

NATIONAL COMPANY LAW TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

C.P NO. (IB)108(PB)/2017
CA NO.

CORAM:

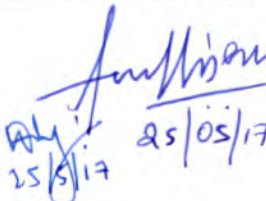
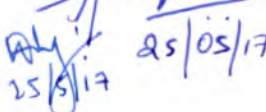
PRESENT: CHIEF JUSTICE M. M. KUMAR
Hon'ble President

Ms. Deepa Krishan
Hon'ble Member (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE PRINCIPAL BENCH OF
THE NATIONAL COMPANY LAW TRIBUNAL ON 25.05.2017

NAME OF THE COMPANY: Sanjay Bagrodia
Vs
Sathyam Green Power Pvt. Ltd.

SECTION OF THE COMPANIES ACT: U/s. 9 (IBC)

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
01	ANUSH RAJAN	ADVOCATE	FOR PETITIONER	 25/5/17
02	UDDYAM	MUKHERJEE	ADVOCATE FOR RESPONDENT	 25/5/17

ORDER

It is a material and substantive fact to notice at the outset that default of unpaid debt occurred in September, 2013 as it is expressly mentioned in the demand notice itself (Annexure-I) dated 16.02.2017 and the same reads as under:

PARTICULARS OF OPERATIONAL DEBT	
1. TOTAL AMOUNT OF DEBT, DETAILS OF TRANSACTIONS ON ACCOUNT OF WHICH DEBT FELL DUE, AND THE DATE FROM WHICH SUCH DEBT FELL DUE	Total amount of debt: Rs.71,93,843/- (Rupees Seventy One Lakhs Ninety Three Thousand Eight Hundred and Forty Three) for the period of October, 2012 to September 20, 2013, as salary from Sathyam, along with interest @ 18% from the date of salary becoming due until payment and/or realization thereof. Debt amount fell due from: October 2012
2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED	Amount Rs. 71,93,843/- (Rupees Seventy One Lakhs Ninety Three Thousand Eight Hundred and Forty Three) from October 2012 onwards.

2. Thus, the preliminary question, which arises for our consideration, is whether insolvency process can be triggered in a matter where the default had occurred beyond a period of 3 years and the claim has become time barred on account of period of limitation prescribed by the Limitation Act, 1963 or by virtue of rule of prudence developed by the Courts. The principal Bench of this Tribunal in the case of M/s. Deem Roll-Tech Limited vs. M/s. R.L. Steel & Energy Limited [Company Application No. (I.B.)24/PB/2017] has already taken the view that the period of limitation would be applicable as the claim made by the Operational Creditor was barred by limitation and was being made after the expiry of period of three years. The views of the Principal Bench are evident from the following paras which read thus:

“Be that as it may on a perusal of the records available before us, particularly taking into consideration the invoices as detailed above annexed as Annexure – 3 (colly) to the petition coupled with the Copy of the Ledger Account for the year 2011, 2012, 2013 and 2014, all annexed as part of Annexure – 4 (Colly), it is evident that the invoices relates to the period between February 2011 to January 2012 and the non-payment of dues is claimed to be in relation to 3 invoices as detailed above, and the last date of payment as per the ledger account for the period between 1.4.2013 to 31.3.2014 is that of 25.2.2014 where in a sum of Rs.2,00,000/- is shown as received from the respondent and for the year ended 31.3.2014 the closing balance is disclosed to be in a sum of Rs.5,59,660/- as due from the respondent company. For the year ended 31.3.2015 as well as 31.3.2016 the same amount figures as the closing balance due from the respondent as per the ledger accounts certified by the petitioner. The same seems to be the story for the period commencing from 1.04.2016 to 31.03.2017? as found in page number 26 of the petition. It is pertinent to note that none of the ledger accounts produced and the closing balances stated therein have been confirmed by the respondent company nor any other acknowledgements issued by the respondent produced by the petitioner. In view of the above facts we do not have any hesitation in holding that the amount claimed as a ‘debt’ by the petitioner, as against the respondent giving a ground for triggering the insolvency



process as contemplated under IBC is time barred and hence the petition is liable to fail keeping in view the provisions of IBC as delineated hereunder:-

'Debt' is defined under section 3(11) of IBC to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. 'Claim' is defined under sec 3(6) of IBC as follows:

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

It is also relevant to consider the definition of 'operational debt' and 'operational creditor' which seems to have given rise to the instant petition. Operational debt is defined under sec 5(21) of IBC to mean a claim in respect to the provision of goods or services including employment or a debt in respect of the debt in respect of repayment of dues arising under any law for the time being in force and payable to the central government, state government or any local authority and an operational creditor is defined in sec 5(20) of IBC means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. As per section 60 of IBC this Tribunal has been designated as adjudicating authority in relation to corporate persons. Further as per clause (c) sub-Section (5) section 60, this tribunal is enjoined with the jurisdiction to entertain or dispose off any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this code. Sec 255 of IBC provides that the Companies Act 2013 shall be amended in the manner specified in the eleventh schedule to IBC and a perusal of the eleventh schedule of IBC discloses the amendments made to the Companies Act 2013 of several provisions though not section 433 of the Act wherein specifically the provisions of the Limitation Act 1963 (36 of 1963) is made applicable and that it shall,

