

## TIME BARRED DEBT CAN BE PURSUED UNDER THE INSOLVENCY AND BANKRUPTCY CODE

### 1. INTRODUCTION

In a recent judgment, the National Company Law Appellate Tribunal, New Delhi (the “NCLAT”)<sup>1</sup> held that the provisions of the Limitation Act, 1963 (the “**Limitation Act**”) do not apply to proceedings initiated under the Insolvency and Bankruptcy Code, 2016 (the “**Code**”). The judgment will have far reaching consequences as it means that a creditor can sue a corporate debtor under the Code, even though the debt is barred by time.

### 2. BACKGROUND

The NCLAT’s judgment on the issue arises in the context of insolvency proceedings filed by Urban Infrastructure Trustees Limited (“**Urban Infrastructure**”) against Neelkanth Township and Construction Pvt. Ltd. (“**Neelkanth**”) before the National Company Law Tribunal, Mumbai (“**NCLT Mumbai**”) alleging that Neelkanth defaulted in making payments under debenture certificates issued by it, on the date of maturity mentioned in the debenture certificates.

One of the defenses taken by Neelkanth was that the debenture certificates were due for redemption as far back as 2011, 2012 and 2013 and the application, having been filed under the Code only in 2017, would be barred by time.

Urban Infrastructure argued that the debt was admitted in the balance sheet of Neelkanth for the financial periods 2011-12 to 2015-16 as well as the notes to the balance sheet, thereby triggering the application of Section 18 of the Limitation Act, on account of which the application filed for insolvency would not be barred by time.

The NCLT Mumbai proceeded to admit the insolvency resolution application filed by the Urban Infrastructure, and declared a moratorium.<sup>2</sup>

Neelkanth challenged the order of the NCLT Mumbai before the NCLAT on various grounds, including that the alleged debt of Urban Infrastructure was barred by time.

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<sup>1</sup> *Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Limited*, order dated 11 August 2017 passed in Company Appeal (AT) (Insolvency) No.44 of 2017; also available at [http://nclat.nic.in/final\\_orders/Principal\\_Bench/2017/insolvency/11082017AT442017.pdf](http://nclat.nic.in/final_orders/Principal_Bench/2017/insolvency/11082017AT442017.pdf)

<sup>2</sup> *Urban Infrastructure Trustees Limited vs. Neelkanth Township and Construction Pvt. Ltd.*, Order dated 21 April 2017 passed in C.P.No.69/I&BP/NCLT/MAH/2017; also available at: [http://nclt.gov.in/Publication/Mumbai\\_Bench/2017/Others/UrbanInfrastructureTrusteeLtd.pdf](http://nclt.gov.in/Publication/Mumbai_Bench/2017/Others/UrbanInfrastructureTrusteeLtd.pdf)

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**3. KEY ISSUE**

In addition to the other issues that were raised, one of the main issues before the NCLAT was whether the debt of Urban Infrastructure was barred by time.

**4. ANALYSIS**

The NCLAT rejected the argument advanced by Neelkanth that the debt was barred by time, on the ground that there is nothing on record to show that the provisions of the Limitation Act would apply to the Code. The NCLAT further noted that even the counsel for Neelkanth was not in a position to point out any provision in the Code that would show that the Limitation Act would be applicable.

It held that the Code is not an act for recovery of money claims and that it relates to initiation of corporate insolvency process, and that if there was a debt including interest, and there was default of that debt having continuous cause of action, the argument that the claim for money by Urban Infrastructure would be barred by time, cannot be accepted. There were no other reasons forthcoming in the order, and the NCLAT proceeded to decide this issue solely on the reasoning mentioned above.

Interestingly, the NCLAT did not go into the question of whether or not acknowledgment of the debt in the financial statements of Neelkanth would amount to triggering a fresh period of limitation as contemplated under Section 18 of the Limitation Act. The NCLAT did not consider these aspects, even though they were raised before the NCLT Mumbai.

Thereafter, Neelkanth preferred an appeal to the Supreme Court, assailing the order of the NCLAT.<sup>3</sup> The Supreme Court by an order dated 23 August 2017 dismissed the appeal filed by Neelkanth,<sup>4</sup> leaving the question of whether the provisions of Limitation Act would be applicable to the Code, open.

**5. INDUSLAW VIEW**

The NCLAT's order could have had a more detailed consideration of the law on this issue. The NCLAT appears to have proceeded on a narrow reading of the Code to arrive at the conclusion that the provisions of the Limitation Act are not applicable to the Code.

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<sup>3</sup> Supra Note 1.

<sup>4</sup> *Neelkanth Township and Construction Pvt. Ltd. vs. Urban Infrastructure Trustees Limited*, Civil Appeal No. 10711/2017; also available at [http://supremecourtindia.nic.in/supremecourt/2017/25453/25453\\_2017\\_Order\\_23-Aug-2017.pdf](http://supremecourtindia.nic.in/supremecourt/2017/25453/25453_2017_Order_23-Aug-2017.pdf)

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In this context, the NCLAT failed to consider the judgments passed by the National Company Law Tribunal, New Delhi (“**NCLT Delhi**”) in *M/s Deem Roll -Tech Limited vs. R.L. Steel & Energy Ltd*<sup>5</sup> (the “**Deem Roll Case**”) and *Sanjay Bagrodia vs. Satyam Green Power Pvt. Ltd*<sup>6</sup> (the “**Sanjay Bagrodia Case**”), where the NCLT Delhi took a *contrary* view and held that the provisions of the Limitation Act *would* be applicable to the Code. These judgments, though not binding on the NCLAT, were not considered by the NCLAT while passing the order.

