

**REPORTABLE**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.23988 OF 2017

B.K. EDUCATIONAL SERVICES PRIVATE LIMITED ...APPELLANT

VERSUS

PARAG GUPTA AND ASSOCIATES .RESPONDENTS

WITH

CIVIL APPEAL NO.439 OF 2018

CIVIL APPEAL NO.436 OF 2018

CIVIL APPEAL NO.3137 OF 2018

CIVIL APPEAL NO.4979 OF 2018

CIVIL APPEAL NO.5819 OF 2018

CIVIL APPEAL NO.7286 OF 2018

J U D G M E N T

R.F. NARIMAN, J.

1. The present appeals are concerned with Section 238A of by the Insolvency and Bankruptcy Code, 2016 (“Code”), which

was inserted by the Insolvency and Bankruptcy Code (Second

Amendment) Act, 2018 with effect from 06.06.2018. The said Section is as

follows:

“238A. Limitation.—The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

2. The question raised by the appellants in these appeals is as to whether the Limitation Act, 1963 will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on 01.12.2016 till 06.06.2018. In all these cases, the Appellate Authority has held that the Limitation Act, 1963 does not so apply. Even on the assumption that Article 137 of the Limitation Act, 1963 is attracted to such applications, in any case, such applications being filed only on or after commencement of the Code on 01.12.2016, since three years have not elapsed since this date, all these applications, in any event, could be said to be within time. Having held this, by the impugned order dated 07.11.2017 in Civil Appeal No.23988 of 2017, the Appellate Tribunal went on to hold: “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 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. 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."

3. By reason of this finding, the order of the Tribunal was set aside, and the matter was remanded for a hearing on all points other than the point of limitation.

4. Learned counsel appearing on behalf of the appellants have argued, relying upon the Report of the Insolvency Law Committee of March, 2018, that the object of the Amendment Act which introduced Section 238A into the Code was to clarify the law and, thus, Section 238A must be held to be retrospective. Further, according to them, in any case, the law of limitation, pertaining to the domain of procedure, must be held to apply retrospectively in any case. For this proposition, they cited several judgments which will be referred to later in this judgment. They also referred to and relied upon the definitions under Sections 3(11), 3(12), and Section 5(6) of the Code, which, when contrasted with Section 3(6), would show that though “claim” in Section 3(6) refers to a right to payment, the definitions of “debt” and “default” in Sections 3(11) and 3(12) respectively, refer to liability or obligation in respect of a claim which is “due” and this being the case, a time-barred debt cannot be said to be “due” so as to trigger the Code. The learned counsel further attacked the Appellate Tribunal judgment by stating that an application filed in 2017 under Section 7 or 9 of the Code, praying that the Code be triggered for a debt that has become time-barred long back, say in 2011, would lead to

absurdity as it could never have been the intention of the legislature to resuscitate stale and dead claims leading to the drastic consequence of the taking away of the management of the corporate debtor, which may ultimately result in its corporate death. Also, according to learned counsel for the appellants, if one were to read the definition of “Adjudicating Authority” in Section 5(1) of the Code, together with Sections 408, 424 and 433 of the Companies Act, 2013, it would become clear that proceedings before the National Company Law Tribunal (“NCLT”) arising under the Code would be covered by the Limitation Act via Section 433 of the Companies Act from the very inception or commencement of the Code. According to them, it is important to remember that the Eleventh Schedule to the Code, which made amendments in various Acts, did not introduce the limitation provision of the Companies Act so as to govern the Code as it was unnecessary, as Section 433 applied *vide* Section 5(1) of the Code read with Section 408 of the Companies Act. In any event, they argued that even on the assumption that the Limitation Act does not apply to the applications referred to above, the principle in *State of Madhya Pradesh and Anr. v. Bhailal Bhai and Ors.*, (1964) 6 SCR

261 has to be followed, and the doctrine of laches applies. In applying this doctrine, the period prescribed by the Limitation Act will be taken to be a guide, and any application filed relating to debts that are beyond what is prescribed under the Limitation Act would be hit by this doctrine in any case.

5. On the other hand, Shri Ashish Dholakia, learned advocate appearing on behalf of some of the respondents, argued, based upon our judgment in *Innoventive Industries Ltd. v. ICICI Bank & Anr.*, (2018) 1 SCC 407, that the Code is a complete Code dealing with insolvency and not debt recovery and that, therefore, the periods of limitation that are stated therein would show that the Limitation Act would not apply. In any case, as has been held by various judgments of this Court, the Limitation Act cannot apply to the NCLT as it is a tribunal and not a court.

