REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO.455 OF 2019

Jignesh Shah & Anr. …Petitioners

Versus

Union of India & Anr. …Respondents

WITH

CIVIL APPEAL NO. OF 2019
(Arising out of Special Leave Petition (Civil) No._____of 2019)
(D. No.13468 of 2019)

WITH

TRANSFER PETITION (CIVIL) NO.817 OF 2019

WITH

CIVIL APPEAL NO. 7618-19 OF 2019
(D. No.16521 of 2019)

WITH

WRIT PETITION (CIVIL) NO.645 OF 2019

J U D G M E N T

R.F. Nariman, J.

W.P.(C) No.645 OF 2019

1. The issues involved in Writ Petition (Civil) No.645 of 2019 are entirely different from the Writ Petition (Civil) No.455 of 2019 and its

other connected matters. This writ petition is accordingly de-tagged from Writ Petition (Civil) No.455 of 2019. The Registry is directed to list this writ petition separately.

W.P.(C) No.455 of 2019 & Civil Appeal (Diary No.16521 of 2019)

2. Delay is condoned. Civil Appeal (Diary No. 16521 of 2019) is admitted.

3. Writ Petition (Civil) No.455 of 2019 and Civil Appeal (Diary No. 16521 of 2019) have been filed by Shri Jignesh Shah and Smt. Pushpa Shah respectively, both of whom are shareholders of La-Fin Financial Services Pvt. Ltd. (hereinafter "La-Fin") assailing the order of the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as the "NCLT") admitting a winding up petition that was filed by IL&FS Financial Services Ltd. (hereinafter referred to as "IL&FS") against La-Fin before the High Court of Judicature at Bombay (hereinafter referred to as the "Bombay High Court"), which was transferred to the NCLT and then heard as a Section 7 application under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to the "the Code").

4. The brief facts necessary to appreciate the narrow controversy that arises in Writ Petition (Civil) No.455 of 2019 and its connected matters are as follows:

(i) On 20th August, 2009, a share purchase agreement was executed between Multi-Commodity Exchange India Limited (hereinafter referred to as "MCX"), MCX Stock Exchange Limited (hereinafter referred to as "MCX-SX") and IL&FS, whereby IL&FS agreed to purchase 442 lakh equity shares of MCX-SX from MCX.

(ii) Pursuant to this agreement, La-Fin, as a group company of MCX, issued a 'Letter of Undertaking' to IL&FS on 20th August, 2009 (hereinafter referred to as the "Letter of Undertaking") stating that La-Fin or its appointed nominees would offer to purchase from IL&FS the shares of MCX-SX after a period of one year, but before a period of three years, from the date of investment. On facts, this period of three years expired in August, 2012.

(iii) IL&FS, therefore, by its letter dated 3rd August, 2012, exercised its option to sell its entire holding of shares in MCX-SX, and called upon La-Fin to purchase these shares in accordance with the Letter of Undertaking. On 16th August, 2012, La-Fin replied that it was under no legal or contractual obligation to buy the aforesaid shares.

(iv) Thereafter, correspondence between the parties continued, until finally, on 19th June, 2013, IL&FS filed a Suit No.449 of 2013 in the Bombay High Court for specific performance of the Letter of Undertaking by La-Fin or, in the alternative, for damages. It is important to note that the cause of action for the suit - as stated in the plaint - arose on 16th August, 2012, i.e. the day La-Fin purportedly refused to honour its obligation under the Letter of Undertaking.

(v) On 13th October, 2014, a learned Single Judge of the Bombay High Court passed an injunction order restraining La-Fin from alienating its assets pending disposal of the suit, subject to attachments of La-Fin's properties that had been made by the Economic Offences Wing of the Mumbai Police (hereinafter referred to as the "EOW") during the pendency of the suit. An appeal against this order was dismissed by a Division Bench of the Bombay High Court on 11th September, 2015.

(vi) On 3rd November, 2015, a statutory notice under Section 433 and 434 of the Companies Act, 1956 was issued by IL&FS to La-Fin, referring to the attachment by the EOW, and stating that La-Fin was obviously in no financial position to pay the sum of INR 232,50,00,000/- which, according to IL&FS, was owing to them as of

31st October, 2015. On 18th November, 2015, a reply was promptly given by La-Fin to the aforesaid notice referring to the pending suit, and stoutly disputing the fact that any amount was due and payable. The reply went on to state that La-Fin was otherwise commercially sound and that the statutory notice issued under Sections 433 and 434 of the Companies Act, 1956 was only a pressure tactic.

(vii) On 21st October, 2016, a winding up petition (hereinafter referred to as the "Winding up Petition") was then filed by IL&FS against La-Fin in the Bombay High Court under Section 433(e) of the Companies Act, 1956.

(viii) The Code came into force on 1st December, 2016, and as a result, as per the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Winding up Petition was transferred to the NCLT as a Section 7 application under the Code. The statutory form under these Rules, namely, Form-1 was filled up by IL&FS indicating that the date of default was 19th August, 2012.

