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APPLICABILITY OF LIMITATIONS ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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INTRODUCTION

This thesis covers the applicability of The Limitation Act, 1963 to applications filed for the initiation of insolvency under sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016. Section 238A which provides for the provisions of the Limitation Act to 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 was inserted in the IBC on 6th of June, 2018 via the Second Amendment. As a result of this amendment two very important aspects of the Act of 1963, Article 137 and Section 18, came to be attracted to the Insolvency and Bankruptcy Code (hereinafter referred to as "the Code" or "IBC").

In this thesis I would be dealing with various facets of limitation as germane to the IBC which are as follows:

1. Period of Limitation as prescribed under Article 137 of the Limitation Act
2. Commencement of the period of limitation from the Date of Default
3. A suit for recovery does not extend the period of limitation
4. Section 18 of the Limitation Act as relevant to applications filed under section 7 and 9 of the Code

A. Introduction to section 18 of the Limitation Act

B. What may or may not constitute an acknowledgement under Section 18 of the Limitation Act.

APPLICABILITY OF LIMITATION ACT TO APPLICATIONS FILED UNDER SECTION 7 AND 9 OF THE IBC

Let us first and foremost draw our attention to Article 137 of the Limitation Act, which reads as; "*Any other application for which no period of limitation is provided elsewhere in this Division*." Conspicuously this Article will get attracted to applications filed under section 7 and 9 of the Code and any such application filed beyond the prescribed period of "three years" as stated in Article 137 will be barred by limitation.

Now, adverting to the Report of the Insolvency Law Committee of March, 2018 which sets forth the reason for introduction of Section 238A into the Code, it is imperative to quote the observation of the learned division bench in B.K. Educational Services P. Ltd. v. Parag Gupta and Associates, held as follows:

"25... We 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 there from... 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. MANU/FE/0002/1940 : 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.

27. 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."

The Limitation Act, as is made clear by the abovementioned judgment, would apply to the IBC right from its commencement and the "date of default" will play a crucial role in determining if the right to sue is available to the party. This point is dealt with elaborately in the later part of the thesis.

The judgment delivered by the Hon'ble Supreme Court in Gaurav Hargovindbhai Dave vs. Asset Reconstruction Company (India) Ltd. and Ors. , further made it clear that The Act of Limitation will be applicatory to the applications filed under section 7 and 9 of the Code. The brief facts of the case were that the borrower was declared NPA on July 21, 2011. An application under section 7 of the IBC was filed on October 3, 2017. The NCLT while applying article 62 of the Limitation Act, 1963, held the period of limitation to be 12 (twelve) years from the date when the money sued for, becomes due. Accordingly, it held that the application was filed within the limitation period and admitted the application. The NCLAT held that the time of limitation would begin to run for the purposes of limitation only from December 1, 2016 i.e. when the IBC was brought into force. Consequently, it dismissed the appeal.

Moreover, In V Hotels Ltd., Tulip Star Hotels Ltd. v. Asset Reconstruction Co. , the NCLAT while allowing the appeals and holding that the application under section 7 was not maintainable emphasized that Article 62 of the Limitation Act which would not come into play in the context of IBC as it only applies to suits. It further stated that the present case was an application filed under section 7 of the Code and hence, would fall within the purview of Article 137 of the Limitation Act.

In Jignesh Shah & ors v. UOI , the Apex Court emphasized and reiterated its annotation in B.K. Educational Services Ltd., that the Winding up petition filed beyond the period of three years from the date of default, as mention in Article 137 of the limitation Act was time barred and therefore, could not be proceeded with any further.

As rightly opined by the Tribunals and Supreme Court in the above-mentioned judgments, the purpose of the legislature, while introducing the Code could not have been to bring to life those debts which had already become obsolete. Hence, any application filed in relation to a debt which is time barred will be subject to rejection by the Adjudicating Authority.

LIMITATION PERIOD BEGINS FROM THE DATE OF DEFAULT

The most important aspect pertaining to applications filed under sections 7 and 9 IBC is the Date of Default. The clock starts ticking from the very date a default is committed. Any application filed after three years from the date of default gets barred by limitation.

Article 137 clearly mentions that limitation period starts "When the right to apply accrues." Section 7 (1) of the Code reads as " A financial creditor either by itself or jointly with [other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central government] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred" while section 8(1) of the Codes reads as "An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed."

Consequently, both, sections 7 and 8 indicate that an application for initiating the process of an insolvency resolution can be filed on the occurrence of a "default" and hence, the limitation period under Article 137 sets in motion from the date when the right to apply accrues, that is, the date of default under sections 7 and 8.

