

Parag Gupta & Associates vs B.K. Educational Services Pvt. Ltd on 7 November, 2017

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

NEW DELHI

(Arising out of Order dated 11.04.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)-41(ND)/2017)

Company Appeal (AT) (Insolvency) No. 47 of 2017

IN THE MATTER OF:

MIs. Speculum Plast Pvt. Ltd.

... Appellant

Versus

PTC Techno Pvt. Ltd.

... Respondent

Present: For Appellant: Shri Shubho Jana and Ms. Kanti Mohan
Rustagi, Advocates

For Respondent: Shri Dhruv Gupta, Advocate

WITH

Company Appeal (AT) (Insolvency) No. 76 of 2017

(Arising out of Order dated 25.04.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)-27(PB)/2017)

IN THE MATTER OF:

Parag Gupta & Associates

Appellant

Versus

B.K. Educational Services Pvt. Ltd.

Respondent

Present: For Appellant: Shri Mukul K. Gupta and Shri N.K. Singh,
Advocates

For Respondent: Ms. Ruchi Khurana and Shri Pertpal
Singh, Advocates

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017

WITH

Company Appeal (AT) (Insolvency) No. 78 of 2017

(Arising out of Order dated 04.05.2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. (IB)-77(ND)/2017)

IN THE MATTER OF:

Ashlay Infrastructure Pvt. Ltd.

Appellant

Versus

LDS Engineers Pvt. Ltd.

Respondent

Present: For Appellant: Ms. Jhankar Rastogi with Shri Navodaya Singh Rajpurohit, Advocates

For Respondent: Shri H.D. Arya, Advocate

JUDGEMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

In all these appeals as common question of law is involved, they were heard together and are being disposed of by this common judgment.

The question that arises for determination in these appeals is: -

Whether Limitation Act, 1963 is applicable for triggering 'Corporate Insolvency Resolution Process' under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "I&B Code")? Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017

3. According to Learned Counsel for the appellant(s) 'I&B Code' is a 'Special Act' enacted by Parliament and is a 'self-contained code' and in absence of any specific provision made therein the Limitation Act, 1963 is not applicable for triggering 'Corporate Insolvency Resolution Process'.

4. To substantiate the arguments, Learned Counsel for the appellant(s) relied on the report of the 'Bankruptcy Law Reforms Committee' to suggest that the legislative intent behind the formulation of the 'I&B Code' is to formulate a 'single law', independent of any other law including the Limitation Act.

5. On the other hand, according to learned counsel for the Respondents-

'Corporate Debtor(s)' the Limitation Act, 1963 is applicable for triggering 'Corporate Insolvency Resolution Process' under 'I&B Code' which is to be read in conjunction with the provisions of the Companies Act, 2013 and other Acts, as far as they are applicable.

6. It was submitted that the 'Adjudicating Authority', as defined in sub-section (1) of Section 5 of the 'I&B Code' being 'National Company Law Tribunal' as constituted under Section 408 of the Companies Act, 2013, the provisions of Chapter XXVII of the Companies Act, 2013 including Section 433 of the said Act are applicable as it is not in conflict with the provisions of the 'I&B Code'.

7. Further, according to learned counsel for the 'Corporate Debtor(s)', as the 'I&B Code' nowhere specifically bars the applicability of the Companies Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 Act, 2013, Section 433 of the Companies Act, 2013 is applicable to 'I&B Code'.

8. Referring to Sections 424, 425, 433, 434 and 430 of the Companies Act, 2013, it was contended that the aforesaid provisions necessarily imply that the law of limitation and procedure of the Tribunal are applicable to the 'I&B Code'.

9. On merit, Learned Counsel for the 'Corporate Debtor(s)' submitted that all the application in question, having filed beyond the period of three years, the application for triggering 'Corporate Insolvency Resolution Process' were not maintainable.

10. Mr. A.S. Chandhiok, Learned Senior Counsel, who assisted the Court as Amicus Curiae, submitted that the Doctrine of Limitation and Prescription is based on two broad considerations.

First, there is a presumption that the right not exercised for a long time becomes non-existent. The second is that the rights of debt or right on property or rights in general should not be in a state of constant uncertainty, doubt and suspense.

Reliance was placed on Salmond: Jurisprudence 12th Ed. Page 438 and 439, and observation of Hon'ble Abbott CJ in Battley v. Faulkner [(1820) 3 B & Aid 288].

11. It was submitted that the above principles were also recognised by the Hon'ble Supreme Court of India in "Rajinder Singh v. Santa Singh, AIR 1973 SC 2537".