AT

12

as far as may be apply to the proceedings or appeals before the Tribunal or Appellate tribunal as the case may be. Hence in the absence of any specific bar in the IBC to the application of the Limitation Act, 1963 coupled with the provisions of Sec 433 of the Act as contained in the Companies Act 2013 which makes Limitation Act applicable to this Tribunal the debt as claimed by the petitioner is barred by limitation and hence cannot be the basis for invoking IBC before this Tribunal”.

3. Mr. Mehta, learned Counsel for the Operational Creditor has however, argued that the aforesaid view was taken without any detail discussion of various judgments rendered by the Hon'ble Supreme Court laying down that the Tribunal are creatures of a Statute and the Limitation Act, 1963 cannot be read into the Statutes creating the Tribunals unless it is expressly provided. In support of his submission, learned Counsel has placed reliance on the judgments of the Supreme Court in the cases of ***L.S. Synthetics Ltd. v. Fairgrowth Financial Services Ltd. & Anr. (2004) 11 SCC 456*** and ***M.P. Steel Corporation v. Commissioner of Central Excise (2015) 7 SCC 58*** and has argued that in the absence of any provision made by the Insolvency and Bankruptcy Code, 2016 (for brevity 'IBC') expressly incorporating the provision of the Limitation Act, no such provision can be read into the 'IBC'. Learned Counsel has also pointed out that this Tribunal must perform its functions within the parameters laid down by IBC. The argument proceeds that the IBC is a consolidated piece of legislation as is patent from the reading of its preamble. In that regard, Mr. Mehta has also drawn our attention to Section 238 of IBC and has argued that this is a non-obstante clause which provide that the 'IBC' will have its effect notwithstanding anything inconsistent therewith contained in other laws for the time being in force.

4. It is pertinent to mention that in the present case the default has occurred in respect of non-payment of salary for the period October 2012 to September

20, 2013. The present petition has been filed before this Tribunal on 12.05.2017. If the period of three years is applied, it expires on September 20, 2016. It is thus obvious that the claim has been made long after the expiry of period of three years. In the case of L.S. Synthetics Ltd., (supra) the issue raised was whether the provisions of Limitation Act, 1963 would apply to the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992.

5. In that case a notification was issued on 2.7.1992 by the Custodian notifying Respondent No. 1 as a notified party in terms of the provisions of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (for short "the 1992 Act"). The Appellant had obtained short-term loans amounting to Rs. 14.25 lakhs from the notified party during the period 1.4.1991 to 6.6.1992 as specified in the 1992 Act. The Custodian called upon the appellant to furnish particulars of the said loan. The Appellant accepted the said amount to be outstanding as on 30.6.1992 in the books of Respondent No. 1 payable to him. On the said amount of loan, interest at the rate of 21% per annum was payable. The Custodian directed the appellant to deposit the principal amount. On failure of the appellant to comply with the said direction, Respondent No. 1 initiated proceeding before the Special Court praying for a direction upon the appellant to pay to the Custodian a sum of Rs. 34, 99,900.68/- on his behalf.

6. The contentions of the appellant before the Special Court and also before Hon'ble the Supreme Court were that it having furnished full details of the amount in question to the Custodian in 1993, the claim was barred by limitation and the 1992 Act did not enable the respondent to recover any time-barred debts from it. The Limitation Act, 1963 is applicable only in relation to certain applications and not all applications despite the fact that the words "other proceedings" were added in the long title of the Act in 1963. It was held in the

facts and circumstances of that case that the provisions of the 1963 Act are not applicable to the proceedings before bodies other than courts, such as quasi-judicial tribunal or even an executive authority. The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act, 1963 per se may not be applied to the proceedings before it. Even in relation to certain civil proceedings, the Limitation Act may not have any application due to *suo motu* exercise of powers by the court. Even no period of limitation is prescribed in relation to a writ proceeding. In terms of provisions of the 1992 Act, no period of limitation is prescribed, evidently because the Parliament thought it to be wholly unnecessary. Once the statutory operation relating to the attachment of the property belonging to a notified person comes into being, the duties and functions of the Special Court start. In relation to the duties and functions required to be performed by a court of law, no period of limitation need be prescribed. The attachment of the properties of the notified party being for specific purposes i.e. for the purpose of discharging his liabilities, the Special Court is bound to pass appropriate orders in relation thereto. A property once attached shall remain under attachment till an appropriate order is passed. It is, therefore, idle to contend that even in respect thereof the provisions of the Limitation Act would apply.