He cited a number of judgments to point out the difference between amounts that are “due and payable” as opposed to amounts that are “due and recoverable”. According to him, since the language used in Section 3(11) is “due” and in Section 3(12), “due and payable”, it would be clear that a time- barred debt would be subsumed within the

said expression as it is not a debt that is “due and recoverable” under the said provision. For this purpose, he relied upon a number of judgments and Sections 25(3), 60 and 61 of the Indian Contract Act, 1872. He also handed up a chart in which, according to him, the following Tribunals, depending upon the particular Act in question, would either be governed or not governed by the Limitation Act as follows:

Tribunal Name	Discharges functions of	Whether there is a provision for application of Limitation Act?
Telecom Disputes Settlement and Appellate Tribunal	Appellate Tribunal under Airports Economic Regulatory Authority of India Act, 2008	No
	Appellate Tribunal under Information Technology Act, 2000	Yes - Section 60
	Appellate Tribunal under Telecom Regulatory Authority of India Act, 1997	No
National Company Law Appellate Tribunal	Appellate Tribunal under Competition Act, 2002	No
	Appellate Authority under Insolvency & Bankruptcy Code, 2016	No**
	Appellate Tribunal under Companies Act, 2013	Yes - Section 433
National Company Law Tribunal	Tribunal under Companies Act, 2013	Yes - Section 433
	Adjudicating Authority under Insolvency & Bankruptcy Code, 2016	No**

Securities Appellate Tribunal	Appellate Tribunal under Securities & Exchange Board of India Act, 1992	Yes - Section 15W
	Appellate Tribunal under Depositories Act, 1996	Yes - Section 23D
	Appellate Tribunal under Securities Contracts (Regulation) Act, 1956	Yes - Section 22D
	Appellate Tribunal under Pension Fund Regulatory and Development Authority Act, 2013	No
		**Prior to the Insolvency & Bankruptcy (Second Amendment) Act, 2018

Also, according to the learned advocate, incongruous results would obtain if we were to hold that Section 433 of the Companies Act, would apply to provide a period of limitation to the NCLT deciding cases under the Code. He argued that the National Company Law Appellate Tribunal (“NCLAT”) is an appellate tribunal which is common to three statutes, namely, the Competition Act, 2002, the Companies Act, 2013, and the

Insolvency and Bankruptcy Code, 2016. Under the Competition Act, no period of limitation is prescribed within which a complaint may be made to the Competition Commission. Therefore, when the Appellate Tribunal decides a case under the Competition Act, it will decide the case on merits despite the period of limitation having elapsed, whereas, if the argument of the appellants is correct, the same Appellate Tribunal will decide a case under the Code applying a period of limitation and barring applications that fall outside such period. This is an incongruous situation which could not possibly have been intended by the legislature. He also went on to argue that Section 238A of the Code could not be retrospective as it would take away a vested right of the application filed under Section 7 or Section 9 to be decided without applying the Limitation Act pre 06.06.2018. He went on to argue that if the doctrine of laches were to be applied, it would have to be applied along with other doctrines such as acquiescence and estoppel on the facts of each case, there being no hard and fast rule that once a period of limitation was over, the application must be dismissed. He also relied upon several decisions to buttress his contentions.

6. Having heard the learned counsel for both sides, it is important to first set out the reason for the introduction of Section 238A into the Code. This is to be found in the Report of the Insolvency Law Committee of March, 2018, as follows:

“28. APPLICATION OF LIMITATION ACT, 1963

28.1 The question of applicability of the Limitation Act, 1963 (“Limitation Act”) to the Code has been deliberated upon in several judgments of the NCLT and the NCLAT. The existing jurisprudence on this subject indicates that if a law is a complete code, then an express or necessary exclusion of the Limitation Act should be respected.<sup>1</sup> In light of the confusion in this regard, the Committee deliberated on the issue and unanimously agreed that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. It is settled law that when a debt is barred by time, the right to a remedy is time-barred.<sup>2</sup> This requires being read with the definition of ‘debt’ and ‘claim’ in the Code. Further, debts in winding up proceedings cannot be time-barred,<sup>3</sup> and there appears to be no rationale to exclude the extension of this principle of law to the Code.

28.2 Further, non-application of the law on limitation creates the following problems: first, it re-opens the right of financial and operational creditors holding time-barred debts under the Limitation Act to file for CIRP, the trigger for which is default on a debt above INR one lakh. The purpose of the law of limitation

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<sup>1</sup> Ravula Subba Rao and Anr. v. The Commissioner of Income Tax, Madras, (1956) SCR 577.

<sup>2</sup> Punjab National Bank and Ors. v. Surendra Prasad Sinha AIR 1992 SC 1815.

<sup>3</sup> Interactive Media and Communication Solution Private Limited v. Go Airlines, 199 (2013) DLT 267.

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”<sup>4</sup>. Though the Code is not a debt recovery law, the trigger being ‘default in payment of debt’ renders the exclusion of the law of limitation counter-intuitive. Second, it re-opens the right of claimants (pursuant to issuance of a public notice) to file time-barred claims with the IRP/RP, which may potentially be a part of the resolution plan. Such a resolution plan restructuring time-barred debts and claims may not be in compliance with the existing laws for the time being in force as per section 30(4) of the Code.

28.3 Given that the intent was not to package the Code as a fresh opportunity for creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period, the Committee thought it fit to insert a specific section applying the Limitation Act to the Code. The relevant entry under the Limitation Act may be on a case to case basis. It was further noted that the Limitation Act may not apply to applications of corporate applicants, as these are initiated by the applicant for its own debts for the purpose of CIRP and are not in the form of a creditor’s remedy.”

The Report of the Committee would indicate that it has applied its mind to judgments of the NCLT and the NCLAT. It has also applied its mind to the aspect that the law is a complete Code and the fact that the intention of such a Code could not have been to give a new lease of life to debts which are time-barred.

7. We will first take up the position in law of the applicability of the

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<sup>4</sup> Rajinder Singh v. Santa Singh, AIR 1973 SC 2537.