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12. It was further submitted that the object of fixing time-limit for litigation is based on Public Policy, fixing a life span of legal remedies for the purpose of general welfare as held by Hon'ble Supreme Court in "N. Balakrishnan V. M.A. Krishnamurthy, (1998) 7 SCC 123"

13. According to Learned Amicus Curiae, the Limitation Act was enacted in the year 1963, when the provisions relating to all kinds of winding up of the Companies were governed by the Companies Act, 1956 wherein the question of limitation arose at two stages i.e.

(i) When winding up petition was presented before the Hon'ble High Court, and

(ii) When the creditor presented its claim against the company in winding up before the Official Liquidator.

14. It was contended that it is a settled principle of law, that bar of limitation applied to the winding up petitions which used to be presented before the Hon'ble High Court and a creditor is not entitled to file a winding up petition based on a debt, if the debt is, otherwise time-barred.

15. Learned Amicus Curiae referred to Section 3 of Limitation Act, 1963 and submitted that the bar of limitation would apply to a claim filed by a creditor before the Official Liquidator attached to the Hon'ble High Court in terms of Companies Act, 1956, though the Official Liquidator is not a Court or a Judicial Tribunal or Quasi-Judicial Tribunal, but an executive appointed and authority recognized under the Companies Act, 1956. Such Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 'Official Liquidator' merely invites claims and submits report before the Hon'ble High Court.

16. According to him now under the 'I&B Code' the Insolvency Professional takes the position of the 'Official Liquidator', but with greater role to play, than the 'Official Liquidator'.

17. Learned Amicus Curiae also relied on Section 433 of the Companies Act, which provides that the provision of Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal as the case may be. It was also submitted that the Limitation Act, 1963 is also applicable for 'Corporate Insolvency Resolution Process'.

18. Learned Amicus Curiae placing reliance on sub-section (6) of Section 60 of the 'I&B Code' submitted that the said provision makes it clear that the Limitation Act, 1963 is applicable to the proceedings under 'I&B Code'.

19. It was further submitted that the legislature in sub-section (5) of Section 60 has not used the expression 'Adjudicating Authority', but retained the word 'National Company Law Tribunal' which also clears the intent of the legislature that Section 433 of the Companies Act, 2013 is applicable for triggering the 'Corporate Insolvency Resolution Process' under Sections 7 or 9 and 10 of the 'I&B Code'.

Reliance was also placed on definition of 'Adjudicating Authority' as defined under sub-section (1) of Section 5 of the 'I&B Code' which means Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of

2017 'National Company Law Tribunal' constituted under Section 408 of the Companies Act, 2013

20. According to Learned Senior Counsel, even if it is accepted that 'I&B Code' is 'self-contained Code', unless it expressly bars the provision(s), the other provisions can be made applicable. Reliance was placed on Hon'ble Supreme Court decision in "Girnar Traders (3) v. State of Maharashtra & Ors. (2011) 3 SCC 1", wherein two legislations fell for consideration before the Apex Court, namely the 'Maharashtra Regional and Town Planning Act, 1966 (MRTP Act)', and the 'Land Acquisition Act, 1894'. The appellant in the said case had urged that the provisions of the Land Acquisition Act would mutatis mutandis apply to an acquisition under the MRTP Act. The respondent had, in contradiction, taken plea that MRTP Act was a 'self-contained Code' in itself and as such the provisions of Land Acquisition Act could not be referred to. In the said case, the Hon'ble Supreme Court considering the aforesaid question raised by the parties held: -

"69. For an Act to be a "self-contained code", it is required to be shown that it is a complete legislation for the purpose for which it is enacted. The provisions of the MRTP Act relate to preparation, submission and sanction of approval of different plans by the authorities concerned which are aimed at achieving the object of planned development in contradistinction to haphazard development. An owner/person Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 interested in the land and who wishes to object to the plans at the appropriate stage a self-contained adjudicatory machinery has been spelt out in the MRTP Act. Even the remedy of appeal is available under the MRTP Act with a complete chapter being devoted to acquisition of land for the planned development. Providing adjudicatory mechanism is one of the most important facets of deciding whether a particular statute is a "complete code" in itself or not.

21. We have noticed the rival contentions, the relevant provisions of law and decisions, as referred to above.

22. For determination of the issue, it is to be noticed as to whether 'I&B Code' is a 'self-contained Code' or not.

In 'MIs. Innoventive Industries Ltd v. ICICI Bank & Anr', 2017 SCC OnLine Sc 10251, the Hon'ble Supreme Court noticed the statement of objects and reasons in passing the 'I&B Code' based on various reports, most important of which the report of Bankruptcy Law Reforms Committee of November, 2015, and observed: -

"13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 insolvency process. As per the data available with the World Bank in 2016, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 135 out of 190

countries on the ease of resolving insolvency based on various indicia."