(ix) On 28th August, 2018, the said Winding up Petition was admitted by the NCLT as an application under Section 7 of the Code, stating on a reading of the share purchase agreement and the Letter of Undertaking that a financial debt had, in fact, been incurred by La-Fin. The National Company Law Appellate Tribunal

(hereinafter referred to as the "NCLAT") by an order dated 21st January, 2019 dismissed the appeal filed by Shri Jignesh Shah against the aforesaid admission order, agreeing with the NCLT that the aforesaid transaction would fall within the meaning of "financial debt" under the Code, and that the bar of limitation would not be attracted as the Winding up Petition was filed within three years of the date on which the Code came into force, viz., 1st December, 2016.

(x) A Writ Petition was filed by Smt. Pushpa Shah against these orders in the Bombay High Court, challenging certain provisions of the Code, with which we are not directly concerned. Writ Petition (Civil) No.455 of 2019 was then filed in this Court on 4th April, 2019 challenging the constitutionality of certain provisions of the Code, as well as the NCLT and NCLAT orders, after which the Civil Appeal (Diary No. 16521 of 2019) was also filed against the NCLAT order under Section 62 of the Code.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing on behalf of the Petitioners/Appellants, did not go into the merits of the case, but has raised only the statutory bar of limitation against IL&FS. According to the learned Senior Advocate, after this Court's judgment in **B.K. Educational Services Pvt. Ltd. v. Parag Gupta**

and Associates 2018 SCC OnLine 1921, it is clear that the Limitation Act, 1963 (hereinafter referred to as the "Limitation Act") would apply to all Section 7 applications that are filed under the Code and that the residuary Article, i.e., Article 137 of the Limitation Act would be attracted to the facts of this case. Inasmuch as the Winding up Petition that has been transferred to the NCLT was filed on 21st October, 2016, i.e., beyond the period of three years prescribed (as the cause of action had arisen in August, 2012), it is clear that a time-barred winding up petition filed under Section 433 of the Companies Act, 1956 would not suddenly get resuscitated into a Section 7 petition under the Code filed within time, by virtue of the transfer of such petition. He relied heavily on **B.K. Educational Services Pvt. Ltd.** (supra) which, according to him, covered this case on all fours. In addition, he relied upon High Court judgments, Judgments from the United States of America, and one English judgment to buttress the proposition that the mere filing of a suit for specific performance would not in any manner impact the limitation period for a winding up petition, which as a separate and independent remedy, must fall or stand on its own legs. He also painstakingly took us through the statutory notice under Sections 433 and 434 sent by IL&FS, as well as the Winding up Petition filed

by IL&FS, and relied heavily on the fact that the Form-1 (which was filled by IL&FS in order to transfer the aforesaid Winding up Petition to the NCLT) itself stated that the date of default was 19th August, 2012, clearly indicating that the Winding up Petition, being beyond three years of the cause of action, was time-barred.

6. On the other hand, Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of the Respondents IL&FS, argued that the cause of action for the suit and the cause of action for the Winding up Petition filed were separate and distinct. He argued that it is well-settled that a winding up petition cannot be filed in order to recover a debt, but is a proceeding 'in rem', which involves commercial insolvency of the company sought to be wound up. Therefore, according to the learned Senior Advocate, the cause of action for filing the Winding up Petition arose only in 2015/2016, after Shri Jignesh Shah (the Petitioner before us) was arrested; after attachment of the assets of La-Fin; and as stated in the Winding up Petition, after La-Fin's assets had fallen from being worth around INR 1000 crores in 2013, to only being worth around INR 200 crores in October, 2016. He relied on several judgments to support this argument. According to him, the suit that was filed by IL&FS for specific performance of the Letter of Undertaking on 19th June, 2013

kept alive the debt that was owed to his client and, therefore, in any event, the Winding up Petition filed after such debt was kept alive would be in time, notwithstanding that it was filed at a subsequent period after the suit. According to him, in any event, limitation being a mixed question of fact and law, at best the matter ought to be remanded to the NCLT for a determination on this mixed question.

7. Having heard the learned Senior Counsel for the parties, it is important to first advert to this Court's decision in **B.K. Educational Services Pvt. Ltd.** (supra) in which Section 238A of the Code was referred to, which states 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."

8. In paragraph 7 of the said judgment, the Report of the Insolvency Law Committee of March, 2018 was referred to as follows:

> "**7.** 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:
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> "**28. APPLICATION OF LIMITATION ACT, 1963**

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.[1] 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.[2] This requires being read with the definition of 'debt' and 'claim' in the Code. Further, debts in winding up proceedings cannot be time-barred,[3] and there appears to be no rationale to exclude the extension of this principle of law to the Code.

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 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*"[4]. 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.

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."
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> (emphasis supplied)

9. After referring to Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016, the Court extracted passages from the judgment in **M.P. Steel Corporation v. CCE** (2015) 7 SCC 58 and then concluded:

> "**20.** 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.
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> **21.** In *State of Kerala* v. *V.R. Kalliyanikutty*, (1999) 3 SCC 657, ("*V.R. Kalliyanikutty*"), 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,
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> "8. …… In every case the exact meaning of the word "due" will depend upon the context in which that word appears."

22. 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.

23. 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.

24. 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*, 4th 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……"
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> **25.** 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."