Limitation Act, on a reading of the Code together with a cognate legislation, the Companies Act, 2013. Sections 3(6), 3(11), 3(12), and 5(6) of the Code read as follows:

“3. Definitions.—In this Part, unless the context otherwise requires,—

(6) “claim” means—

- (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;”

xxx xxx xxx

“(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;

(12) “default” means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;”

“5. Definitions.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(6) “dispute” includes a suit or arbitration proceedings relating to—

- (a) the existence of the amount of debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty;”

Vide Section 3(37), words and expressions used, but not defined in the Code, but defined *inter alia* in the Companies Act, 2013 shall have the meanings respectively assigned to them in that Act. Section 5(1) of the Code defines Adjudicating Authority as follows:

“5. Definitions.—In this Part, unless the context otherwise requires,—

(1) “Adjudicating Authority”, for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);”

This Section, therefore, requires that we look at Section 408 of the Companies Act. Section 408 of the Companies Act states:

“408. Constitution of National Company Law Tribunal.—The Central Government shall, by notification, constitute, with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.”

It is important to notice that the NCLT is set up to discharge such powers and functions that are conferred on it not merely under the Companies Act but also under “any other law for the time being in force”. Section 433 of the

Companies Act states 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.”

What is conspicuous by its absence in this Section are the expressions “under this Act” or “subject to the provisions of this Act”. By way of contrast, Section 424(2) uses the expression “under this Act” as follows:

“424. Procedure before Tribunal and Appellate Tribunal.—

xxx xxx xxx

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any

representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.”  
(emphasis supplied)

Pertinently, the Eleventh Schedule (Amendments to the Companies Act, 2013) to the Code reads as follows:

“1. In Section 2,— xxx xxx

xxx

(b) after clause (94), the following clause shall be inserted, namely—

‘(94-A) “winding up” means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.’”

8. It may also be noticed that under Section 434(1)(c) of the Companies Act, all proceedings under the Companies Act, including the proceedings relating to winding up of companies, pending immediately before such date, before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before they are transferred. This Section is also important in that it indicates that proceedings under the Companies Act relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, that were pending

before the District Court or the High Court, may now be transferred

to the Tribunal. Each of these proceedings would directly be governed by the Limitation Act as they are proceedings before Courts. Obviously, upon transfer of such proceedings to the Tribunal, it cannot be stated that because these proceedings are now before the Tribunal, the Limitation Act will cease to apply. Also, in fresh applications that are made after the Code comes into force, it cannot be said that to such applications, the Limitation Act will not apply, but to applications that are transferred from the District Court or the High Court, the provisions of the Limitation Act will apply. In particular, winding up proceedings pending before a High Court are liable to be transferred to the NCLT for further decision by applying the Code and not the Companies Act. This becomes clear on a reading of Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, which reads as follows:

“5. Transfer of pending proceedings of Winding up on the ground of inability to pay debts.—(1)  
All petitions relating to winding up of a company under clause (e) of section 433 of the Act<sup>5</sup> on the ground of inability to pay its debts pending before a High Court, and, where the petition has not been served on the respondent under rule 26 of the Companies (Court) Rules, 1959 shall be

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<sup>5</sup> Rule 2(2) of the Companies (Transfer of Pending Proceedings) Rules, 2016 defines the “Act” as meaning the Companies Act, 1956.

transferred to the Bench of the Tribunal established under sub-section (4) of Section 419 of the Companies Act, 2013 exercising territorial jurisdiction to be dealt with in accordance with Part II of the Code:

Provided that the petitioner shall submit all information, other than information forming part of the records transferred in accordance with rule 7, required for admission of the petition under sections 7, 8 or 9 of the Code, as the case may be, including details of the proposed insolvency professional to the Tribunal upto 15<sup>th</sup> day of July, 2017, failing which the petition shall stand abated:

Provided further that any party or parties to the petitions shall, after the 15<sup>th</sup> day of July, 2017, be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code:

Provided also that where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause (e) of section 433 of the Act for winding up against the same company pending as on 15<sup>th</sup> December, 2016, such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.”

9. It is thus clear that Section 433 of the Companies Act, 2013 would apply to the Tribunal even when it decides applications under Sections 7 and 9 of the Code.

10. The matter can be viewed from a slightly different angle. In *National Sewing Thread Co. Ltd. v. James Chadwick and Bros. Ltd.*, 1953 SCR 1028, this Court dealt with an appeal to the High Court from any decision of the Registrar under Section 76 of the Trade Marks Act. It was argued that the provisions of clause

15 of the Letters Patent would not be attracted to such an appeal preferred under Section 76. This was negated by this Court stating:

“ The Trade Marks Act does not provide or lay down any procedure for the future conduct or career of that appeal in the High Court, indeed Section 77 of the Act provides that the High Court can if it likes make rules in the matter. Obviously after the appeal had reached the High Court it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the charter under which that Court is constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. The rule is well settled that when a statute directs that an appeal shall lie to a Court already established, then that appeal must be regulated by the practice and procedure of that Court.....

Though the facts of the cases laying down the above rule were not exactly similar to the facts of the present case, the principle enunciated therein is one of general application and has an apposite application to the facts and circumstances of the present case. Section 76 of the Trade Marks Act confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by Section 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a Single Judge, his judgment becomes subject to appeal under clause 15 of the Letters Patent there being nothing to the contrary in the Trade Marks Act.”

