the NCLAT. It has also applied its mind to the aspect that the law is a complete Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred.

> *"28.* ***APPLICATION OF LIMITATION ACT, 1963***
> *28.1 The question of applicability of the Limitation Act, 1963 ("Limitation Act") to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.(Ravula Subba Rao and Anr. v. The Commissioner of Income Tax, Madras, (1956) SCR 577) In light of the confusion in this regard, the Committee deliberated on the*

issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.(Punjab National Bank and Ors. v. Surendra Prasad Sinha AIR 1992 SC 1815) This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred,(Interactive Media and Communication Solution Private Limited v. Go Airlines, 199 (2013) DLT 267) and there appears to be no rationale to exclude the extension of this principle of law to the Code.

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(Rajinder Singh v. Santa Singh, AIR 1973 SC 2537.)" 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 own debts for the purpose of CIRP and are not in the form of a creditor's remedy."

The position in law of the applicability of the Limitation Act, on a reading of the Code together with a cognate legislation, the Companies Act, 2013. Sections 3(6), 3(11), 3(12), and 5(6) of the Code:

Under Section 434(1)(c) of the Companies Act, all proceedings under the Companies Act, including the proceedings relating to 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. This Section is also important in that it indicates that proceedings under the Companies Act relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, that were pending before the District Court or the High Court, may now be transferred to the Tribunal. 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. This becomes clear on a reading of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016.

It is thus clear that Section 433 of the Companies Act, 2013 would apply to the Tribunal even when it decides applications under Sections 7 and 9 of the Code.

Given the fact that the "procedure" that would apply to the NCLT would be the procedure contained inter alia in the Limitation Act, it is clear that the NCLT would have to decide applications made to it under the Code in the same manner as it exercises its other jurisdiction under the Companies Act. This being the position in law, it is clear that when various provisions of the Companies Act were amended by the Eleventh Schedule to the Code, it was unnecessary to apply and adapt Section 433 of the Companies Act to the Code, as was done to various other Sections of the Companies Act.

Section 238A, being clarificatory of the law and being procedural in nature, must be held to be retrospective, it is necessary to refer to a few judgments of this Court. In *M.P. Steel Corporation v. CCE, (2015) 7 SCC 58*. A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

The court may also refer to a recent decision of this Court in *SBI v. V. Ramakrishnan, (2018) SCC Online SC 963*, where this Court, after referring to the selfsame Insolvency Law Committee Report, held that the amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14 was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14 ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception.

It will be seen from a reading of the definition of "debt" in Section 3(11) of the Code, that "debt" is said to mean a liability or obligation in respect of a claim which is "due" from any person, and includes a financial debt and an operational debt.

The definition of "default" in Section 3(12) uses the expression "due and payable" followed by the expression *"and is not paid by the debtor or the corporate debtor……"*. "Due and payable" in Section 3(12), therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes "due and payable", is not in fact paid by the corporate debtor. The context of this provision is therefore actual non-payment by the corporate debtor when a debt has become due and payable.

Section 7 applies to a financial creditor who may file an application for initiating a corporate insolvency resolution process against a corporate debtor when a "default" has occurred. The same expression is used when it comes to an operational creditor, who may on the occurrence of a "default" under Section 8, deliver a demand notice as may be
prescribed. What throws considerable light on the expression "default" is Section 8(2)(a).

It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a "dispute". We have seen that "dispute" as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, "default" must be non-payment of amounts that have become due and payable in law. The "dispute" or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression "due" and "due and payable" occur in Sections 3(11) and 3(12) of the Code, they refer to a "default" which is non-payment of a debt that is due in law, i.e., that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see *Bhogilal Chunilal Pandya v. State of Bombay, 1959 Supp. (1) SCR 310 at 313-314)*. It is thus clear that the expression "default" bears the same meaning in Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred.

Strong reliance was placed by Shri Dholakia on France *B. Martins v. Mafalda Maria Teresa Rodrigues, (1999) 6 SCC 627*, by which Section 24A was inserted in the Consumer Protection Act, 1986 by a 1993 amendment, making the provisions of the Limitation Act applicable to the Consumer Protection Act. In turning down the plea that Section 24A would cover the period from 1986 to 1993, this Court held that the legislature in its wisdom thought it appropriate not to prescribe a period of limitation for proceedings under the Act as the object of that Act was for the better protection of the interest of consumers. The Court, therefore, held that the addition of Section 24A in the Act shows that initially, the legislature did not intend to prescribe any period of limitation for filing complaints under the Act as it would stultify the beneficent social legislation contained therein. This case is again wholly distinguishable in that the Court found that the Consumer Protection Act is a beneficial social legislation, whose object was not to apply the Limitation Act when it was first enacted. On the contrary, in the present case, we find that the object of the Code was subserved by applying Section 433 of the Companies Act from the very inception of the Code. Also, the Insolvency Law Committee Report of March, 2018 makes it clear that the object of the Code from the very beginning was not to allow dead or stale claims to be resuscitated. In this view of the matter, we are afraid that this judgment also would have no bearing.

SC have held that at least insofar 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. Also, the argument that the NCLAT is an appellate tribunal which is common to three statutes, under one of which, viz., the Competition Act, no period of limitation has been prescribed, would not lead to any anomalous situation. When the Appellate Tribunal, i.e., the NCLAT decides an appeal under the Competition Act, since an appeal is a continuation of the application filed before the Competition Commission (See *Lachmeshwar Prasad Shukul and Ors. v. Keshwar Lal Chaudhuri and Ors., AIR 1941 FC 5)*, the NCLAT will decide the appeal on the footing that the Limitation Act did not apply to an application made before the Competition Commission. On the other hand, insofar as applications are filed under Section 7 or 9 of the Code, or petitions or applications filed under the Companies Act, the NCLAT will decide such petitions/applications on the footing that the Limitation Act will apply to such petitions/applications. Merely because appeals under different statutes are sent to one appellate tribunal would make no difference to the position in law. Undoubtedly, if three separate appellate tribunals had been constituted under the three enactments in question, this argument would have no legs to stand on. Merely because, from the point of view of convenience, appeals are filed before one appellate forum would not mean that any anomalous situation would arise as
each appeal would be decided keeping in mind the provisions of the particular Act in question. Therefore, this argument also must be rejected.

Shri Dholakia argued that the Code being complete in itself, an intruder such as the Limitation Act must be shut out also by application of Section 238 of the Code which provides that, *"notwithstanding anything inconsistent therewith contained in any other law for the time being in force"*, the provisions of the Code would override such laws. In fact, Section 60(6) of the Code specifically states as follows:

> *"**60. Adjudicating Authority for corporate persons**.—*
>
> *xxx xxx xxx*
> *(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 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 for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."*

This 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, Section 433 of the Companies Act as well as Section 238A of the Code, apply the provisions of the Limitation Act "as far as may be". Obviously, therefore, where periods of limitation have been laid down in the Code, these periods will apply notwithstanding anything to the contrary contained in the Limitation Act. From this, it does not follow that the baby must be thrown out with the

bathwater. This argument, therefore, must also be rejected.

It is thus clear 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.

In view of our finding that the Limitation Act has in fact been applied from the inception of the Code, it is unnecessary for us to go into the arguments based on the doctrine of laches. The appeals are therefore remanded to the NCLAT to decide the appeals afresh in the light of this judgment.

III. Full text of the judgment

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