The Court then held:

> "**38.** 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."

Finally, the Court held:

> "**48.** 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."

10. This judgment clinches the issue in favour of the Petitioner/Appellant. With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code. Winding up petitions filed before the Code came into force are now converted into petitions filed under the Code. What has, therefore, to be decided is whether the Winding up Petition, on the date that it was filed, is barred by lapse of time. If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL&FS, default in repayment had occurred, it is barred by time.

11. Dr. Singhvi relied upon a number of judgments in which proceedings under Section 433 of the Companies Act,1956 had been initiated after suits for recovery had already been filed. These judgments have held that the existence of such suit cannot be construed as having either revived a period of limitation or having

extended it, insofar as the winding up proceeding was concerned. Thus, in **Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd.** (1999) 96 Comp Cas 349, a Single Judge of the Karnataka High Court, in the fact situation of a suit for recovery being filed prior to a winding up petition being filed, opined:

> "**8**…To my mind, there is a fallacy in this argument because the test that is required to be applied for purposes of ascertaining whether the debt is in existence at a particular point of time is the simple question as to whether it would have been permissible to institute a normal recovery proceeding before a civil court in respect of that debt at that point of time. Applying this test and de hors that fact that the suit had already been filed, the question is as to whether it would have been permissible to institute a recovery proceeding by way of a suit for enforcing that debt in the year 1995, and the answer to that question has to be in the negative. That being so, the existence of the suit cannot be construed as having either revived the period of limitation or extended it. It only means that those proceedings are pending but it does not give the party a legal right to institute any other proceedings on that basis. It is well settled law that the limitation is extended only in certain limited situations and that the existence of a suit is not necessarily one of them. In this view of the matter, the second point will have to be answered in favour of the respondents and it will have to be held that there was no enforceable claim in the year 1995, when the present petition was instituted."

12. Likewise, a Single Judge of the Patna High Court in **Ferro Alloys Corporation Ltd. v. Rajhans Steel Ltd.** (2000) Comp Cas 426 also held:

> "**12….**In my opinion, the contention lacks merit. Simply because a suit for realisation of the debt of the petitioner-company against opposite party No. 1 was instituted in the Calcutta High Court on its original side, such institution of the suit and the pendency thereof in that court cannot enure for the benefit of the present winding up proceeding. The debt having become time-barred when this petition was presented in this court, the same could not be legally recoverable through this court by resorting to winding up proceedings because the same cannot legally be proved under section 520 of the Act. It would have been altogether a different matter if the petitioner-company approached this court for winding up of opposite party No. 1 after obtaining a decree from the Calcutta High Court in Suit No. 1073 of 1987, and the decree remaining unsatisfied, as provided in clause (b) of sub-section (1) of section 434. Therefore, since the debt of the petitioner-company has become time-barred and cannot be legally proved in this court in course of the present proceedings, winding up of opposite party No. 1 cannot be ordered due to non-payment of the said debt."

13. In **Rameswar Prasad Kejriwal & Sons Ltd. v. M/s. Garodia Hardware Stores** (2002) 108 Comp Cas 187, a money suit that was filed in 1994 was decreed in 1997, after which a winding up petition under Section 433 of the Companies Act, 1956 was filed in 2001. In this fact situation, the learned Single Judge held:

> "**13.** It is an admitted position that the cause of action of the company arose in 1992. The suit was filed in 1994 and the decree was obtained in 1997. But on the basis of the said debt which is said to be merged in the decree, the winding up petition cannot be filed after the period of limitation that means after a period of three years.
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> 14. It is not in dispute that in the instant case, the period of limitation is covered by residuary article namely Article 137 of Limitation Act. A special Bench of this Court, in the

case of *Hari Mohan Dalai* v. *Parmeshwar Shau*, reported in 56 Indian Law Reports, 61, has made certain observations on how the residuary article is to be construed.

15. Construing the provisions of Article 181 the residuary article under the old Act, Chief Justice Rankin, speaking for the Special Bench, held that "In Article 181 the legislature makes provisions not for any definite type of cases but for an unknown number of cases of all kinds. The provision which it makes specific as regard the period of limitation, but as regarded the terminus a quo it is content to state in general language and quite simply the fundamental principle that, for the purposes of any particular application, time is to run from the moment at which the applicant first had the right to make it."

16. This Court goes by the same principle and holds that period of limitation should be counted from 1992. But assuming it is not counted from 1992, it has to be counted from 1997. Therefore, considering the matter from all possible angles, this Court is of the view that instant winding up petition has become barred on the date on which it is presented. It cannot be held that in case of winding up petition, limitation period will be 12 years which may be the case in matters of execution of a decree.

17. Therefore, this winding up petition is, therefore, dismissed but in the facts of this case, there will be no order as to costs."