(at 1033-1034)

11. Given the fact that the “procedure” that would apply to the NCLT would be the procedure contained *inter alia* in the Limitation Act, it is clear that the NCLT would have to decide applications made to it under the Code in the same

manner as it exercises its other jurisdiction under the Companies Act. This being the position in law, it is clear that when various provisions of the Companies Act were amended by the Eleventh Schedule to the Code, it was unnecessary to apply and adapt Section 433 of the Companies Act to the Code, as was done to various other Sections of the Companies Act.

12. Coming to the next argument that, in any case, Section 238A, being clarificatory of the law and being procedural in nature, must be held to be retrospective, it is necessary to refer

to a few judgments of this Court. In *M.P. Steel Corporation v. CCE*, (2015) 7

SCC 58, this Court held:

“54. It is settled law that periods of limitation are procedural in nature and would ordinarily be applied retrospectively. This, however, is subject to a rider.

In *New India Insurance Co. Ltd. v. Shanti Misra* [(1975) 2 SCC 840 : (1976) 2 SCR 266], this Court held: (SCC p. 844, para 5)

5. “On the plain language of Sections 110- A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective

operation of the law is taken away. Otherwise the general rule is to make it retrospective.”

55. In answering a question which arose under Section 110-A of the Motor Vehicles Act, this Court held: (*Shanti Misra case* [(1975) 2 SCC 840 : (1976) 2 SCR 266] , SCC p. 846, para 7)

7. “... ‘(1) Time for the purpose of filing the application under Section 110-A did not start running before the constitution of the tribunal. Time had started running for the filing of the suit but before it had expired

the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.

(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. *Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation.*”

(emphasis in original)

56. This statement of the law was referred to with approval in *Vinod Gurudas Raikar v. National Insurance Co. Ltd.* [(1991) 4 SCC 333] as follows: (SCC p. 337, para 7)

7. “It is true that the appellant earlier could file an application even more than six months after the expiry of the period of limitation, but can this be treated to be a right which the appellant had acquired. The answer is in the negative. The claim to compensation which the appellant was entitled to, by reason of the accident was certainly enforceable as a right. So far the period of limitation for commencing a legal proceeding is concerned, it is adjectival in nature, and has to be governed by the new Act—subject to two conditions. If under the repealing Act the remedy suddenly stands barred as a result of a shorter period of limitation, the same cannot be held to

govern the case, otherwise the result will be to deprive the suitor of an accrued right. The second exception is where the new enactment leaves the claimant with such a short period for commencing the legal proceeding so as to make it

unpractical for him to avail of the remedy. This principle has been followed by this Court in many cases and by way of illustration we would like to mention *New India Insurance Co. Ltd. v. Shanti Misra* [(1975) 2 SCC 840 : (1976) 2 SCR 266]. The husband of the respondent in that case died in an accident in 1966. A period of two years was available to the respondent for instituting a suit for recovery of damages. In March 1967 the Claims Tribunal under Section 110 of the Motor Vehicles Act, 1939 was constituted, barring the jurisdiction of the civil court and prescribed 60 days as the period of limitation. The respondent filed the application in July 1967. It was held that not having filed a suit before March 1967 the only remedy of the respondent was by way of an application before the Tribunal. So far the period of limitation was concerned, it was observed that a new law of limitation providing for a shorter period cannot certainly extinguish a vested right of action. In view of the change of the law it was held that the application could be filed within a reasonable time after the constitution of the Tribunal; and, that the time of about four months taken by the respondent in approaching the Tribunal after its constitution, could be held to be either reasonable time or the delay of about two months could be condoned under the proviso to Section 110-A(3).”

Both these judgments were referred to and followed in *Union of India v. Harnam Singh* [(1993) 2 SCC 162 : 1993 SCC (L&S) 375 : (1993) 24ATC 92], see para 12.

57. The aforesaid principle is also contained in

Section 30(a) of the Limitation Act, 1963:

30. “*Provision for suits, etc., for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908.—Notwithstanding anything contained in this Act—*

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of seven years next after the commencement of this Act or within

the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier.”

58. The reason for the said principle is not far to seek. Though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time-barred under the amended provision.

59. This aspect of the matter is brought out rather well in *Thirumalai Chemicals Ltd. v. Union of India* [(2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458] as follows: (SCC pp. 748-49, paras 22-26)

22. “Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the proviso to subsection (2) of Section 52 of FERA or under the proviso to sub-section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.

*Substantive and procedural law*

23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive

right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.

24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in *Garikapati Veeraya v. N. Subbiah Choudhry* [AIR 1957 SC 540], *New India Insurance Co. Ltd. v. Shanti Misra* [(1975)

2 SCC 840 : (1976) 2 SCR 266], *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087], *Chintamani Saran Nath Shahdeo v. State of Bihar* [(1999) 8 SCC 16] and *Shyam Sunder v. Ram Kumar* [(2001) 8 SCC 24], has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely

procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.”