This has been asserted by Hon'ble Venugopal M., J. in Deepak Kumar v. Pheonix ARC Pvt. Ltd. ; "16. as Article 113 of the Limitation Act relates to suits, Article 137 of the Limitation Act pertains to "applications." Right to sue accrues when Default occurs."

Jignesh Shah & ors v. UOI , further clarifies that the dawning of the period of limitation starts right from the day the default occurs; "22. ...the starting point of the period of limitation is when the company is unable to pay its debts..."

It is imperative to point out that section 434 is a supposing provision referring to three circumstances in which a Company shall be deemed to be "unable to pay its debts" Under Section 433(e). In the first circumstance, if a demand is made by the creditor to whom the company owes a sum exceeding one lakh and due, requiring the company to pay the sum so due, and the company has for three weeks thereafter "neglected to pay the sum", or to secure or compound for it to the reasonable satisfaction of the creditor. "Neglected to pay" would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Similarly in the

second circumstance, if execution or other process is issued on a decree or order of any Court or Tribunal in favor of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. In the third circumstance, it is necessary to prove to the "satisfaction of the Tribunal" that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding up petition Under Section433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434."

A SUIT FOR RECOVERY DOES NOT SHIFT FORWARD THE DATE OF DEFAULT

The next point of contention with respect to IBC and limitation, which has created dubiety time and again, is whether a suit for recovery leads to an extension of the period of limitation as prescribed for filing applications under sections 7 and 9 of the Code.

A perusal of the judgments as mentioned below will make it clear that the trigger point for the purpose of limitation for filing a winding up petition or an application under section 7 or 9 of the Code is the date on which a default occurs. A suit for recovery is an entirely independent and distinct suit hence, cannot in any manner impact the limitation period within which a winding up proceeding is to be filed. Moreover, Section 18 of the Limitation Act clearly mentions that only an acknowledgement in writing signed by the party against whom a right is claimed can compute a fresh period of limitation.

It has been very aptly explained in Jignesh Shah & ors v. UOI that when time begins to run, the limitation period can only be extended in the manner as provided in the Limitation Act. Like an acknowledgement of liability under section 18 of the Limitation Act would certainly extend such a period of limitation. However, a suit for recovery based upon a cause of action that is within the limitation can in no way affect the separate and independent remedy of a winding up proceeding by somehow keeping the debt breathing.

The finding in V Hotels Ltd., Tulip Star Hotels Ltd. v. Asset Reconstruction Co. further reaffirms the aforesaid stance taken in Jignesh Shah while adding that an acknowledgement of liability under section 18 of the Limitation Act has to be in writing, duly signed by the party against whom such property of right is claimed.

Munshi Kumar Bhunsali & ors. v. Kotak Mahindra Bank & ors. also throw light on the matter by observing that the proceeding to prosecute a suit against a company for recovery of debt cannot be taken into account while calculating the period of limitation as for the matter in question in a suit while that in a winding up petition is entirely distinct.

Furthermore, as reflected below in V. Padmakumar v. Stressed Assets Stabilisation Fund (SASF) & anr. , the NCLAT was of the same view in holding that a suit of recovery will not aid in moving forward the limitation period. It further stated that a judgment or a decree passed by a Court or DRT for recovery of money cannot extend the period of limitation for the purpose of computing the period for filing an application under section 7 of the IBC.

Therefore, a suit for recovery involves an issue that is altogether different from the issue involved in a winding up petition and hence, such a suit must not in any way affect the period of limitation and only an acknowledgement as mentioned in Section 18 of the Limitation Act will result in an extension of the period of limitation.

SECTION 18 OF THE LIMITATION ACT AS APPLICABLE TO SECTIONS 7 AND 9 OF THE CODE

ACKNOWLEDGEMENT U/S 18 OF THE LIMITATION ACT AND ITS REQUIREMENTS

In order to understand the effect of section 18 on applications filed under sections 7 and 9 of the Code, we must first understand the word "acknowledgement" as mentioned in section 18 of the Limitation Act. In order to do so, it is pertinent to first go through section 18 exhaustively.

Section 18 of the Limitation Act, 1963:

Effect of acknowledgment in writing— (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or

right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,— (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right, (b) the word "signed" means signed either personally or by an agent duly authorized in this behalf, and (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

Setting forth the essential requirements of an acknowledgement, in Khan Bahadur Shapoor Freedom Mazda v. Durga Prasad Chamaria , the Apex Court opined that Section 18(1) says, inter alia, that where before the expiration of the period of limitation prescribed for a suit in respect of any right, an acknowledgement of liability in respect of such right has been made in writing and signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

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Furthermore, it is pertinent to take a look at clause (2) of section 18 of the Limitation Act. This clause divulges the situation where an acknowledgement is undated. For such an undated acknowledgement oral evidence may be given about the time when it was signed. However, it prescribes that subject to the provisions of the Indian Evidence Act, 1872, such oral evidence may only be given for the time and not for the contents of the document.