14. In **Dr. Dipankar Chakraborty v. Allahabad Bank & Ors.** 2017 SCC OnLine Cal 8742, the fact situation was that a suit had been filed by the petitioner in the City Court at Calcutta for damages against the Allahabad Bank. The Bank, in turn, filed a proceeding under Section 19 of the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 in 2001 before the Debt Recovery Tribunal, Calcutta. The Civil Suit was also transferred to the Debt Recovery Tribunal, Calcutta where both proceedings were pending adjudication. Meanwhile, under the Securitisation and Restructure of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), a notice dated 3rd March, 2016 was issued under Section 13(2) of the SARFAESI Act. The question which arose before the Court was whether the invocation of the SARFAESI Act, being beyond limitation, would be saved because of the pending proceedings under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Court negatived the plea of the Bank, stating:

> "**22.** Section 14 of the Limitation Act, 1963 permits exclusion of the time taken to proceed bona fide in a Court without jurisdiction. Such section permits a plaintiff to present the same suit, if the Court of the first instance, returns a plaint from defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, a secured creditor is not withdrawing a proceeding pending before the Debts Recovery Tribunal under Section 19 of the Act of 1993 to invoke the provisions of the Act of 2002. Rather the secured creditor is proceeding, independent of its right to proceed under the Act of 1993, while invoking the provisions of the Act of 2002. This choice of the secured creditor to invoke the Act of 2002 is independent of and despite the pendency of the proceedings under the Act of 1993, has to be looked at from the perspective of whether or not such an action meets the requirement of Section 36 of the Act of 2002, when the secured creditor is proposing to take a

measure under Section 13(4) of the Act of 2002. Although, a secured creditor, as held in *Transcore* (supra), is entitled to take a remedy or a measure as available in the Act of 2002, despite the pendency of other proceedings, including a proceeding under Section 19 of the Act of 1993, in respect of the self-same cause of action, in my view, the invocation of such independent right under the Act of 2002, has to be done within the period of limitation prescribed under the Limitation Act, 1963 in terms of Section 36 of the Act of 2002. The Act of 2002 gives an independent right to a secured creditor to proceed against its financial assets and in respect of which such asset the secured creditor has security interest. The right to proceed, however, is subject to the adherence to the provisions of limitation as enshrined in the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, attracted to a proceeding initiated under the Act of 2002. That being the legal position, the invocation of the provisions of the Act of 2002 in the facts of the present case, on July 5, 2011, without there being an extension of the period of limitation by the act of the parties cannot be sustained.

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25. The issues raised are, therefore, answered by holding that, the initiation of the proceedings by the bank was barred by the laws of limitation on July 5, 2011 and all proceedings taken by the bank consequent upon and pursuant to the notice under Section 13(2) of the Act of 2002 dated July 5, 2011 are quashed including such notice."

15. In **Indo Alusys Industries v. Assotech Contracts (India) Ltd.** 2009 (110) DRJ 384, a learned Single Judge of the Delhi High Court opined that a suit for recovery and a winding up proceeding are distinct and independent remedies, as follows:

"**12.** So far as the objection that the petitioner has filed a suit disentitling it to maintain the present petition is concerned, it is well settled that the right to bring a winding up action is statutory conferred under Section 433 of the Companies Act, 1956. However, no person has a statutory right to winding up of a company incorporated under the Companies Act, 1956. Action to recover amounts and to winding up of the company are two wholly distinct and independent remedies. It is not necessary that every petition under Section 433 of the Companies Act, 1956 ends up in an order of winding up. Several essential factors as public interest, justice and convenience enter into the consideration before the prayed for order results. The nature of the defence and extent of dispute raised by the respondent also impact adjudication in winding up action. At the same time, limitation for seeking the remedy of recovery against the company continues to run. The two remedies are not alternative remedies. More often than not, as a matter of abundant caution, parties do not wait for final decision in one remedy before invoking the other.

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14. In view of the above, mere filing of the suit by the petitioner in order to protect its right and by way of abundant caution certainly would not prohibit filing of the winding up petition or preclude the petitioner from maintaining the same."

16. In **Board of Regents of the University of the State of New York et. al. v. Mary Tomanio** 100 S. Ct. 1790, the Supreme Court of the United States of America held that a federal action under the Civil Rights Act of 1871 was barred by the application of a three-year New York statute of limitations. What was argued was that the federal remedy became available only as a consequence of the

State remedy being denied, as the Respondent had commenced a proceeding in the New York states courts attacking a decision of the Board of Regents not to grant a waiver of a licence to practice as a chiropractor. By November 1975, the appeals in the State proceedings being exhausted, and the Respondent being denied any relief, the Respondent instituted an action in the Federal District Court on 25th June, 1976. The Supreme Court of the United States of America held that the second action was clearly barred by the law of limitation, being filed three years after the cause of action had arisen. It was held that once the limitation period started running, it did not stop because a separate and independent remedy had been pursued in the meanwhile. The Court held:

> "No section of the law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action."

17. In **Martiza Alamo-Hornedo v. Juan Carlos Puig and Jose Perez-Riera** 745 F.3d 578, the US Court of Appeals, First Circuit held on the facts of the case, that a separate and independent action which was otherwise barred by limitation could not be brought within limitation merely because a prior suit had been filed. The Court held:

"**4.** The plaintiff also suggests that her prior suit in the Court of First Instance somehow tolled the statute of limitations. This suggestion is fanciful.