60. This judgment was strongly relied upon by Shri A. K. Sanghi for the proposition that the law in force on the date of the institution of an appeal, irrespective of the date of accrual of the cause of action for filing an appeal, will govern the period of limitation. Ordinarily, this may well be the case. As has been noticed above, periods of limitation being procedural in nature would apply retrospectively. On the facts in the judgment in *Thirumalai case* [(2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458], it was held that the repealed provision contained in the Foreign Exchange Regulation Act, namely, Section 52 would not apply to an appeal filed long after 1-6-2000 when the Foreign Exchange Management Act came into force, repealing the Foreign Exchange Regulation Act. It is significant to note that Section 52(2) of the repealed Act provided a period of limitation of 45 plus 45 days and no more whereas Section 19(2) of FEMA provided for 45 days with no cap thereafter provided sufficient cause to condone delay is shown. On facts, in that case, the appeal was held to be properly instituted under Section 19, which as has been stated earlier, had no cap to condonation of delay. It was, therefore, held that the Appellate Tribunal in that case could entertain the appeal even after the period of 90 days had expired provided sufficient cause for the delay was made out.”

A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation

providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

13. In *State of Kerala v. V.R. Kalliyankutty*, (1999) 3 SCC 657, (“V.R. Kalliyankutty”), this Court dealt with whether a time-barred debt can be recovered by resorting to recovery proceedings under the Kerala Revenue Recovery Act of 1968.

In stating that the said Act cannot extend to recovery of a time-barred debt, this Court stated in paragraph 8,

“8 ..... In every case the exact meaning of the word “due” will depend upon the context in which that word appears.”

It was held in that case that Section 17(3) of the Kerala Revenue Recovery Act, 1968 made it clear that a person making payment under protest will have a right to institute a suit for refund of the whole or part of the sum paid by him under protest. It was thus held that when the right to file such a suit is expressly preserved, there is a necessary implication that the shield of limitation available to a

debtor in a suit is also preserved, as a result of which, a wide interpretation of the expression “amount due” to include time-barred debts would destroy an important defence available to a debtor in a suit against him by the creditor, and may fall foul of Article 14 of the Constitution of India.

14. Another judgment referred to by learned counsel for the appellants is contained in *Union of India v. Uttam Steels Ltd.*, (2015) 13 SCC 209. Here the question was whether Section 11-B of the Central Excise Act as amended on 12.05.2000 would apply to the fact situation in that case. Section 11-B provided a longer period of limitation by substituting “six months” with “one year”. Since the rebate application was filed within a period of one year, the respondent contended that they were within time. This Court held, in paragraph 10, that limitation, being procedural law, would ordinarily be retrospective in nature. This is however with one proviso superadded, which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time-barred before the amending Act came into force, bringing a larger period of limitation with it. On the facts of that case,

it was held that since the claim for rebate was made beyond the period of six months but within the extended period of one year, such extended period would not avail the respondent in that case.

15. In *Allied Motors (P) Ltd. v. CIT*, (1997) 3 SCC 472, this

Court took the view that the amendment made to Section 43-B

in the Income Tax Act was retrospective, holding:

“14..... As observed by G.P. Singh in his *Principles of Statutory Interpretation*, 4<sup>th</sup> Edn. at p.

291: “It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.” In fact the amendment would not serve its object in such a situation unless it is construed as retrospective ”

In the present case also, it is clear that the amendment of Section 238A would not serve its object unless it is construed as being retrospective, as otherwise, applications seeking to resurrect time-barred claims would have to be allowed, not being governed by the law of limitation.

16. We may also refer to a recent decision of this Court in *SBI v. V. Ramakrishnan*, (2018) SCC Online SC 963, where this Court, after referring to the selfsame Insolvency Law Committee Report,

held that the amendment made to Section 14 of the Code, in which the moratorium prescribed by Section 14 was held not to apply to guarantors, was held to be clarificatory, and therefore, retrospective in nature, the object being that an overbroad interpretation of Section 14 ought to be set at rest by clarifying that this was never the intention of Section 14 from the very inception.

17. We now come to some of the judgments cited by Shri Dholakia. In *State of Jharkhand v. Shivam Coke Industries*, (2011) 8 SCC 656, this Court, in construing Section 46(4) of the Bihar Finance Act, 1981, held that the Limitation Act could not be read into the exercise of a *suo motu* power of revision. This was for the reason that the Limitation Act applies to courts and not to quasi-judicial bodies. In so holding, the Court went on to hold:

“46. We would, however, agree with the position that such a power cannot be exercised by the revisional authority indefinitely. In our considered opinion, such extraordinary power i.e. *suo motu* power of initiation of revisional proceeding has to be exercised within a reasonable period of time and what is a reasonable period of time would depend on the facts and circumstances of each case. For this proposition, a number of decisions of this Court can be referred to on which reliance was placed even by the counsel appearing for the respondent.”

This judgment has no direct bearing on the controversy before us except that even where the Limitation Act was held not to apply, the power of the revisional authority cannot be exercised at any point of time but had to be exercised within a reasonable period, otherwise, it would be barred by a doctrine akin to limitation, namely, delay.