23. In paragraph 16 of the said judgment, the Hon'ble Supreme Court noticed the Bankruptcy Law Reforms Committee Report of November, 2015 and the 'key economic question' in the Bankruptcy Process highlighted by Bankruptcy Law Reforms Committee, as quoted below: -

"The key economic question in the bankruptcy process When a firm (referred to as the corporate debtor in the draft law) defaults, the question arises about what is to be done. Many possibilities can be envisioned. One possibility is to take the firm into liquidation. Another possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on an NPV basis, and hope that the negotiated value exceeds the liquidation value. Another possibility is to sell the firm as a going concern and use the proceeds to pay Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 creditors. Many hybrid structures of these broad categories can be envisioned.

The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary) into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it."

xxx xxx xxx xxx "Speed is of essence Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the 'calm period' can help keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation.

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay." xxx xxx xxx xxx "The role that insolvency and bankruptcy plays in debt financing Creditors put money into debt investments today in return for the promise of fixed future cash flows. But the returns expected on these investments are still uncertain because at the time of repayment, the seller (debtor) may make repayments as promised, or he may default and does not make the payment. When this happens, the debtor is considered insolvent. Other than cases of outright fraud, the debtor may be insolvent because of Financial failure - a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues, or Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 • Business failure - which is a breakdown in the business

model of the enterprise, and it is unable to generate sufficient revenues to meet payments.

Often, an enterprise may be a successful business model while still failing to repay its creditors. A sound bankruptcy process is one that helps creditors and debtors realise and agree on whether the entity is facing financial failure and business failure. This is important to allow both parties to realise the maximum value of the business in the insolvency." xxx xxx xxx "Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this."

24. In the said decision of Hon'ble Supreme Court the 'Principles driving the design' the new Insolvency and Bankruptcy Resolution framework has been noticed as quoted below: -

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 "Principles driving the design The Committee chose the following principles to design the new insolvency and bankruptcy resolution framework:

I. The Code will facilitate the assessment of viability of the enterprise at a very early stage.

1. The law must explicitly state that the viability of the enterprise is a matter of business, and that matters of business can only be negotiated between creditors and debtor. While viability is assessed as a negotiation between creditors and debtor, the final decision has to be an agreement among creditors who are the financiers willing to bear the loss in the insolvency.

2. The legislature and the courts must control the process of resolution, but not be 'burdened to make business decisions.

3. The law must set up a calm period for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by creditors.

4. The law must appoint a resolution professional as the manager of the resolution period, so that the Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 creditors can negotiate the assessment of viability with the confidence that the debtors will not take any action to erode the value of the enterprise. The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The professional will manage the resolution process of negotiation to ensure balance of power between the creditors and debtor, and protect the rights of all creditors. The professional will ensure the reduction of asymmetry of information between creditors and debtor in the resolution process.

II. The Code will enable symmetry of information between creditors and debtors.

5. The law must ensure that information that is essential for the insolvency and the bankruptcy resolution process is created and available when it is required.

6. The law must ensure that access to this information is made available to all creditors to the enterprise, either directly or through the regulated professional.

7. The law must enable access to this information to third parties who can participate in the resolution process, through the regulated professional.

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 III. The Code will ensure a time-bound process to better preserve economic value.

8. The law must ensure that time value of money is preserved, and that delaying tactics in these negotiations will not extend the time set for negotiations at the start.

IV. The Code will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

V. The Code will respect the rights of all creditors equally.

10. The law must be impartial to the type of creditor in counting their weight in the vote on the final solution in resolving insolvency.

VI. The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.

11. The law must order the liquidation of an enterprise which has been found unviable. This outcome, of the negotiations should be protected Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 against all appeals other than for very exceptional cases.

VII. The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

12. The law must clearly lay out the priority of distributions in bankruptcy to all stakeholders. The priority must be designed so as to incentivise all stakeholders to participate in the cycle of building enterprises with confidence.

13. While the law must incentivise collective action in resolving bankruptcy, there must be a greater flexibility to allow individual action in resolution and recovery during bankruptcy compared with the phase of insolvency resolution."

25. The aforesaid 'principles driving the design' shows that the Code has been framed to facilitate the assessment of viability of the enterprise at a very early stage; to enable symmetry of information between creditors and debtors; to ensure a time-bound process to better preserve economic value; to ensure a collective process; to respect the rights of all creditors equally; to ensure that when the negotiations fail to establish viability; the outcome of bankruptcy must be binding and to ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy. Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017

26. The Hon'ble Supreme Court in "MIs. Innoventive Industries Ltd. Vs. ICICI Bank & Anr. 2017 SCC OnLine SC 1025" referring to different provisions of the 'I&B Code', observed:

"59. The Insolvency and Bankruptcy Code, 2016 is an Act to consolidate and amend the laws relating to reorganization and insolvency resolution, inter alia of corporate persons. Insofar as corporate persons are concerned, amendments are made to the following enactments by Sections 249 to 252 and 255 The Hon'ble Supreme Court further held: -

"60. It is settled law that a consolidating and amending act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein The Hon'ble Supreme Court further proceeded to hold: -

"63. There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List HI in the 7th Schedule which reads as under.-

nder:

"9.