5. To begin, exhaustion of state remedies is not a condition precedent to the maintenance of a section 1983 action. See *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Rogers v. Okin,* 738 F.2d 1, 5 (1st Cir. 1984). Thus, the commencement and pendency of a state proceeding ordinarily does not toll the limitations period for a parallel action under Section 1983. See, *e.g., Rodriguez-Garcia v. Municipality of Caguas*, 354 F.3d 91, 93 (1st Cir.2004); *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d 315, 319 (1st Cir. 1978). The plaintiff attempts to parry his thrust by noting that, under Puerto Rico law, the statute of limitations can be "interrupted" by, among other things, suing on the relevant claim. P.R. Laws Ann. tit. 31, 5303. Once the court action "comes to a definite end," the "statute of limitations begins to run anew." *Rodriguez-Gracia*, 354 F.3d at 97 (internal quotation marks omitted).

*582 **6.** The plaintiff's reliance on this principle elevates hope over reason. In order to have the tolling effect desired by the plaintiff, the complaint in the first action "must assert causes of action identical to" those asserted in the second action. *Id.* (internal quotation marks omitted).

6. The identicality requirement has three facets. The two actions "must seek the same form of relief"; they "must be based on the same substantive claims"; and they "must be asserted against the same defendants in the same capacities." *Id.* at 98. The plaintiff offers no developed argumentation sufficient to show that she satisfies these conditions.

In all events, it is readily apparent that the plaintiff has not satisfied the identicality requirement. The first action, brought in the Court of First Instance, sought the equitable remedies of reinstatement and back pay; the second action, brought in the federal district court, sought the legal remedies of compensatory and punitive

damages. Thus, it is nose-on-the-face plain that the two actions did not seek the "same form of relief."

We hasten to add that this conclusion breaks no new ground. This court has held, squarely and repeatedly, that under Puerto Rico law, "seeking only equitable relief does not toll the statute of limitations where the subsequent complaint… seeks damages." *Nieves-Vega v. Ortiz-Quinones,* 443 F.3d 134, 137 (1st Cir. 2006) (collecting cases).

In view of the plaintiff's failure to satisfy the first facet of the identicality requirement, we need not inquire into the other two facets. Puerto Rico law is pellucid that a plaintiff who seeks to interrupt the running of a statute of limitations on this basis must satisfy all three facets of the identicality requirement. *See, e.g., Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 116 (1st Cir. 2009); *Nieves-Vega*, 443 F.3d at 137-38.

That ends this aspect of the matter. When all is said and done, the plaintiff's decision to sit idly by while the proceedings in the Court of First Instance unfolded dooms her tardy attempt to assert a federal claim. Although waiting for the Commonwealth court's ruling may have served to strengthen the plaintiff's belief that her firing was illegal, there is no requirement that a period who wishes to pursue a Section 1983 claim premised on an allegedly wrongly termination of employment await an independent finding that her dismissal was unlawful. Consequently, the plaintiff's election to await a ruling by the Court of First Instance does not justify her failure to bring her federal claim within the time allotted by statute."

18. In **Re Karnos Property Co. Ltd.** (1989) 5 B.C.C. 14, a learned Single Judge of the Chancery Division (Companies Court) held that a local authority's petition to wind up a company for non-payment of rates was barred by the law of limitation, being presented more than

six years after the cause of action arose. The fact that the rate demanded had been the subject of distress warrants did not in any manner impact the limitation period for the winding up petition. It was thus held:

> "Applying those words to the petition proceedings now in train it seems that the cause of the proceedings arose at the latest when the company failed to pay the latest rate demand on 1 April 1981. That is more than six years before the presentation of the petition. Accordingly I conclude that the petition must be dismissed because it is founded on rates unpaid for more than six years. In other words a local authority petition for non-payment of rates is subject to the provisions of the Limitation Acts.
>
> Mr. Acton for the local authority conceded, as I understand, that rates unpaid for six years and never the subject of a distress warrant were irrecoverable in any way; so that the local authority ceases to be a creditor and thus may not petition. But, said Mr. Acton, once a distress warrant has been obtained it remains always available for execution and thus preserves the local authority its character as a creditor and ever able to petition. I do not accept this submission. If one assumes that the two distress warrants issued in this case remain available to the local authority, I do not think it follows that the provisions of the Limitation Acts that I have mentioned do not operate to stop the presentation of a petition. The effect of Section 2(1) of the 1939 Act (or Section 9(1) of the 1980 Act) is that a petition may not be presented if six years have passed since the rates were demanded. There is nothing there to qualify the position if a distress warrant happens to be current. A petition lies not because a distress warrant has been or may be issued but because a local authority is a "creditor" as that word is and has been used in the Companies Acts (see the North Bucks case).

> The remedies by way of distress and petition are separate and distinct."

19. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding up proceeding. In law, when time begins to run, it can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under Section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding up proceeding.

20. Shri Kaul, however, relied heavily on the judgment of a Single Judge of the Bombay High Court reported as **Re: Messrs: Bhimji Nanji and Co.** (1969) Mh.L.J. 827. That case arose under the Presidency-towns Insolvency Act, 1909, the question raised being as follows:

> "**4.** Whether the debt on the basis of which the petition for adjudication is presented and an adjudication order is sought should be a subsisting debt at the date of the

hearing of the petition or is it enough that it subsisted at the date of the presentation of the petition?"