18. Learned counsel for the respondents then referred to and relied upon *Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay*, 1958 SCR 1122 (“*Bombay Dyeing*”). In this case, the Court was concerned with the *Bombay Labour Welfare Fund Act* in which the well-known distinction between the loss of a right and the loss of a remedy was reiterated thus:

“It will be observed that the definition of “unpaid accumulations” takes in only payments due to the employees remaining unpaid within a period of three years after they become due. The intention of the Legislature obviously was that claims of the employees which are within time should be left to be enforced by them in the ordinary course of law, and that it is only when they become time-barred and useless to them that the State should step in and take them over. On this, the question arises for consideration whether a debt which is time-barred can be the subject of transfer, and if it can be, how it can benefit the Board to take it over if it cannot be realised by process of law. Now, it is the settled law of this country that the statute of Limitation only bars the remedy but does not extinguish the debt. Section 28 of the Limitation Act provides that when the period limited to a person for instituting a suit for possession of any

property has expired, his right to such property is extinguished. And the authorities have held — and rightly, that when the property is incapable of possession, as for example, a debt, the section has no application, and lapse of time does not extinguish the right of a person thereto. Under Section 25(3) of the Contract Act, a barred debt is good consideration for a fresh promise to pay the amount. When a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. (Vide Section 60 of the Contract Act). It has also been held that a creditor is entitled to recover the debt from the surety, even though a suit on it is barred against the principal debtor. Vide *Mahant Singh v. U Ba Yi* [(1939) LR 66 IA 198], *Subramania Aiyar v. Gopala Aiyar* [(1910) ILR 33 Mad 308] and *Dil Muhammad v. Sain Das* [AIR 1927 Lah 396]. And when a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt, even though an action thereon would be time-barred. Vide

*Narendra Lal Khan v. Tarubala Dasi* [(1921) ILR 48 Cal 817, 823] .....<sup>6</sup>

(at 1134-1135)

Section 25(3) of the Contract Act was referred to by this judgment.

This Section is based on the fact that under the Indian Contract Act, 1872, “consideration” is defined in Section 2(d) as including past consideration, a notion that was unknown to English law. This doctrine came from Field’s Draft Civil Code, 1862,<sup>7</sup> which was one of the sources for the enactment of the Indian Contract Act, 1872.

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<sup>6</sup> Similarly, in *Punjab National Bank v. S. Sinha*, 1993 Supp (1) SCC 499, this Court reiterated the well-known difference between the right to recover a debt remaining even though the remedy to do so may be barred by the law of limitation (see paragraph 5).

<sup>7</sup> DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK, PREPARED BY THE COMMISSIONERS OF THE CODE, AND SUBMITTED TO THE JUDGES AND OTHERS FOR EXAMINATION, PRIOR TO REVISION BY THE COMMISSIONERS (Weed, Parsons and Company Printers 1862) [“Field’s Draft Civil Code”].

Section 572 of Field's Draft Civil Code reads as follows:

“§ 572. An existing legal or moral obligation resting upon the promiser, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.”<sup>8</sup>

19. Shri Dholakia also referred to and relied upon Section 60 and 61 of the Contract Act which are set out hereunder:

“60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.”

These Sections also recognize the fact that limitation bars the remedy but not the right. In the context in which Section 60 appears, it is interesting to note that Section 60 uses the phrase “actually due and payable to him....” whether its

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<sup>8</sup> David Dudley Field Jr., the draftsman of the Draft Civil Code for the State of New York, was one of three celebrated brothers. Stephen Field, one of the brothers, was the second-longest serving Justice of the U.S. Supreme Court, having served for over 34 years. He was the only Justice to have been appointed as the tenth sitting Justice of the U.S. Supreme Court by President Lincoln. Another brother, Cyrus Field, was famous for connecting two continents by laying the Atlantic Cable, after several failed attempts, in 1866, and was immortalized in Stefan Zweig's 'The Tide of Fortune'.

recovery is or is not barred by the limitation law. The expression “actually” makes it clear that in fact a debt must be due and payable notwithstanding the law of limitation. From this, it is very difficult to infer that in the context of the Contract Act, the expression “due and payable” by itself would connote an amount that may be due even though it is time-barred, for otherwise, it would be unnecessary for Section 60 to contain the word “actually” together with the later words, “whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits”.

20. Shri Dholakia went on to cite *Bhimsen Gupta v. Bishwanath Prasad Gupta*, (2004) 4 SCC 95, and *In re Sir Harilal Nemchand Gosalia*, AIR 1950 Bom 74 for the proposition that debts “due and payable” must be differentiated from debts “due and recoverable”.

In the former case, Section 11(1)(d) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 provided for eviction of a tenant where the amount of two months’ rent “lawfully payable by the tenant and due from him” was in arrears. This Court followed *Bombay Dyeing (supra)*, stating as follows:

“6. Section 11 of the said Act, 1982 deals with eviction of tenants. It begins with non obstante clause. It states that notwithstanding

anything

contained in any contract or law to the contrary, no tenant shall be liable to be evicted except in execution of a decree passed by the court on one or more of the grounds mentioned in Sections 11(1)(a) to (f). In this case we are concerned with the ground of default which falls under Section 11(1)(d) and which states that where the amount of two months' rent, lawfully payable by the tenant and due from him is in arrears by reason of non-payment within the time fixed by the contract or in the absence of such contract by the last day of the month next following that for which rent is payable then such default would constitute ground for eviction. It is interesting to note that the expression used in Section 11(1)(d) is "lawfully payable" and not "lawfully recoverable" and therefore, Section 11(1)

(d) has nothing to do with recovery of arrears of rent. On the contrary, Section 11(1)(d) provides a ground for eviction of the tenant in the eviction suit. It is well settled that law of limitation bars the remedy of the claimant to recover the rent for the period beyond three years prior to the institution of the suit, but that cannot be a ground for defeating the claim of the landlord for decree of eviction on satisfaction of the ingredients of Section 11(1)(d) of the said Act, 1982. In the case of *Bombay Dyeing & Mfg. Co. Ltd. v. State of Bombay* [AIR 1958 SC 328] it has been held that when the debt becomes time-barred the amount is not recoverable lawfully through the process of the court, but it will not mean that the amount has become not lawfully payable. Law does not bar a debtor to pay nor a creditor to accept a barred debt."