7. A proceeding before the Special Court is not a suit for recovery of an amount. The proceedings before the Special Court are extraordinary in nature. The provisions of the Limitation Act would *inter alia* apply only when a suit is filed or a proceeding is initiated for recovery of an amount and not where a property is required to be applied towards the claims pending before the Tribunal for the purpose of discharge of the liabilities of the notified person in

terms of Section 11 of the 1992 Act. A Special Court having regard to its nature and functions may be a court within the meaning of Section 3, Evidence Act, 1872 or Section 3 of the Limitation Act, 1963 but having regard to its scope and object and in particular the fact that it is a complete code in itself, the period of limitation provided in the schedule appended to the Limitation Act, 1963, will have no application. Section 13 of the said Act provides for a non- obstante clause which has been used as a device to modify the ambit of provisions of law mentioned therein or to override the same in the specified circumstances. In a case of conflict between the said Act and any other Act, the provisions of the former shall prevail.

8. It is thus, evident that the issue raised in the case of L.S. Synthetics Ltd. (supra) is entirely different than the one raised before us. The distinction is marked by italics. In the present case, there is no statutory operation relating to attachment of property belonging to a notified person which has come into being which is a pre cursor for the Special Court to start discharging its functions. In the present case, there is no duty and function cast on the Tribunal to perform with regard to notify a person in terms of the provisions of 1992 Act in respect of an attached property. The delay, if any, had occurred at the hands of the applicant. In the present case, the whole function and duties is thus on the shoulder of the Applicant to avail its remedy within period of limitation to assert its rights which may be parallel to the one in L.S. Synthetics case.

9. Even the Judgment in the case of M.P. Steel Corporation would not have any application to the proceedings initiated before this Tribunal as their Lordship of the Hon'ble Supreme Court were considering the provisions of Section 14 of the Limitation Act and the question of retrospective application of the period of

limitation was being considered.



10. The argument of Mr. Mehta can also not be accepted for another significant reason. There is broad indication implicit in the IBC for application of the Limitation Act, 1963 itself. In that regard, Section 60(6) makes an interesting reading which is as under:

“(6) Notwithstanding anything contained in the Limitation Act, 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”.

A perusal of the above quoted provision would show that for computing the period of limitation specified for any suit or application by or against a corporate debtor, the period during which such moratorium has remained in operation is to be excluded. In other words, if the resolution of insolvency has failed then in case a suit or application is filed then moratorium period has to be excluded. If an Operational Creditor has approached the NCLT after three years or prescribed period of limitation then, how his claim in the suit or application could be within the period of limitation prescribed. The simple result flowing from the plain reading of Section 60(6) IBC is that the claim made before the NCLT must also be within the period of limitation as prescribed by the Limitation Act, 1963.

11. Even otherwise the rule of prudence would require that public policy of law must be given effect which is widely followed namely it does not come to the rescue of those who sleep over their rights. It come to the help of those who are vigilant. Before a Constitution Bench of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh v. Bhailal Bhai & Ors. AIR 1964 SC 1006***, the question arose whether any period of limitation can be implied for a litigant

to file a writ petition. Their lordships of Hon'ble the Supreme Court held that the maximum period of limitation prescribed for filing a writ petition cannot be more than the one prescribed for filing of a civil suit. The judgment has been followed and applied umpteen times. Obviously, the aforesaid principle of prudence has been laid down when there is no limitation prescribed in the Constitution under Article 226 or Article 32 of the Constitution. When the period of limitation was absent for filing of a writ petition, Hon'ble the Supreme Court has taken the view that the period of limitation as prescribed in the Limitation Act would be the maximum. Constitution is supreme and fundamental law of/and all laws take guidance from the Constitution. Therefore, it is binding on all including this Tribunal.

12. Then we ask learned Counsel for the Applicant whether an application under IBC would be maintainable to recover the amount which fell due 50 years ago. Mr. Mehta, learned Counsel for the Applicant lowered his eyes and was not able to propose any straight answer. We are thus of the considered view that this Tribunal cannot be a flowering pot for claims which have become dead and are wholly time barred.

13. The other argument based on Section 238 of IBC would also not advance the case of the applicant because Section 238 only postulates that if there is any conflict between the provisions of IBC and any other existing law then IBC would prevail. It is obviously a non-obstante clause. Nothing has been pointed out to us to highlight any conflict so as to attract the application under Section 238 of the IBC.

14. Mr. Mehta then made an attempt to raise the issue that there is in fact an acknowledgement of the unpaid debt. In that regard, he has made a reference to the reply to the notice dated 08.02.2017 urging that it was a final denial.

However, no document could be referred which could lead to an inference that the liability has been acknowledged within the period of three years and acknowledgement has infused a fresh lease of life extending it further. Therefore, no acknowledgment could be shown which may constitute the basis for extending the period of limitation.

15. As a sequel to the above discussion, this Petition fails and the same is dismissed.

Sd/-

**(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT**

Sd/-

**(DEEPA KRISHAN)
MEMBER(TECHNICAL)**

25.05.2017
V.Sethi