'9. Bankruptcy and insolvency"

27. Thereby it is clear that the 'I&B Code' is complete code in itself. Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017

28. Limitation Act, 1963 is the general legislation on the law of limitation. Section 3 prescribes 'bar of limitation', as quoted below: -

"3. Bar of limitation.-- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. (2) For the purposes of this Act-- (2) For the purposes of this Act--"

(a) a suit is instituted--

- (i) in an ordinary case, when the plaint is presented to the proper officer;
 - (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and
 - (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;
- (b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted--

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- (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;
- (ii) in the case of a counter claim, on the date on which the counter claim is made in court;
- (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

29. In view of aforesaid provisions in 'Mukri Gopalan v. Cheppilat Puthanpuravil Aboobacker (1995) 5 SCC 5', the Hon'ble Supreme Court examined the question whether Limitation Act, 1963 will apply to the Kerala Buildings (Lease and Rent) Control Act, 1965. Though, the Court noticed that the Act prescribes a period of limitation, which is different from the period of limitation under the Limitation Act, 1963, in absence of any exclusion of Sections 4 to 24 of the Limitation Act 1963, the Hon'ble Supreme Court held that those Sections 4 to 24 of Limitation Act, 1963 shall be applicable to the Kerala Buildings (Lease and Rent) Control Act, 1965.

30. However, in 'Hukumdev Narain Yadav v. Lalit Narain Mishra (1974) 2 SCC 133', a three Judges Bench of the Hon'ble Supreme Court, while examining the question as to whether the Limitation Act, 1963 would be applicable to the provisions of Representation of People Act, held as under:

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 "17 but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation."

31. From the decision of Hon'ble Supreme Court in 'Hukumdev Narain Yadav v. Lalit Narain Mishra (1974) 2 SCC 133', it is clear that even if there exists no express exclusion in the special law, the court reserves the right to examine the provisions of the special law, to arrive at a conclusion as to whether the legislative intent was to exclude the operation of the Limitation Act, 1963 or not.

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32. To examine the legislative intent to decide whether the 'I&B Code' excludes the operation of the Limitation Act, 1963, it is desirable to refer the previous Acts on Insolvency, namely the 'Presidency-Towns Insolvency Act, 1909' and the 'Provincial Insolvency Act, 1920'.

33.. In Part VII of the 'Presidency-Towns Insolvency Act, 1909', the period of limitation was prescribed under Sections 101, which reads as follows:

"Limitation

101. The period of limitation for an appeal from any act or decision of the official assignee, or from an order made by an officer of the Court empowered under section 6, shall be twenty days from the date of such act, decision or order, as the case may be."

34. Section 101A related to computing the period of limitation for any suit or other legal proceedings, which reads as follows: -

"101A. Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or other legal proceeding (other than a suit or legal proceeding in respect of which the leave of the Court was obtained under section 17) which might have been brought but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 Provided that nothing in this section shall apply to any suit or other legal proceeding in respect of a debt provable but not proved under this Act."

35. Similarly in the 'Provincial Insolvency Act, 1920' under Section 78 the limitation was prescribed, as quoted below: -

"78. Limitation.--(1) The provisions of sections 5 and 1.2 of the Indian Limitation Act, 1908 (9 of 1908), shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree (2) Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree or (other than a suit or application in respect of which the leave

of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

36. The 'Presidency-Towns Insolvency Act, 1909' and the 'Provincial Insolvency Act, 1920' have been repealed by Section 243 of the 'I&B Code', relevant provision of which reads as follows: -

"243. Repeal of certain enactments and savings. - (1) The Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 are hereby repealed.

(2) Notwithstanding the repeal under sub-sections (1), -

(i) all proceedings pending under and relating to the Presidency Towns Insolvency Act 1909, and the Provincial Insolvency Act 1920 immediately before the commencement of this Code shall continue to be governed under the aforementioned Acts and be heard and disposed of by the concerned courts or tribunals, as if the aforementioned Acts have not been repealed;

(ii) any order, rule, not fication, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of any repealed enactment shall, if in force at the commencement of this Code, continue to be in force, and shall have effect as if the aforementioned Acts have not been repealed;

(iii) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments, shall be deemed valid;

(iv) any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall not be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repealed enactments;

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(v) any prosecution instituted under the repealed enactments and pending immediately before the commencement of this Code before any court or tribunal shall, subject to the provisions of this Code, continue to be heard and disposed of by the concerned court or tribunal;

(vi) any person appointed to any office under or by virtue of any repealed enactment shall continue to hold such office until such time as may be prescribed; and

(vii) any jurisdiction, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not in existence or in force shall not be revised or restored.