It is clear that this judgment will have no application to the present case as

Section 11(1)(d) had nothing to do with

recovery of arrears of rent, but furnished a ground for evicting the tenant, this being the context in which the words "lawfully payable by the tenant and due from him" had been used. This Court correctly held that the right to evict the

tenant cannot be affected as the law of limitation has reference only to the remedy of recovery of arrears of rent, and such law cannot be held to stand in the way of the right to evict the tenant.

Similarly, in Sir Harilal Nemchand Gosalia (supra), the expression used is “amount of debts due and owing from the deceased, payable by law out of the estate” which appeared in the third schedule of the Court Fee Act, 1870. It was held that an executor of a will is entitled to pay time-barred debts and cannot be confused with a creditor who may sue the executor in relation to those debts. The creditor would fail in his action because although the debt subsists, the remedy has been extinguished due to the law of limitation. Since the executor is duty bound to pay the amounts due and owing under the will without going to Court, he is entitled to pay a time-barred debt.

This, the Court held, is made clear by Section 323 of the Succession Act, 1925, which made no exception in case of time-barred debts. It is in this context that the Court noted the difference between “payable” and “recoverable”.

21. It is important to remember that interpretation is the art of matching the text with the context. In a slightly different context, under Section 86 of the Electricity Act, this Court, in Andhra Pradesh Power Coordination Committee and Ors. v.

Lanco Kondapalli Power Ltd. and Ors., (2016) 3 SCC 468, refused to apply the principle of these cases stating:

“30..... In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.

31. We have taken the aforesaid view to avoid injustice as well as the possibility of discrimination.

We have already extracted a part of para 11 of the judgment in *State of Kerala v. V.R. Kalliyankutty* [*State of Kerala v. V.R. Kalliyankutty*, (1999) 3 SCC 657] wherein the Court considered the matter also in the light of Article 14 of the Constitution. In that case the possibility of Article 14 being attracted against the statute was highlighted to justify a particular interpretation as already noted. It was also observed that it would be ironic if in the name of speedy recovery contemplated by the statute, a creditor is enabled to recover claims beyond the period of limitation. In this context, it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor — electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it

is barred by limitation prescribed for an ordinary suit before the civil court. .. ”

(emphasis supplied)

This case is most apposite. As in the present case, and as is reflected in the Insolvency Law Committee Report of March, 2018, the legislature did not contemplate enabling a creditor who has allowed the period of limitation to set in to allow such delayed claims through the mechanism of the Code. The Code cannot be triggered in the year 2017 for a debt which was time- barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death. This being the case, the expression “debt due” in the definition sections of the Code would obviously only refer to debts that are “due and payable” in law, i.e., the debts that are not time-barred. That this is the case has already been held by us in the Innoventive Industries Ltd. (supra) as follows:

“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4,

the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution

professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”

(emphasis supplied)

xxx xxx xxx

“30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt

is “due” i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(emphasis supplied)

22. We have already seen from the judgment in V.R. Kalliyankutty (supra), that the expression “due” will depend upon the context in which that word appears. It will be seen from a reading of the definition of “debt” in Section 3(11) of the Code, that “debt” is said to mean a liability or obligation in respect of a claim which is “due” from any person, and includes a financial debt and an operational debt.

“Financial debt” is defined in Section 5(8) as follows:

“5. Definitions.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;

- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; *Explanation*.—For the purposes of this subclause,—
- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
  - (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;”

Operational debt is defined in Section 5(21) as follows:

“5. Definitions.—In this Part, unless the context otherwise requires,—

xxx xxx xxx

(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the

Central Government, any State Government or any local authority;”

The definition of “default” in Section 3(12) uses the expression “due and payable” followed by the expression “and is not paid by the debtor or the corporate debtor”. “Due and payable” in Section 3(12), therefore, only refers to the whole or part of a debt, which when referring to the date on which it becomes “due and payable”, is not in fact paid by the corporate debtor. The context of this provision is therefore actual non-payment by the corporate debtor when a debt has become due and payable.

23. Section 7 applies to a financial creditor who may file an application for initiating a corporate insolvency resolution process against a corporate debtor when a “default” has occurred. The same expression is used when it comes to an operational creditor, who may on the occurrence of a “default” under Section 8, deliver a demand notice as may be prescribed. What throws considerable light on the expression “default” is Section 8(2)(a) which reads as follows:

“8. Insolvency resolution by operational creditor.

xxx xxx xxx

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;”

