

Dispute Resolution Hotline

October 31, 2017

BREATHING FRESH LIFE INTO OLD DEBTS

- Limitation for initiation of insolvency proceedings on pre-existing claims to commence from December 2016
- A window of 3 years may be available for all time barred debts
- Still no finality on whether Limitation Act is applicable to the Code

The National Company Law Appellate Tribunal (“NCLAT”) has recently ruled that even if one were to apply the Limitation Act, 1963 (“**Limitation Act**”) to the Insolvency & Bankruptcy Code, 2016 (“**Code**”), the limitation period for initiating proceedings under the Code for all claims existing prior to the commencement of the Code, begins from December 1, 2016 (i.e. from the date the Code came into force). Thus, suggesting that a window of opportunity now exists for initiating insolvency proceedings for debts which otherwise could not have been recovered due to expiry of the limitation period.

This piece is in continuation of our previous hotline on *Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustee Ltd.*¹ (“**Neelkanth Judgment**”) wherein the NCLAT had ruled that the Limitation Act, 1963 does not apply to the Code at all. The same can be accessed [here](#).

FACTS

The present judgment of *Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ltd.*² has come in pursuit of an appeal filed by an operational creditor against the order of National Company Law Tribunal (“NCLT”) which dismissed its application under the Code. The NCLT was of the view that the “...*debt [in the present case] is time barred and unenforceable...*”, and hence disposed-off the application of the operational creditor.

The operational creditor i.e. Black Pearl Hotels Pvt. Ltd. had entered into a Business Conducting Agreement (“BCA”) with the corporate debtor i.e. Planet M Pvt. Ltd. in February 2008. The operational creditor claimed that the corporate debtor failed to pay a certain monthly minimum guarantee fee that was required to be paid under the BCA.

On such ground, the operational creditor issued a demand notice under section 8(1) of the Code to the corporate debtor. The said notice was responded to by the corporate debtor denying all the claims. Thereafter, the operational creditor after waiting for a period of 10 days and having received such a reply, filed an application before NCLT, Mumbai under Section 9 of the Code for initiation of corporate insolvency resolution process against the corporate debtor.

The NCLT dismissed the application of the operational creditor holding that the whole debt as claimed by the creditor is time barred as it pertained to years 2011-12.

JUDGMENT

The question before NCLAT, once again, was whether the application preferred by operational creditor was barred by limitation.

Earlier, the NCLAT in the Neelkanth Judgment had held that there is nothing in the Code to suggest that the law of Limitation Act, is applicable to Code. Accordingly, the application of Limitation Act was barred completely. The NCLAT referred to the Supreme Court order³ passed in the Special Leave Petition challenging the Neelkanth Judgment (“**Neelkanth Judgment Appeal**”). In the said order, the Supreme Court opined that there were no reasons to interfere with the Neelkanth Judgment and dismissed the appeal. However, the Supreme Court specifically kept the question of law i.e. whether the Limitation Act would apply to proceedings under the Code, open.

The NCLAT in the present judgment did not address the issue of applicability of Limitation Act to the Code. It rather proceeded on the basis that even if the Limitation Act, 1963 was applied, the application of the creditor was within the prescribed limitation period.

NCLAT noted that Article 137 of the Schedule to the Limitation Act would apply. Article 137 prescribes a limitation period of 3 (three) years from the period when such right to apply accrues to the applicant.

The Tribunal observed that Code came into force on December 1, 2016. Therefore, the right to apply under the Code accrued only on December 1, 2016 and not before the said date. It thus held that the application filed much prior to the expiry of three years from December 1, 2016 is not barred by limitation. Accordingly, the order of NCLT was set aside. It should however be noted that the Respondent had not appeared before the NCLAT.

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The NCLAT without ruling on the issue of applicability of Limitation Act, opined that even if Limitation Act applied to the Code, the application of the creditor would still not get hit by limitation. Such approach was specifically adopted by NCLAT after recognizing that the question of applicability of Limitation Act to proceedings under the Code has specifically been kept open by the Supreme Court. In fact, the Supreme Court order may have encouraged the NCLAT to assess the facts on the touchstone of Limitation Act also.

However, the way NCLAT has applied the Limitation Act, suggests that a window to initiate insolvency proceedings for time barred debts opened on the day the Code was brought into force. This window would close on November 30, 2019 i.e. three years from the day the Code was brought into force. Thus, the NCLAT has still retained the possibility for initiation of action under the Code on the basis of time barred debts.

It should also be noted that in the present ruling NCLAT did not consider whether a debt which is otherwise time barred could be considered as due and payable such that it satisfies the definition of ‘*debt*’ and ‘*default*’ under the Code.

Also, it remains to be seen whether such implementation of the Code could be considered as taking away the vested substantive right (if any) of a corporate debtor, to bar initiation of insolvency proceedings on basis of time barred debts. This is a larger debate that whether without any express provision covering past rights or obligations, can a new legislation be made applicable to breathe fresh life in an old cause of action.

Therefore, the present ruling does not remove the ambiguity surrounding the applicability of the Limitation Act and the manner thereof. However, it does encourage parties to initiate actions under the Code for time barred debts.

– **Mohammad Kamran, Ashish Kabra & Vyapak Desai**

You can direct your queries or comments to the authors

¹ Company Appeal (AT) (Insolvency) No. 44 of 2017

² Company Appeal (AT) (Insolvency) No. 91 of 2017

³ Order dated August 23, 2017 in Civil Appeal No. 10711 of 2017

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