(3) The mention of particular matters in sub-section (2) shall not be held to prejudice the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal of the repealed enactments or provisions of the enactments mentioned in the Schedule."

37. Though the aforesaid two Acts have been repealed, in the 'I&B Code', the Legislature did not choose to prescribe any separate provisions of Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 'limitation' as was made in Section 101 of the 'Presidency-Towns Insolvency Act, 1909' or sub-section (1) of Section 78 of the 'Provincial Insolvency Act, 1920' whereunder provisions of Sections 5 and 12 of the 'Indian Limitation Act, 1908' were made applicable to appeals and applications under the aforesaid Acts and the decision under the provisions was treated to be decree.

38. However, the provision of computing the period of limitation prescribed for any suit or other legal proceeding, as ordered to be excluded in Section 101A of the 'Presidency-Towns Insolvency Act, 1909' and sub-section (2) of Section 78 of the 'Provincial Insolvency Act, 1920' has been retained with appropriate modification under sub-section (6) of Section 60 of the 'I&B Code', as quoted- below: -

"60. Adjudicating Authority for corporate persons. - (6) Notwithstanding anything contained in the Limitation Act, 193 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."

39. The aforesaid provisions, makes clear the intent of the Legislature which necessarily excluded the provisions of Sections 4 to 24 of the Limitation Act, 1963.

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40. A separate time period has been prescribed under different provisions of the 'I&B Code' such as:
-

Fourteen days' time allowed under sub-section (4) of Section 7 and sub-section (4) of Section 10 of the 'I&B Code' has been allowed to the Adjudicating Authority to

ascertain fact and thereafter to admit or reject the application, if incomplete.

41. Similarly, ten days' expiry period prescribed under sub-section (1) of Section 9 from the date of delivery of the notice or invoice demanding payment under sub-section (1) of Section 8 of the 'I&B Code' has been prescribed for filing an application under section 9 of the 'I&B Code'.

42. Like, Sections 7 and 8 of the 'I&B Code' under sub-section (5) of Section 9, the Adjudicating Authority has been allowed fourteen days' time to admit or reject the application if incomplete, provided before rejecting an application seven days' time is to be granted to the Applicant to remove the defects.

43. Under Section 12 of the 'I&B Code', one hundred and eighty days time has been prescribed for completion of 'Insolvency Resolution Process' though it is open to the Adjudicating Authority to extend the period, but not exceeding ninety days' (Total 270 days). If the Resolution Plan is not received within the aforesaid period by Adjudicating Authority or it rejects the same, under Section 33 liquidation proceedings shall be initiated. Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017

44. For preferring appeals under Section 61 while thirty days time has been allowed, the Appellate Tribunal has been allowed only fifteen days time beyond thirty days to condone the delay.

45. Under Section 62 of the 'I&B Code', against order of Appellate Tribunal, an appeal can be preferred by aggrieved person to the Hon'ble Supreme Court but such appeal is required to be preferred within forty-five days and the Hon'ble Supreme Court has been allowed to condone the delay but not exceeding fifteen days.

There are other provisions where such time limit has been prescribed, which is different from the time prescribed under the Limitation Act, 1963.

46. From the aforesaid provision, we find that the scheme of the 'Special Act' i.e. the 'I&B Code', and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it.

47. In so far as, the application under Section 433 of the Companies Act, 2013 is concerned, we are of the view that the said provision is not applicable for the following reasons: -

Under Section 255 of the 'I&B Code', certain provisions of the Companies Act, 2013 have been amended in the manner specified in the Eleventh Schedule of the 'I&B Code'. Thereunder Section 424 of the Companies Act, 2013 has been made part of the 'I&B Code' for the purpose of following procedural or principles of natural justice. Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 Section 433 of the Companies Act, 2013 relates to limitation as quoted below: -

"433. Limitation. - The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be."

However, Section 433 of the Companies Act, 2013 has not been amended to make it as a part of the 'I&B Code', therefore, we hold that Section 433 which relates to limitation of the Companies Act, 2013, ipso facto will not be applicable to 'I&B Code'.

48. There is a provision of limitation under the 'Recovery of Debts Due to Banks and Financial Institutions Act, 1993' (hereinafter referred to as "DRT Act") and 'Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002' (hereinafter referred to as "SARFAESI Act").