Section 13 of the Presidency-towns Insolvency Act, 1909 laid down what factors are required to be proved by a petitioning-creditor at the hearing of the petition before the Court. Section 13(2) of the said Act, which fell for consideration before the Bombay High Court, is set out hereinbelow:

> "At the hearing the Court shall require proof of –
> (a) the debt of the petitioning creditor, and
> (b) the act of insolvency or, if more than one act of insolvency is alleged in the petition, some one of the alleged acts of insolvency."

The observation that was made by the Court which is relied upon heavily by Shri Kaul is contained in paragraph 9, which is set out hereinbelow:

> "**9.** Mr. Shah urged that if this view were accepted by the Court it would cause great hardship to the creditor. Once an insolvency petition is presented by a creditor, he normally expects that the adjudication order would be passed at the hearing of his petition and simply because the hearing of the petition is delayed not for any default on his part but say on account of the exigencies of the Court work the creditor will have to meet the fate which he may not have thought of or contemplated, if in the meantime the debt becomes barred by limitation. I do not see any hardship arising to the creditor as suggested by Mr. Shah, for it would be open to the creditor or rather it would be his duty to see that he keeps the debt alive either by means of an acknowledgement or part payment or by filing a suit in respect thereof in a proper court well within the period of limitation, but to my mind, it is clear

> that mere pendency of an insolvency petition without anything more cannot have the effect of saving the limitation prescribed by the Indian Limitation Act."

The context in which the learned Single Judge made an observation that the filing of a suit within limitation would keep the debt alive, is in the context of Section 13 of the Presidency-towns Insolvency Act, 1909 - which requires that the debt of the petitioning creditor should be alive even at the hearing of the insolvency petition. Obviously, if at the hearing of the petition, the debt was time-barred, the stringent result of insolvency of the individual concerned would not follow. It is in this context that the learned Single Judge held that a debt would be subsisting at the date of hearing of the insolvency petition if a suit was filed to recover it within the period of limitation. The context of Section 13 of the Presidency-towns Insolvency Act, 1909 is far removed from the present context, in which what has to be seen is whether a winding up proceeding has been filed within the limitation period provided. In the facts of the present case, no question as to subsistence of a live debt at the hearing of a winding up petition is at all involved. This case is, therefore, wholly distinguishable.

21. Shri Kaul then relied strongly on the rationale for laws of limitation generally, which was set out in **Rajender Singh and Ors. v. Santa Singh and Ors.** (1973) 2 SCC 705 as follows:

> "**17.** The policy underlying statutes of limitation, spoken of as statutes of "repose", or of "peace" has been thus stated in *Halsbury's Laws of England* Vol. 24, p. 181 (para 330):
>
> "330. *Policy of Limitation Acts.*—The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely: (*1*) that long dormant claims have more of cruelty than justice in them, (*2*) that a defendant might have lost the evidence to disprove a stale claim, and (*3*) that persons with good causes of actions should pursue them with reasonable diligence."
>
> **18.** 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."

These observations are apposite in the context of the facts of the present case. It is clear that IL&FS pursued with reasonable diligence the cause of action which arose in August, 2012 by filing a suit against La-Fin for specific performance of the Letter of Undertaking in June, 2013. What has been lost by the aforesaid party's own inaction or laches, is the filing of the Winding up Petition long after the trigger for filing of the aforesaid petition had taken place; the trigger being the debt that became due to IL&FS, in repayment of which default has taken place.

22. At this stage, it is necessary to set out Section 433(e) and Section 434 of the Companies Act, 1956, which read as follows:

"**433. Circumstances in which company may be wound up by Tribunal.-** A company may be wound up by the Tribunal,-

xxx xxx xxx

(e) if the company is unable to pay its debts;"

"**434. Company when deemed unable to pay its debts.-**(1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order if any Court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by any such agent or legal adviser or by any member of the firm."

A reading of the aforesaid provisions would show that the starting point of the period of limitation is when the company is unable to pay its debts, and that Section 434 is a deeming provision which refers

to three situations in which a Company shall be deemed to be “unable to pay its debts” under Section 433(e). In the first situation, if a demand is made by the creditor to whom the company is indebted in a sum exceeding one lakh then due, requiring the company to pay the sum so due, and the company has for three weeks thereafter “neglected to pay the sum”, or to secure or compound for it to the reasonable satisfaction of the creditor. “Neglected to pay” would arise only on default to pay the sum due, which would clearly be a fixed date depending on the facts of each case. Equally in the second situation, if execution or other process is issued on a decree or order of any Court or Tribunal in favour of a creditor of the company, and is returned unsatisfied in whole or in part, default on the part of the debtor company occurs. This again is clearly a fixed date depending on the facts of each case. And in the third situation, it is necessary to prove to the “satisfaction of the Tribunal” that the company is unable to pay its debts. Here again, the trigger point is the date on which default is committed, on account of which the Company is unable to pay its debts. This again is a fixed date that can be proved on the facts of each case. Thus, Section 433(e) read with Section 434 of the Companies Act, 1956 would show that the trigger point for the purpose of limitation for filing of a winding up

petition under Section 433(e) would be the date of default in payment of the debt in any of the three situations mentioned in Section 434.