It will be seen from a reading of Section 8(2)(a) that the corporate debtor shall, within a period of 10 days of the receipt of the demand notice, bring to the notice of the operational creditor the existence of a “dispute”. We have seen that “dispute” as defined in Section 5(6) includes a suit or arbitration proceeding relating to certain matters. Again, under Section 8(2)(a), the corporate debtor may, in the alternative, disclose the pendency of a suit or arbitration proceedings filed before the receipt of the demand notice. It is clear therefore, that at least in the case of an operational creditor, “default” must be non-payment of amounts that have become due and payable in law. The “dispute” or pendency of a suit or arbitration proceedings would necessarily bring in the Limitation Act, for if a suit or arbitration proceeding is time-barred, it would be liable to be dismissed. This again is an important pointer to the fact that when the expression “due” and “due and payable” occur in Sections 3(11)

and 3(12) of the Code, they refer to a “default” which is non-payment of a debt that is due in law, i.e., that such debt is not barred by the law of limitation. It is well settled that where the same word occurs in a similar context, the draftsman of the statute intends that the word bears the same meaning throughout the statute (see *Bhogilal Chunilal Pandya v. State of Bombay*, 1959 Supp. (1) SCR 310 at 313-314). It is thus clear that the expression “default” bears the same meaning in

Sections 7 and 8 of the Code, making it clear that the corporate insolvency resolution process against a corporate debtor can only be initiated either by a financial or operational creditor in relation to debts which have not become time-barred.

24. Strong reliance was placed by Shri Dholakia on France

*B. Martins v. Mafalda Maria Teresa Rodrigues*, (1999) 6 SCC 627, by which Section 24A was inserted in the Consumer Protection Act, 1986 by a 1993 amendment, making the provisions of the Limitation Act applicable to the Consumer Protection Act. In turning down the plea that Section 24A would cover the period from 1986 to 1993, this Court held that the legislature in its wisdom thought it appropriate

not to prescribe a period of limitation for proceedings under the Act as the object of that Act was for the better protection of the interest of consumers. The Court, therefore, held that the addition of Section 24A in the Act shows that initially, the legislature did not intend to prescribe any period of limitation for filing complaints under the Act as it would stultify the beneficent social legislation contained therein. This case is again wholly distinguishable in that the Court found that the Consumer Protection Act is a beneficial social legislation, whose object was not to apply the Limitation Act when it was first enacted. On the contrary, in the present case, we find that the object of the Code was subserved by applying Section 433 of the Companies Act from the very inception of the Code. Also, the Insolvency Law Committee Report of March, 2018 makes it clear that the object of the Code from the very beginning was not to allow dead or stale claims to be resuscitated. In this view of the matter, we are afraid that this judgment also would have no bearing.

25. The chart handed up by Shri Dholakia, in which he wished to demonstrate that various tribunals under different Acts either apply or do not apply the Limitation Act, again leads us nowhere.

Depending upon the intention of the legislature in each of the enactments mentioned in the chart, either the legislature thought it fit to apply the Limitation Act, or it did not, depending upon the subject matter of the Act in question. We have held that at least insofar as the Code is concerned, the intention of the legislature, from the very beginning, was to apply the Limitation Act to the NCLT and the NCLAT while deciding applications filed under Sections 7 and 9 of the Code and appeals therefrom. Section 433 of the Companies Act, which applies to the Tribunal and the Appellate Tribunal, expressly applies the Limitation Act to the Appellate Tribunal, the NCLAT, as well. Also, the argument that the NCLAT is an appellate tribunal which is common to three statutes, under one of which, *viz.*, the Competition Act, no period of limitation has been prescribed, would not lead to any anomalous situation.

When the Appellate Tribunal, i.e., the NCLAT decides an appeal under the Competition Act, since an appeal is a continuation of the application filed before the Competition Commission (See *Lachmeshwar Prasad Shukul and Ors. v. Keshwar Lal Chaudhuri and Ors.*, AIR 1941 FC 5), the NCLAT will decide the appeal on the

footing that the Limitation Act did not apply to an application made before the Competition Commission. On the other hand, insofar as applications are filed under Section 7 or 9 of the Code, or petitions or applications filed under the Companies Act, the NCLAT will decide such petitions/applications on the footing that the Limitation Act will apply to such petitions/applications. Merely because appeals under different statutes are sent to one appellate tribunal would make no difference to the position in law. Undoubtedly, if three separate appellate tribunals had been constituted under the three enactments in question, this argument would have no legs to stand on. Merely because, from the point of view of convenience, appeals are filed before one appellate forum would not mean that any anomalous situation would arise as each appeal would be decided keeping in mind the provisions of the particular Act in question. Therefore, this argument also must be rejected.

26. Shri Dholakia argued that the Code being complete in itself, an intruder such as the Limitation Act must be shut out also by application of Section 238 of the Code which provides that, “notwithstanding anything inconsistent therewith contained in any

other law for the time being in force”, the provisions of the Code would override such laws. In fact, Section 60(6) of the Code specifically states as follows:

“60. Adjudicating Authority for corporate persons.— xxx xxx xxx

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 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.”

This provision would have been wholly unnecessary if the Limitation Act was otherwise excluded either by reason of the Code being complete in itself or by virtue of Section 238 of the Code. Both, Section 433 of the Companies Act as well as Section 238A of the Code, apply the provisions of the Limitation Act “as far as may be”. Obviously, therefore, where periods of limitation have been laid down in the Code, these periods will apply notwithstanding anything to the contrary contained in the Limitation Act. From this, it does not follow that the baby must be thrown out with the bathwater. This argument, therefore, must also be rejected.

27. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

28. In view of our finding that the Limitation Act has in fact been applied from the inception of the Code, it is unnecessary for us to go into the arguments based on the doctrine of laches. The appeals are therefore remanded to the NCLAT to decide the appeals afresh in the light of this judgment.

.....J.  
(R.F. Nariman)

(Navin Sinha)

New Delhi;  
October 11, 2018.