49. By Section 249 of the 'I&B Code', the 'Recovery of Debts Due to Banks and Financial Institutions Act, 1993' has been amended in the manner specified in the Fifth Schedule. In the said Act, sub-section (1) and sub-section (4) of Section 1 has been amended, as quoted below: -

"(a) In sub-section (1), for the words "Due to Banks and Financial Institutions" the words "and Bankruptcy" shall be substituted;

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(b) In sub-section (4), for the words "The provision of this Code", the words "Save as otherwise provided, the provisions of this Code", shall be substituted."

50. Section 24 of the 'Recovery of Debts due to Banks and Financial Institutions Act, 1993' relates to limitation, as quoted below: -

"24. Limitation.-- The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an application made to a Tribunal."

Section 24 of the said Act has not been amended by 'I&B Code' and thereby not made applicable to 'I&B Code'.

51. Similarly, by Section 251 of the 'I&B Code' the SARFAESI Act has been amended in the manner specified in the Seventh Schedule. Thereunder in sub-section (9) of Section 13, for the words "In the case of", the words and figures "Subject to the provisions of the 'I&B Code, in the case of' have been substituted.

52. Section 36 of the SARFAESI Act relate to limitation, as quoted below:-

"36. Limitation. - No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act,

1963 (36 of 1963)."

However, Section 36 of the SARFAESI Act has not been amended to make applicable to 'I&B Code'..

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53. In view of the aforesaid discussion, we hold that Section 24 of the Recovery of Debts and Bankruptcy Act, 1993 and Section 36 of the SARFAESI Act, 2002 are not applicable to the proceedings for initiation of 'Corporate Insolvency Resolution Process'.

54. On the other hand, the Committee by its report suggested to frame law for 'Insolvency Resolution Process' to facilitate the assessment of viability of the enterprise at a very early stage; to enable symmetry of information between creditors and debtors; to ensure a time-bound process to better preserve economic value; to ensure a collective process; to respect the rights of all creditors equally; to ensure that when the negotiations fail to establish viability, the outcome of bankruptcy must be binding and to ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy, as noticed above.

55. In 'MIs. Innoventive Industries Ltd v. ICICI Bank & Anr' (Supra) the Hon'ble Supreme Court held that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. While noticing the key economic question in the bankruptcy process, the Hon'ble Supreme Court noticed the report of the Bankruptcy Law Reforms Committee, and observed that there is only one forum for evaluating possibilities, and for taking a decision there is a creditors committee, where all 'Financial Creditors' have votes in proportion to the magnitude of debt that they hold. As mentioned, the Hon'ble Supreme Court also noticed that 'speed is the Company Appeals (AT) (Insolvency) Nos. 47, 75 and 78 of 2017 essence' under 'I&B Code'. We find that the Committee never suggested that for admitting the 'Resolution Process' question of limitation, should also be considered.

56. The matter can be looked at from another angle. If law of limitation prescribed under the Limitation Act, 1963 is made applicable, one may take a plea that default of debt is barred by limitation to initiate 'Corporate Insolvency Resolution Process' under Section 7 or Section 9 of the 'I&B Code'. However, such stand cannot be taken, where a 'Corporate Applicant' applies for initiation of 'Corporate Insolvency Resolution Process' against itself ('Corporate Debtor'), having no capacity to pay back the debt and default having occurred. The law of limitation cannot be made applicable for filing an application under section 10, which otherwise will render the provisions of Section 10 of the 'I&B Code' redundant as the 'Corporate Applicants', do not file application for money claim. This apart, there may be companies which are closed for more than three years and having failed to pay a debt, such sick companies will have to be allowed to continue resulting in depreciation of the value of its assets for time to come, which is against the statement and object of the 'I&B Code'.

57. Similarly, in a case which is not barred by limitation, if application filed under Section 7 or Section 9 or Section 10 of the 'I&B Code' is admitted, pursuant to public notice under Section 15 of the 'I&B Code', the 'Interim Resolution Professional' is required to receive and collect all the claims as may be submitted by creditors to him, as stipulated in clause (b) of sub-section (1) of Section 18. In such case, once the creditors put their Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 claim, the 'Insolvency Resolution Professional' cannot reject the claim on the ground that the claim is barred by limitation, as the provision of Limitation Act, 1963 will not be applicable for filing a claim before the 'Interim Resolution Professional'. Similarly, the Committee of Creditors while deciding the resolution plan, cannot reject any such claim, on the ground that the same is barred by limitation though the Committee of Creditors may not make any provision in the resolution plan on the ground of unexplained delay.

58. Even if it is accepted that the Limitation Act, 1963 is applicable, though we have held otherwise, in that case also application under Section 7 or 9 or 10 cannot be rejected on the ground that the application is barred by limitation for being filed beyond three years for following reasons.