23. Shri Kaul relied upon several well-known judgments, which lay down the law under Section 433 and 434 of the Companies Act, 1956. He relied upon **M/s Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Pvt. Ltd.** (1971) 3 SCC 632, wherein in a case of a winding up petition filed under Section 433(e), the High Court had rejected the claim of the Appellant to wind up the Company as creditors of the Company. Unlike the present case, the Appellant therein gave no statutory notice to raise any presumption of inability to pay debts. In this context, this Court held:

> "**20.** Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See *London and Paris Banking Corporation* [(1874) LR 19 Eq 444]) Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. (See *Re. Brighton Club and Horfold Hotel Co. Ltd.* [(1865) 35 Beav 204])
>
> **21.** Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that

> particular debt, see *Re. A Company.* [94 SJ 369] Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely See *Re Tweeds Garages Ltd.* [1962 Ch 406] The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends."

The Court then stated that as the making of a winding up order is discretionary, the Court will ordinarily consider the wishes of all the creditors, and if they are opposed to winding up the company, the Court may, in its discretion, refuse such order. What was relied upon strongly by Shri Kaul was paragraph 29, in which the Court held:

> "**29**…In determining whether or not the substratum of the company has gone, the objects of the company and the case of the company on that question will have to be looked into. In the present case the company alleged that with the proceeds of sale the company intended to enter into some other profitable business. The mere fact that the company has suffered trading losses will not destroy its substratum unless there is no reasonable prospect of it ever making a profit in the future, and the court is reluctant to hold that it has no such prospect. (See *Re Suburban Hotel Co.* [(1867) 2 Ch App 737] and *Davis and Co.* v. *Brunswick* (*Australia*) *Ltd.* [(1936) 1 AER 299])…The company has not abandoned objects of business. There is no such allegation or proof. It cannot in the facts and circumstances of the present case be held that the substratum of the company is gone. Nor can it be held in the facts and circumstances of the present case that the company is unable to meet the outstandings of any of its admitted creditors. The

> company has deposited in court the disputed claims of the appellants. The company has not ceased carrying on its business. Therefore, the company will meet the dues as and when they fall due. The company has reasonable prospect of business and resources."

24. According to Shri Kaul, it was not possible for his client to approach the High Court with a winding up petition as on the date on which he filed the suit for specific performance, because La-Fin (i.e. the Company sought to be wound up), could not be said to have lost its substratum as on such date. It was for this reason that he approached the winding up Court in 2016, when the assets of La-Fin, which, as of 2013 were worth over INR 1000 crores, had in 2016 become only worth INR 200 crores.

25. This judgment does not take Shri Kaul's argument any further. Nowhere in the Winding up Petition is it alleged that the company sought to be wound-up has lost its substratum, in the sense that there is no reasonable prospect of it ever making a profit in the future, nor can it be said that the company had abandoned its business and is, therefore, unable to meet the outstandings owed by it. On the other hand, what emerges from this judgment (and paragraph 21 therein in particular), is that it is not open for a company to say that a debt is undisputed, that it has ability to pay the debt, but will not pay the debt. Equally, where a debt is clearly

owed, but the exact amount of debt is disputed, the company will be held to be unable to pay its debts. What has to be seen in each case is whether the debt is *bona fide* disputed. If so, without more, a winding up petition would then be dismissed. One other thing must be noticed at this stage. The trigger for limitation is the inability of a company to pay its debts. Undoubtedly, this trigger occurs when a default takes place, after which the debt remains outstanding and is not paid. It is this date alone that is relevant for the purpose of triggering limitation for the filing of a winding up petition. Though it is clear that a winding up proceeding is a proceeding 'in rem' and not a recovery proceeding, the trigger of limitation, so far as the winding up petition is concerned, would be the date of default. Questions as to commercial solvency arise in cases covered by Sections 434(1) (c) of the Companies Act, 1956, where the debt has first to be proved, after which the Court will then look to the wishes of the other creditors and commercial solvency of the company as a whole. The stage at which the Court, therefore, examines whether the company is commercially insolvent is once it begins to hear the winding up petition for admission on merits. Limitation attaches insofar as petitions filed under Section 433(e) are concerned at the stage that default occurs for, it is at this stage that the debt becomes payable.

For this reason, it is difficult to accept Shri Kaul's submission that the cause of action for the purposes of limitation would include the commercial insolvency or the loss of substratum of the company.

26. The next judgment referred to and relied upon by Shri Kaul is **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd. and Anr.** (1994) 3 SCC 348. In this case, it was found that Dalmia Industries had resorted to arbitration proceedings, in which there was a substantial dispute raised on the amount claimed. The passage strongly relied upon by Shri Kaul is set out hereinbelow:

> "**27.** What then is inability when the section says "unable to pay its dues"? That should be taken in the commercial sense. In that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent — that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain — as to make the Court feel satisfied — that the existing and probable assets would be insufficient to meet the existing liabilities". (In *European Life Assurance Society, Re* [LR (1869) 9 Eq 122] ; *V.V. Krishna Iyer & Sons* v. *New Era Mfg. Co. Ltd.* [(1965) 35 Comp Cas 410 : (1965) 1 Comp LJ 179 (Ker)])"

This passage is in the context of an order under 433(e) of the Companies Act, 1956 being discretionary, which is referred to in the preceding paragraph 25. As stated hereinabove, the facts as to commercial insolvency are to be pleaded and proved at the

admission stage of the winding up petition; the trigger for the winding up proceeding for limitation purposes, as has been stated hereinabove, being the date of default.

