

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. No.1333/I&BP/2017

Under section 9 of IBC, 2016

In the matter of
Machhar Polymer Pvt. Ltd.
....Applicant

v/s.

Sabre Helmets Pvt. Ltd.
....Respondent

Order delivered on: 03.10.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner : Mr. Shyam Kapadia, Advocate.
For the Respondent : None.

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

Heard and pronounced on 28.9.2017

It is Company Petition filed u/s 9 of Insolvency & Bankruptcy Code (Code) by the Operational Creditor against the Corporate Debtor on the ground that the Petitioner raised invoices dated 31.07.2014 for an amount of ₹3,57,160 and another invoice dated 16.09.2014 for an amount of ₹2,49,184 towards the goods namely polymers supplied to the Corporate Debtor, when this Debtor failed to make payment against the amounts raised through above mentioned invoices, the Petitioner issued Section-8 Notice on 10.06.2017 under IB Code, since neither payment has been made nor the corporate debtor replied

to Section-8 Notice within 10 days from the date of receipt of Section-8 notice, the Petitioner filed this petition for initiation of Insolvency Resolution Process under the Code against this Corporate Debtor, hence this Petition.

2. Looking at the facts of the case, we have ascertained that the Petitioner sent Section 8 notice for two invoices dated 31.07.2014 and 16.09.2014 for payment, since this Petitioner has not received the aforesaid amounts, the Petitioner filed this Petition on 22.08.2017 u/s 9 of Code, by the time one of the invoices raised on 31.07.2014 was time barred.

3. Therefore, now the point to be decided is as to *whether or not this petition should be admitted u/s 9 when one of the invoices is time barred by the time Company Petition filed.*

4. Before going into facts of the case, this Bench is obliged to say that it is general and settled proposition that prosecuting party cannot seek remedy over time barred debt. For one of the invoices is time barred, to get over this point, the Petitioner's Counsel Mr. Sam Kapadia relied upon a judgment passed by Hon'ble National Company Law Appellate Tribunal (NCLAT) in *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Ltd. (Company Appeal 44/2017 dt. 11.08.2017)*, by placing para 24, which is as follows:

"The next ground taken on behalf of the appellant is that the claim of the respondent is barred by limitation, as the Debentures were matured between the year 2011-2013 is not based on law. There is nothing on the record that Limitation Act, 2013 is applicable to I & B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B Code to suggest that the Limitation Act, 1963 is applicable. I&B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and

there is default of debt and having continuous course of action, the argument that the claim of money by respondent is barred by Limitation cannot be accepted".

5. On reading this para dealt with Limitation aspect by Hon'ble NCLAT, it appears to us that Hon'ble NCLAT said that Code has nowhere envisaged that Limitations Act is applicable to I & B Code, it is true, as Honorable NCLAT said, it is nowhere said in I & B Code that Limitation Act is applicable to it, but it is also nowhere said in the Code that Limitation Act is not applicable to it. Perhaps for that reason only, Honorable Appellate Tribunal, in the last sentence of the same para, held *"If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by respondent is barred by Limitation cannot be accepted"*.

6. Therefore taking out one sentence out of context to say that the Code is not governed by limitation is not permissible in jurisprudence. If quoted para is read as a whole, it is clear that the contention of the appellant that debt is barred by limitation has not been decided by Honorable Appellate Authority holding that *"There is nothing on the record that Limitation Act, 2013 is applicable to I & B Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of I & B Code to suggest that the Law of Limitation Act, 1963 is applicable. I&B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process."*

7. On the contrary, the point raised by the appellant has been decided against the appellant saying since existence of validity of debentures being a continuous course of action, **the argument of the appellant saying claim by the Respondent is time barred is not accepted. Meaning thereby, the reason given by the Appellate Authority to turn down the plea that claim is time barred is not by saying Limitation Act is not applicable but by saying the**

claim is saved by limitation because it is a continuous course of action. This Bench need not separately say that reason given to a decision alone will become ratio, but not a statement not leading to a decision in any adjudication.

8. Yes, it is obviously not a Code meant for recovery of money claims, but for initiation of Insolvency Resolution Process. Here, the point to remember is for recovery of money, the cause of action is **existence of debt and occurrence of default**, likewise for filing case under I & B Code, cause of action is **existence of debt and occurrence of default**– same as that of recovery of money. This must be the reason for legislature to miss out limitation aspect in the Code – in the code it has not been said as either applicable or not applicable to the Code.