Munshi Kumar Bhunsali & ors. v. Kotak Mahindra Bank & ors. , the NCLAT further elucidated on a salient point to be considered while discussing acknowledgement with respect to the IBC is that an acknowledgement must be made within the limitation period. Any such acknowledgement of liability that is made after the period of limitation has expired will not resurrect a time barred claim as there can only be an acknowledgement of an existing and subsisting liability.

In Vivek Jha v. Daimler Financial Services India Pvt. Ltd. & Anr. , the effect of an acknowledgement was meticulously explained by Hon'ble Venugopal. M., J. as follows: "31…An

"acknowledgement" of liability not only saves the limitation period but also confers on an individual a "cause of action" on him to lay his claims. In this case, the appellant had made a payment of 3 lacks rupees through cheque on March 18, 2015 and that the said payment was made after the issuance of loan recall notice dated May 6, 2014 and later a demand notice dated August 17, 2017 was issued by the respondent to the appellant and co-borrower in respect of the loan agreement dated March 28, 2018 where the Corporate Debtor had agreed to pay Rs. 1,08,755/- per month beginning from March 30, 2013 to March 30, 2016 and also this tribunal keeping in mind that the application under section 7 of the IBC was filed by the respondent before the Adjudication Authority on December 16, 2017 this tribunal comes to a consequent conclusion that the claims of the respondent is not barred by the plea of limitation."

One very important aspect that is more than often missed out is that an "acknowledgement of debt" must relate to an admission of an existing relationship of a debtor and creditor and their intention to continue it must also be evident. An unequivocal and unqualified admission of "debt" is to be established and simple admission of debt is sufficient in so far as "acknowledgement" is concerned . An acknowledgement has to be in writing, within the period of limitation and it is to be signed by the litigant party whom the property or right is claimed. Moreover, an unconditional acknowledgement is enough to 'furnish a cause of action' for it implies a promise to pay.

From a reading of the above rulings, a few pertinent points become apposite to an acknowledgement under section 18 of the Limitation Act, which are as follows:

- Firstly, an acknowledgement must be an unconditional acknowledgement with regard to a subsisting liability, made in writing and signed by the person against whom the right is claimed.
- Secondly, it must be made before the applicable period of limitation has expired.
- Thirdly, the acknowledgement must suggest the existence of a jural relationship between the parties.
- Fourthly, acknowledgement as stated in the Limitation Act only starts a fresh period of limitation from the date the acknowledgement is signed by the party against whom a subsisting liability is claimed and does not create a new right of action.

WHAT MAY OR MAY NOT CONSTITUTE AN ACKNOWLEDGEMENT

The Hon'ble Tribunal through synchronous judgments has resolved that Balance Sheet or Annual Returns cannot be taken into account to elongate the period of limitation.

In RKG International v. Goradia Special Steels Ltd. , it was established by the Hon'ble Tribunal that: "14. The petitioner has submitted that the Corporate Debtor in its balance sheet showed Sundry Creditors to the tune of Rs. – for the year ending 31/3/2011. However, on perusal of B/S for the said year as submitted by the petitioner, it is observed that what is stated in the said B/S cannot be an acknowledgement of liability in respect of the claim amount made in writing signed by the parties for the purpose of extending the period of Limitation under section 18 of the Limitation Act. The Corporate Debtor has not made entry in his B/S regarding the amount due to the petitioner. Thus, the balance of Sundry Creditors as shown in the B/S of Corporate Debtor is of no avail to the petitioner."

In V Hotels Ltd., Tulip Star Hotels Ltd. v. Asset Reconstruction Co. , the NCLAT arrived at the same conclusion by holding that books of Account cannot be treated as an acknowledgement of liability.

In V. Padmakumar v. Stressed Assets Stabilization Fund (SASF) & anr. , the NCLAT gave a very analytical explanation as to why Balance Sheet or Annual Return cannot be constructed as acknowledgement. Firstly, the NCLAT observed that as filing of Balance Sheet/Annual Return is compulsory under section 92(4) of the Companies Act and a failure to do so results in penal action under section 92 (5) and (6), the Balance Sheet/Annual Return of the "Corporate Debtor" cannot be treated to be an acknowledgement under section 18 of the Limitation Act. Secondly, if we hypothetically accept that the Balance Sheet/Annual Return of the "Corporate Debtor" amounts to acknowledgement under section 18 of the Limitation Act then in such cases no limitation would be applicable as every year it is compulsory for the corporate debtor to file Balance Sheet/Annual Return, which is not the law.