27. Shri Kaul then relied upon **Mediquip Systems (P) Ltd. v. Proxima Medical System GMBH** (2005) 7 SCC 42 and in particular, paragraphs 18 and 23 thereof, which state as follows:

> "**18.** This Court in a catena of decisions has held that an order under Section 433(*e*) of the Companies Act is discretionary. There must be a debt due and the company must be unable to pay the same. A debt under this section must be a determined or a definite sum of money payable immediately or at a future date and that the inability referred to in the expression "unable to pay its debts" in Section 433(*e*) of the Companies Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from a company.
>
> xxx xxx xxx
>
> **23.** The Bombay High Court has laid down the following principles in *Softsule (P) Ltd., Re* [(1977) 47 Comp Cas 438 (Bom)] : (Comp Cas pp. 443-44)
>
> Firstly, it is well settled that a winding-up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. If the debt is not disputed on some substantial ground, the court/Tribunal may decide it on the petition and make the order.
>
> Secondly, if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(*a*) of the Companies Act, 1956. If there is no

> neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated.
>
> Thirdly, a debt about the liability to pay which at the time of the service of the insolvency notice, there is a bona fide dispute, is not "due" within the meaning of Section 434(1)(*a*) and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" the same so as to incur the liability under Section 433(*e*) read with Section 434(1)(*a*) of the Companies Act, 1956.
>
> Fourthly, one of the considerations in order to determine whether the company is able to pay its debts or not is whether the company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the company should be in a position to meet its liabilities as and when they arise."

28. The Bombay High Court judgment referred to in paragraph 23 of the judgment above states the law on winding up petitions filed under Section 433(a) of the Companies Act, 1956 correctly. The primary test is set out in paragraph 1, which is that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the Company. Absent such dispute, the petition may be admitted. Equally, where the debt is *bona fide* disputed, there cannot be 'neglect to pay' within the meaning of Section 434(1)(a) of the Companies Act, 1956 so that the deeming provision then does not come into play. Also, the moment there is a *bona fide* dispute, the debt is then not 'due'. The

High Court also correctly appreciates that whether the company is commercially solvent is one of the considerations in order to determine whether the company is able to pay its debts or not.

29. Even on the facts of this case, the Winding up Petition alleges that the ultimatum to the Respondent company asserting that the Respondent company was legally obliged to purchase the requisite shares in accordance with the terms of the Letter of Undertaking was on 7th January, 2013. By this date at the very latest, the cause of action for filing a petition under Section 433(e) certainly arose. Also, as has been correctly pointed out by Dr. Singhvi, the statutory notice given on 3rd November, 2015 does not refer to any facts as to the commercial insolvency of La-Fin. The statutory notice only refers to the suit proceedings and attachment by the EOW which had taken place long before in December 2013. Factually, therefore, no basis is laid for the legal contentions argued before us by Shri Kaul.

30. In the Winding up Petition itself, what is referred to is the fall in the assets of La-Fin to being worth approximately INR 200 crores as of October, 2016, which again does not correlate with 3rd November, 2015, being the date on which the statutory notice was itself issued. This again is only for the purpose of appointing an Officer of the Court as Official Liquidator in order to manage the day-to-day affairs

and otherwise secure and safeguard the assets of the Respondent company. There is no averment in the petition that thanks to these or other facts the Company's substratum has disappeared, or that the Company is otherwise commercially insolvent. It is clear therefore that even on facts, the company's substratum disappearing or the commercial insolvency of the company has not been pleaded. Whereas, in Form-1, upon transfer of the winding up proceedings to the NCLT, what is correctly stated is that the date of default is 19th August, 2012; making it clear that three-years from that date had long since elapsed when the Winding up Petition under Section 433(e) was filed on 21st October, 2016.

31. We therefore allow Civil Appeal (Diary No. 16521 of 2019) and dispose of the Writ Petition (Civil) No.455 of 2019 by holding that the Winding up Petition filed on 21st October, 2016 being beyond the period of three-years mentioned in Article 137 of the Limitation Act is time-barred, and cannot therefore be proceeded with any further. Accordingly, the impugned judgment of the NCLAT and the judgment of the NCLT is set aside.

SLP(C) (Diary No.13468 of 2019) & T.P. (C) No.817 of 2019

32. In view of the aforesaid, nothing survives insofar as Special Leave Petition (Diary No.13468 of 2019) and Transfer Petition (Civil) No.817 of 2019 are concerned, and they are accordingly disposed of as having become infructuous.

……J.
(R.F. Nariman)

……J.
(R. Subhash Reddy)

……J.
(Surya Kant)

New Delhi:
September 25, 2019.