9. Non-mentioning of applicability of certain doctrines shall not be seen as doors open to this Bench to legislate such and such enactments are not applicable. Doctrine of limitation and prescription is such a doctrine that has universal application, and such application cannot be peeled out from any legislation unless it is said as not applicable. Application of Limitation Act has to be viewed as constructive application to uphold the sanctity of this Code as well as general jurisprudence emanating from various enactments in existence.

10. **By reading all the sentences of the para quoted in tandem, it appears that Hon'ble NCLAT categorically held that since it is a continuous course of action, the argument of the Appellant saying debt is barred by Limitation cannot be accepted, therefore, ratio decided by Hon'ble NCLAT cannot be stretched out to say that Limitation Act is not applicable to the Code. If limitation is not mentioned as applicable, it does not mean that courts get a right to set out prescription of limitation period on its own.**

11. If we come to the Code, we see many words that normally come in money recovery suits, that is debt, dispute, default, creditor, debtor, etc., most

of which do not appear in Companies Act, and issues involved in the Code also revolve around claim of creditors.

12. In Section-6 of the Code, jurisdiction arises to the parties to initiate proceedings come from existence of debt and commitment of default, therefore whole exercise begins under this Code only when debt and default in existence, the same is the jurisdiction for recovery of money. Fundamentally, no difference. The only difference is summary alternative relief under this Code, in addition to recovery claim. It is a summary jurisdiction – in this jurisdiction, two aspects to be proved before admission u/s 7 or 9 or 10, one is existence of debt, two existence of default. Of course under section 8 & 9, crystallization of debt and default also mandatorily to be ascertained before admission.

13. Under section 433 (1) (e) of Companies Act 1956, there criteria for winding up is **inability of company to pay its debts** – inability or deemed inability is to be proved, here under the Code, no need of waiting to proceed until company is unable to pay its debts. Though proving company as insolvent is imperative under old dispensation, Limitation Act is applied. In the present dispensation, ability or inability of the company in paying its debts is not a criterion to file petition for admission under this Code, the common denominator to file petition under section 7 or 9 or 10 is debt and default, not inability in paying debts.

14. In the present dispensation, section 8 is precursor to file petition Section 9 Petition. By the time Company Petition filed u/s 9, the claim shall be within Limitation, that being the situation, the Petitioner today cannot take out an argument that by the time notice given u/s 8, since both the invoices upon which claim raised are within Limitation, therefore, even if one of the invoices claimed is time barred, by taking other invoice in limitation into consideration, claim against both the invoices shall be considered as within limitation for filing petition under section 9 of the Code.

15. Since debt u/s 8 shall be crystallized by the time notice u/s 8 given, such debt crystallized by the time notice given u/s 8 shall also remain within limitation by the time petition filed u/s 9 of the Code. But here, part of the debt that is within limitation by the time notice given u/s 8 has become time barred by the time case filed u/s 9 of the Code. The Petitioner has included time barred claim along with another claim within limitation in the petition filed u/s 9, solely on the assumption since both the invoices claims were within limitation when notice was given u/s 8, the composite claim has to be construed as within limitation, but such assumption cannot make a defective claim as enforceable debt.

16. Even in winding-up cases under Companies Act 1956, it has been held that time barred debt would not be considered as claim for filing winding-up Petitions. It is a fact that one should not forget that in Companies Act, 1956 it has not been said anywhere Limitation Act is applicable to it, still Limitation Act has been applied to Companies Act 1956 for more than century. Since it has become settled proposition that Limitation Act is applicable to Companies Act 1956, with all humility, we hereby hold that same analogy is applicable to this Code. Relief in winding-up petition is also not meant for recovery of money. Henceforth that defective invoice i.e. timebarred by Limitation being included in the claim, the claim that was not defective by the time notice given u/s 8 has become defective as on the date of filing case u/s 9 of the Code.

17. If we navigate through many of the major and fundamental laws, applicability of Limitation Act 1963 or 1908 Act has not been mentioned not only in Companies Act 1956, but also in various Acts, such as Contract Act, Transfer of Property Act, Sale of Goods Act and many other Acts, just as Insolvency and Bankruptcy Code. But in almost all cases, where court proceedings are initiated, Limitation Act is invariably applied for the reason mentioned in the following para.