Another facet is if a judgment or a decree passed by a Court for recovery of money by the Civil Court/DRT would amount to extending the date of default for the purpose of computing the period for filing an application under section 7 of the IBC.

The NCLAT, in G.E Rao v. Stressed Assets Stabilization Fund , while holding that a Balance Sheet/ Annual Return cannot be treated as an acknowledgement, also noted that a decree passed by the DRT or a suit will not extend the limitation period.

Further, in Ashish Kumar v. Vinod Kumar Pukhraj Ambavat , it was held by the Tribunal that an OTS (One time settlement) letters the corporate debtor had offered to pay varying amounts to Allahabad Bank/Respondent No. 2 for full and final settlement of liability and thereby admitted the jural relationship of debtor-creditor.

In Akram Khan v. Bank of India Ltd. & Anr. , the NCLAT observed that an application moved by the Corporate Debtor for reconstruction of the debt or the payment of interest, would not amount to an acknowledgement.

However, if a part of the debt is paid before the expiry of the period of limitation, a fresh period of limitation will start from the day the part payment is made. In the case of Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd. , it was held that S.19 provides for a fresh period of Limitation in case of part payment of a debt to be computed from the date of such payment. The facts of the case were that the last of the part payments was made by opposite party no. 1 on July 17, 1985 which was well within the prescribed period of Limitation from the date of the bills and hence, a fresh lease of life was given to the petitioner company. If computed with effect from June 17, 1985 the period of three years prescribed under Article 15 expired on June 17, 1988. Any claim preferred beyond June 17, 1988, for realization of debt by way of filing suit or otherwise stood barred. The present petition was filed on September 29, 1992 and was more than four years after the debt had become time barred.

Besides, an email in which the debtor conspicuously accepts his liability will be a valid acknowledgement, as was seen in, Michael Hart v. Nine Star Info Tech . The facts of the matter being, that an e-mail dated April 1, 2008, had been sent by the managing director, admitting the liability of the respondent company and the issuance of the promissory note in favor of the appellant. In the said e-mail the respondent company had clearly admitted the fact that it could not make the payments, payable to the appellant, due to financial constraints. Additionally, it was held that the argument that the promissory note produced by the appellant was not sufficiently stamped and it is defective were beyond the scope of a company proceeding.

At the same time in, Shri Hari Electricals v. Royal Palms, it was held that a correspondence exchanged between the parties did not constitute an acknowledgement as the respondent did not admit his liability.

A perusal of the above two decrees makes it clear that for an email, a letter or a correspondence to constitute an acknowledgement, an acceptance of liability must be given by the party against whom a right is claim. Any other sort of exchange between the parties disputing or denying the liability will not extend the limitation period.

CONCLUSION

In lieu of the above judgments, it can thus, simply be deciphered that limitation once commenced, cannot be interrupted unless there is either a part payment made before the expiry of the limitation period or there is an acknowledgement in writing made before the expiration of the limitation period by the party against whom a right is claimed.

For any writing to constitute an acknowledgement there must be a clarion admission of debt and the establishment of a jural relationship between the parties. Any letter, correspondence, email, OTS which clearly admits and acknowledges the liability before the period of limitation comes to an end will amount to an acknowledgement. However, a mere application moved by the "Corporate Debtor" to restructure debt or payment of interest, per contra, will not compound into an acknowledgement.

Furthermore, Books of Accounts do not constitute an acknowledgement under section 18 of the Limitation Act. It has been held time and again that a Balance Sheet or an Annual Return cannot shift forward the period of limitation. The reason for this is considerably intelligible in the sense that the Companies Act makes it necessary for filing of annual returns within the specified period, failing which the company and its officer who is in default shall be liable to a penalty of fifty thousand rupees which may extend to the maximum of five lakh rupees. Consequently, for the Balance Sheet or Annual Returns to amount to an acknowledgement it must be construed that no limitation is applicable as the Balance Sheet and Annual Returns are to be filed every year, which is not the law.

Another very important aspect while studying what makes up an acknowledgement are: judgments and decrees. The judgments and decrees passed by the courts and tribunals do not constitute an acknowledgement as they merely decide that the debt became due and payable and do not shift the

date of default. It is not that after passing a judgment or decree, the default takes place immediately. By filing an application under section 7 of the IBC a decree cannot be executed. In such a case, it will be covered under section 65 IBC which stipulates that IPR or liquidation proceeding if filed fraudulently attracts penal action.