Except Article 137 of Part II i.e. 'other applications', as quoted below, no other provisions of Limitation is applicable in the matter of filing application under Sections 7 or 9 or 10: -

Part II-OTHER APPLICATION Description of application Period of Limitation Time
from which period begins to run

137. Any other application for which Three years When the right to no period of
limitation is provided apply accrues elsewhere in this division.

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59. From Article 137 of the Limitation Act, 1963, it is clear that the period of three years' is to be counted from the date right to apply accrues to a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Debtor'.

60. For initiation of 'Corporate Insolvency Resolution Process', the right to apply accrues under Section 7 or Section 9 or Section 10 only with effect from 1st December, 2016 when 'I&B Code' has come into force, therefore, the right to apply under Section 7 or Section 9 or Section 10 in all present cases having accrued after 1st December 2016, such applications cannot be rejected on the ground that the application is barred by limitation.

61. Learned Amicus Curiae rightly contended that there should be a time limit for raising claim, including money claim. In this regard, it is desirable to refer the definition of 'Debt' and 'Default' as defined in sub-section (11) and (12) of Section 3 of the 'I&B Code', and quoted below: -

"3(11) "debt" means a liability or obligation in respect of a claim which is due from
any person and includes a financial debt and operational debt;

3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be"

62. From the aforesaid definition, it is clear that 'debt' is a liability or obligation in respect of a claim which is due from any person and includes a 'Financial Debt' and 'Operational Debt'. It is further clear that when whole or Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the 'Corporate Debtor', it amounts to 'default'.

63. Now, the question arises, whether a person can claim any amount due from another, a 'Corporate Debtor' after long delay on the ground that Limitation Act, 1963 is not applicable?

64. To decide the aforesaid issue, it is necessary to notice the Doctrine of Limitation and Prescription, as held by jurists and Hon'ble Courts. The Doctrine of Limitation and Prescription is based on two broad considerations. First, there is 'a presumption that the right not exercised for a long time is non-existent. In Salmond: Jurisprudence 12th Ed. Page 438 and 439, the learned author described the doctrine in the following words:

"In order to avoid the difficulty and error that necessarily result from lapse of time the presumption of the coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so within the period, otherwise his right, if has one will be forfeited as a penalty for his neglect, *vigilantibus non dormientibus jura subvenient* (Laws come to the assistance of the vigilant and not of the sleepy)"

65. It is also necessary to ensure that the rights of debt, in property or rights in general should not be in a state of constant uncertainty, doubt and suspense. In Abbott CJ in *Battley v. Faulkner* [(1820) 3 B & Aid 288] the Court observed that "the statute of limitation was intended for relief and quiet Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 of the defendant and to prevent the persons from being harassed at a distant period of time after the committing of the injury complained of".

66. The above principles have been also recognised by the Hon'ble Supreme Court of India in *Rajinder Singh v. Santa Singh*, AIR 1973 SC 2537, wherein the Hon'ble Supreme Court observed:

"The object of 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."

67. The object of fixing time-limit for litigation is based on Public Policy, fixing a life span of legal remedies for the purpose of general welfare. The Hon'ble Supreme Court in *N. Balakrishnan v. M.A. Krishnamurthy*, (1998) 7 scc 123, inter alia observed:

"the rules of limitation are not meant to destroy the rights of the parties but are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly and the law of limitation fixes a life span for legal injury suffered and that it is enshrined in the maxim interest reipublicae Ut sit finis litum i.e. it is for the general welfare that a period to be put to litigation and this is not meant to destroy the rights of the parties, but they are meant to see that the party do not resort to dilatory tactics but seek their remedy promptly because the idea is that every legal remedy must be alive for a legislatively fixed period of time."

68. In view of the settled principle, while we hold that the Limitation Act, 1963 is not applicable for initiation of 'Corporate Insolvency Resolution Process', we further hold that the Doctrine of Limitation and Prescription is Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 necessary to be looked into for determining the question whether the application under Section 7 or Section 9 can be entertained after long delay, amounting to laches and thereby the person forfeited his claim.

69. If there is a delay of more than three years from the date of cause of action and no laches on the part of the Applicant, the Applicant can explain the delay. Where there is a continuing cause of action, the question of rejecting any application on the ground of delay does not arise.

70. Therefore, if it comes to the notice of the Adjudicating Authority that the application for initiation of 'Corporate Insolvency Resolution Process' under section 7 or Section 9 has been filed after long delay, the Adjudicating Authority may give opportunity to the Applicant to explain the delay within a reasonable period to find out whether there are any laches on the part of the Applicant.

71. The stale claim of dues without explaining delay, normally should not be entertained for triggering 'Corporate Insolvency Resolution Process' under Section 7 and 9 of the 'I&B Code'.