18. Doctrine of limitation and prescription are based on – (1) that the rights which are not exercised for a long time are said to be as non-existence, (2) that, the rights which are related to property and rights which are in general should not be in a state of constant uncertainty, doubt and suspense. The intention in accepting the concept of limitation is that **“controversies are restricted to a fixed period of time, lest they should become immortal while men are moral.”**

19. If we take Insolvency and Bankruptcy Code in totality, it could be evident that it has nowhere been mentioned that Limitation Act is not applicable, but since application of limitation has not been specifically barred, it has to be understood that Doctrine of Limitation is applicable notwithstanding mention of applicability of Limitation Act, especially when limitation was all through applied in winding up cases under Companies Act 1956, which is in pari-materia to second stage in the Code, therefore we don't find any logic to say that Limitation Act is not applicable to Insolvency and Bankruptcy Code.

20. If we read Limitation Act, it is a general enactment governing right of remedy – right for recovery of money claim is prescribed as three years. The period begins running since debt has come into existence or as agreed between persons, likewise default is also being defined on such terms as agreed or as prescribed under Limitation Act. When such is the computation for recovery of debt, for there being no other computation prescribed for filing Insolvency Petition, to give effect to public policy of giving certainty to controversy, and having nonpayment of debt being cause of action to file insolvency petition, the same computation of limitation applied for recovery is applicable to insolvency petition. It is also pertinent to mention that no new right has been carved out under I & B Code, the remedy that was available under old Companies Act is made available in a modified version under new dispensation, therefore there is no merit to say that since it is a new enactment,

period of limitation will have to start from the day Code has come into force. Assuming limitation period started running from the date code has come into force, what happens – time barred debts will also get life for recovery.

21. What will ultimately happen in Insolvency Petition? Answer is distribution of assets to pay to the creditors, whether it is in the form of money suit or in the form insolvency, logical end is payment to the creditors by liquidation. It is like one shot, two birds – creditors and other stakeholders will get solution to their dues and maximization of value of the assets of corporate persons will happen in time-bound manner instead of allowing death of company after everything has been sucked into.

22. If limitation is said as not applicable or giving life to time barred debts under the cover of Insolvency and Bankruptcy Code, it will be nothing but opening the lid of uncertainty giving a big hand to the persons not diligent of their rights. If this is the case, tomorrow a person forgets of his remedy many years before will come saying company is to be liquidated basing on a time barred debt. Moreover, so far it is a legitimate expectation of everybody – creditors as well as debtors that time is prescribed for every right of remedy including a remedy for liquidation, therefore lest doctrine of limitation be diluted.

23. Another point ordinarily comes in between is non obstante clause in section 238 of the Code, by reading section 238, it appears that cloud of non-obstante clause prevails over other enactment to the extent inconsistent to the provisions of the Code, since it has not been envisaged in the Code that Limitation Act is not applicable, no provision under Limitation Act can be construed as inconsistent to the Code save and except the time periods mentioned in the Code. As to sections 7, 9 of the Code is concerned; no

limitation is envisaged for initiating proceedings under these sections, therefore Limitation Act is to be construed as applicable to the Code.

24. It can be an argument that since it is not a suit as mentioned in section 3 of Limitation Act 1963, it can't be applied to the proceedings of IBC. My answer to the point is Tribunals are already counted in equivalent to Courts as long as Tribunals have trappings of courts, likewise when an order is passed giving finality to a controversy, it is as good as decree, therefore any proceeding given finality to a controversy, such judicial proceeding can be like any other suit proceeding, in any event application being included in section 3 of Limitation Act, this petition under IB code shall be construed as suit or application, as the case may be, under Limitation Act.

25. Another interesting feature in section 3 of Limitation Act is the proceeding instituted basing on time barred claim *shall be dismissed although limitation has not been set up as defense*. Here, the corporate debtor is not present; going by section 3, this Bench hereby can decide limitation issue without any averment from the corporate debtor.

26. There is a situation where Limitation Act could not reach, that is Constitution, there whenever any writ either under Article 226 or on fundamental rights is filed, since constitution governs every other statute, the Limitation Act will remain applicable to other statutes, for this reason only, delay and laches doctrine has been carved out to meet the situation in constitutional matters.

27. In view of the reasons mentioned above, in whatever line so far limitation is applied to winding up cases, in the same line, prescription of limitation is applicable to the Code as well. As long as limitation is not

prescribed under any specific enactment, it goes without saying Limitation Act, 1963 is automatically applicable to the Code as well.

28. Therefore, for the reasons above mentioned, this Company Petition is **dismissed** with liberty to the petitioner to proceed in respect to the claim within limitation by invoking section 14 of Limitation Act 1963.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)