In Deem Roll Case, the NCLT Delhi held that Section 255 of the Code provides for various amendments to the Companies Act, 2013 (the “**Companies Act**”), in the manner provided under the Eleventh Schedule of the Code. However, this Schedule does not provide for amendments to Section 433 of the Companies Act,<sup>7</sup> which makes the provisions of the Limitation Act applicable to proceedings or appeals before the Tribunal or the Appellate Tribunal.

The NCLT Delhi proceeded on the basis that there is no specific bar on the applicability of the Limitation Act to the Code. Since Section 433 of the Companies Act, 2013 has not been amended, the provisions of the Limitation Act would apply to proceedings brought before the NCLT and the NCLAT. The application filed by an operational creditor, in this case, was accordingly dismissed on the ground that the debt was barred by limitation.

In the Sanjay Bagrodia Case, the NCLT Delhi held that the Limitation Act would apply to the Code and the same is implicit in Code itself. In that regard, the NCLT relied upon Section 60(6) of the Code, which reads as follows:

*“Notwithstanding anything contained in the Limitation Act 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.”*

The NCLT Delhi observed that pursuant to this provision, in the event a resolution of insolvency against a corporate debtor fails, and subsequently a suit or application is filed against it, in that case the moratorium period has to be excluded for the purposes of computation of limitation.

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<sup>5</sup> Order dated 31 March 2017 in C.A. No. (I.B) 24/ PB / 2017; also available at [http://nclt.gov.in/Publication/Principal\\_Bench/2017/Others/Deem%20Roll%20Tech%20Limited%20%20vs.%20R.L.%20Steel%20Energy%20Ltd.pdf](http://nclt.gov.in/Publication/Principal_Bench/2017/Others/Deem%20Roll%20Tech%20Limited%20%20vs.%20R.L.%20Steel%20Energy%20Ltd.pdf)

<sup>6</sup> Order dated 25 May 2017 in C.P. No. (I.B) 108/ (PB) / 2017; also available at [http://nclt.c2k.in/OtherNCLT/interim\\_orders/principal/25.05.2017/30.pdf](http://nclt.c2k.in/OtherNCLT/interim_orders/principal/25.05.2017/30.pdf)

<sup>7</sup> Section 433 of the Companies Act, 2013 reads as follows “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.”

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The NCLT Delhi reasoned that if an operational creditor has approached the NCLT *beyond* the prescribed period of limitation, then the action would not be maintainable in law. In other words, on a plain reading of Section 60(6) of the Code, the NCLT Delhi held that the claim before the NCLT must be made within the period of limitation.

The National Company Law Tribunal, Ahmedabad (the “**NCLT Ahmedabad**”) also took a similar view in *State Bank of India, Colombo vs. Western Refrigeration Private Limited*.<sup>8</sup> Though the NCLT Ahmedabad did not *specifically* decide on the application of the Limitation Act to the Code, it made observations to the effect that since the NCLT was the designated Adjudicating Authority under Section 60 of the Code, the proceedings before it would also be subject to Section 433 of the Companies Act. The NCLT Ahmedabad observed that Section 433 of the Companies Act did not state that it was applicable to NCLT and NCLAT only in respect of proceedings under the said Act.

Considering that even the Supreme Court has left the question of law open<sup>9</sup> and the orders passed in the Deem Roll Case and the Sanjay Bagrodia Case have been passed by the NCLT Delhi, the judgment of the NCLAT holds the field as of today.

The NCLAT’s judgment appears to have been passed on an incorrect appreciation of law. The object of the 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 laches. This judgment is a definite departure from the usual stand adopted by courts on the application of the law of limitation to enforcement of claims.

However, the judgment is considerably helpful for creditors who may either have written off their debts or failed to initiate legal action against defaulters within the prescribed period of limitation. Creditors will now be in a position to pursue such claims that would otherwise have been time barred, under the Code.

Considering the provisions of the Code, the strict timelines and the potential impact of any adverse order passed by the NCLT or the NCLAT under the Code, corporate debtors should now be wary of additional litigation being initiated by creditors, whose debts may have otherwise become barred by time.

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<sup>8</sup> Order dated 26 May 2017 in C.P. No. (I.B) 17/7/NCLAT/AHM / 2017; available at: [http://www.ibbi.gov.in/26thMay2017 in the matter of Western Refrigeration Pvt Ltd CP No IB 17 7 NCLT AHM 2017.pdf](http://www.ibbi.gov.in/26thMay2017%20in%20the%20matter%20of%20Western%20Refrigeration%20Pvt%20Ltd%20CP%20No%20IB%2017%207%20NCLT%20AHM%202017.pdf)

<sup>9</sup> Supra Note 4.

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It is likely that the judgment of the NCLAT will trigger a substantial number of new insolvency proceedings. This has certainly set the cat among the pigeons, though it would always be preferable to initiate legal action under the Code *within* the statutory period of limitation. The judgment of the NCLAT may not remain good law for very long, though it remains to be seen to what extent the Supreme Court will hopefully provide prompt clarity on this issue.

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