72. However, the aforesaid principle for triggering an application under Section 10 of the 'I&B Code' cannot be made applicable as the 'Corporate Applicant' does not claim money but prays for initiation of 'Corporate Insolvency Resolution Process' against itself, having defaulted to pay the dues of creditors.

Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 In so far it relates to filing of claim before the 'Insolvency Resolution Professional', in case of stale claim, long delay and in absence of any continuous cause of action, it is open to resolution applicant to decide whether such claim is to be accepted or not, and on submission of resolution plan, the Committee of Creditors may decide such question. If any adverse decision is taken in regard to any creditor disputing the claim on ground of delay and laches, it will be open to the aggrieved creditor to file objection before the Adjudicating Authority against resolution plan and for its necessary correction who may decide the same in accordance with the observations as made above.

73. Coming to merits of present matter, in the case of M/s. Speculum Plast Pvt. Ltd. Vs. PTC Techno Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 47 of 2017, the Adjudicating Authority by impugned order dated 11th April, 2017 has not decided the question whether Limitation Act, 1963 is applicable in the proceeding for initiation of 'Corporate Insolvency Resolution Process' or not and without deciding the same rejected the case on the ground that the amount legally recoverable is beyond the period of limitation. It has not been noticed that the invoices raised are of the period from 1st April, 2013 to 19th September, 2013, and, therefore, default must have occurred after September, 2013. The 'I&B Code' having come into effect on 1st December 2016, the Adjudicating Authority was not correct in dismissing the application on the ground that the application is beyond the period of limitation.

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74. For the reasons aforesaid, we set aside the impugned order dated 11th April, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi in Company Petition No. (IB)-41(ND)/2017 and remit back the case to the Adjudicating Authority, New Delhi to find out whether the application is otherwise complete or not and, after notice and hearing the parties, will pass appropriate orders in accordance with law. In case, the application is complete, the Adjudicating Authority will admit the application preferred by the Appellants. In case it is incomplete, the Appellant be granted minimum seven days' time to remove the defects in terms of proviso to sub-section (5) of Section 9 of the 'I&B Code'.

75. In Parag Gupta Vs. M/s. B K Educational Services Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 76 of 2017, the Adjudicating Authority observed that the. amount having been paid between the period 1st October, 2012 and 5th February, 2013, there was nothing on the record to suggest that it would extend the limitation to recover the same. The Income Tax Returns filed by 'Corporate Debtor' for the assessment years 2014-15 & 2015-16 were, not taken into consideration as it does not specify that the short term borrowings of over 8 crores including the loans alleged to have been given by the Appellants as barred by limitation has taken into consideration for rejecting the application for non-initiation of 'Corporate Insolvency Resolution Process', the impugned order dated 25th April, 2017 cannot be sustained.

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76. For the reasons aforesaid, the impugned order dated 25th April, 2017 passed by the Adjudicating Authority in Company Petition No. (IB)- 27(PB)/2017 is set aside and we remit the case to the Adjudicating Authority who after notice and hearing the parties will consider the application under Section 7 of the 'I&B Code' preferred by the Appellant- Mr. Parag Gupta and without going into question of limitation, if application is complete, will admit the application. In case of any defect, the appellant be granted seven days' time to remove the defects in terms of proviso to sub- section (5) of Section 9 of the 'I&B Code. Further, if the application is not maintainable for any other reasons, the Adjudicating Authority record such reason.

77. In Ashlay Infrastructure Private Limited Vs. LDS Engineers Pvt. Ltd. in Company Appeal (AT) (Insolvency) No. 78 of 2017, the Adjudicating Authority rejected the application preferred by the Appellant on the ground that it is time barred. The impugned order dated 4th May, 2017 having been passed on the basis that the Limitation Act, 1963 is applicable for initiation of 'Corporate Insolvency Resolution Process', the said order cannot be sustained.

78. We accordingly set aside the impugned order dated 4th May, 2017 passed in Company Petition No. (IB)-77(ND)/ 2017 and remit the case to the Adjudicating Authority who after notice and hearing the parties will consider the application preferred by Appellant under Section 9 of the 'I&B Code' and without going into question of limitation, if application is complete, will Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017 admit the application. In case of any defect, the appellant be granted seven days' time to remove the defects in terms of proviso to sub-section (5) of Section 9 of the 'I&B Code. Further, if the application is not maintainable for any other reasons, the Adjudicating Authority may record such reason.

79. All the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances, there shall be no order as to cost.

(Balvinder Singh)
Member (Technical)

(Justice S .J. Mukhopadhaya)
Chairperson

NEW DELHI

7th November, 2017

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Company Appeals (AT) (Insolvency) Nos. 47, 76 and 78 of 2017