



## AIR Online 2021 SC 161

### A LANDMARK JUDGMENT COVERING CRUCIAL ISSUES UNDER INSOLVENCY AND BANKRUPTCY CODE VIS A VIS LIMITATION ACT AND SARFAESI ACT.

#### Supreme Court of India

#### Sesh Nath Singh vs Baidyabati Sheoraphuli Co ... on 22 March 2021

29.....“[In Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited](#) reported in (2019) 12 SCC 697, this Court followed its earlier judgment in Mobilox Innovations Private Ltd. (supra) and observed as hereunder:-

“In a recent judgment of this Court in [Mobilox Innovations Private Limited v. Kirusa Software Private Limited](#) (2018) 1 SCC 353, this Court has categorically laid down that IBC is not intended to be a substitute to a recovery forum. It is also laid down that whenever there is the existence of a real dispute, the IBC provisions cannot be invoked.....”

33....Provisions relating to insolvency and bankruptcy of companies were to be found in the [Sick Industrial Companies \(Special Provisions\) Act](#), 1985, hereinafter referred to in short as “SICA”, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, now known as the Recovery of Debts and Bankruptcy Act, 1993, and hereinafter referred to as the “[Debt Recovery Act](#)”, the [SARFAESI Act](#), and the [Companies Act](#), 2013.

34.....Liquidation of companies was handled by the High Courts under the provisions of [Sections 271 and 272](#) of the Companies Act, 2013 corresponding to [Sections 433, 434 and 439](#) of the Companies Act, 1956. Individual bankruptcy and insolvency were dealt with under the [Presidency Towns Insolvency Act](#), of 1909 and the [Provincial Insolvency Act](#), of 1920, which have been repealed by the IBC.

35.....35. As stated in its Object and Reasons, the objective of the IBC is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner, for maximization of the value of the assets of such persons, to promote entrepreneurship, availability of credit and to balance the interest of all the stakeholders. An effective legal framework for the timely resolution of insolvency and bankruptcy would support the development of credit markets and encourage entrepreneurship. It would also ease business, and facilitate more investments leading to higher economic growth and development. The IBC seeks to designate the NCLT and DRT as the Adjudicating Authorities for the resolution of insolvency, liquidation and bankruptcy.

37. Section 7 of the IBC provides as follows:

39..... Default is defined in [Section 3\(12\)](#) in very wide terms as meaning non-payment of a debt, once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. The Code gets triggered the moment the default is of rupees one lakh or more ([Section 4](#)).

40.....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.

42..... therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

43...9. Application for initiation of corporate insolvency resolution process by operational creditor.—

44. Under Section 9(5)(i)(d) of the IBC, the Adjudicating Authority has to reject an application made by an operational creditor, if notice of dispute has been received by the operational creditor and there is no record of dispute in the information utility. There is no such provision in section 7 of the IBC.

45. [The Limitation Act](#) 1963, has been enacted to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. [The Limitation Act](#) applies to “suits and other proceedings and for purposes connected therewith” as stated in its preamble. The expression “other proceedings” are necessarily proceedings arising out of and/or related to suits.

46. [In K. Venkateswara Rao And Anr. v. Bekkam Narasimha Reddi & Ors](#)<sup>4</sup>, this Court held that the [Limitation Act](#) did not apply to an election petition under the [Representation of People Act](#), 1950, which is a complete Code. [In Nityananda M. Joshi and Others v. The Life Insurance Corporation of India and others](#) <sup>5</sup>, a three-Judge Bench of this Court speaking through Sikri, J. held that [Article 137](#) of the [Limitation Act](#) only contemplates applications to Courts.

47. Various statutes have, however, adopted the provisions of the [Limitation Act](#), by incorporation or reference, either in its entirety or to a limited extent. For example, [Section 37](#) of the Arbitration Act, 4 AIR 1969 SC 872 5 (1969) 2 SCC 199 1940 provided that all the provisions of the [Indian Limitation Act](#), 1908 would apply to arbitrations as they applied to proceedings in Court. Section 433 of the Companies Act, 2013 provides that the provisions of the Limitation Act, 1963 shall, as far as may be

“238A. 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.”

0. [Section 238](#) gives overriding effect to the IBC, notwithstanding anything inconsistent therewith contained in any other law, for the time being in force, or any instrument having an effect, by virtue of any such law.



51. There is no specific period of limitation prescribed in the [Limitation Act](#), 1963 for an application under the IBC before the NCLT. An application for which no period of limitation is provided anywhere else in the Schedule is governed by [Article 137](#) of the Schedule to the [Limitation Act](#). Under [Article 137](#) of the Schedule to the [Limitation Act](#), the period of limitation prescribed for such an application is three years from the date of accrual of the right to apply.

52. There can be no dispute with the proposition that the period of limitation for making an application under [Section 7](#) or 9 of the IBC is three years from the date of accrual of the right to sue, that is, the date of default.

53. [Section 5](#) of the Limitation Act provides that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period of limitation, if the appellant or the applicant satisfies the Court, that he had sufficient cause for not preferring the appeal or making the application within such period.

54.. “The right to sue”, therefore, accrues when a default occurs.

57. The issues involved in this appeal are:-

(i) Whether delay beyond three years in applying Section 7 of IBC can be condoned, in the absence of an application for condonation of delay made by the applicant under [Section 5](#) of the Limitation Act, 1963?

(ii) Whether [Section 14](#) of the Limitation Act, 1963 apply to applications under Section 7 of the IBC? If so, is the exclusion of time under [Section 14](#) available, only after the proceedings before the wrong forum terminates?

63. [Section 5](#) of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although it is the general practice to make a formal application under [Section 5](#) of the Limitation Act, 1963, to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone the delay, in the absence of a formal application.

67.....The IBC does not exclude the application of [Section 6](#) or 14 or 18 or any other provision of the [Limitation Act](#) to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the [Limitation Act](#) apply to proceedings in the NCLT/NCLAT, to the extent feasible.

71. [In State of Goa v. Western Builders](#)<sup>14</sup>, this Court held that [Section 14](#) of the Limitation Act would apply to an application for setting aside of an arbitral award under [Section 34](#) of the Arbitration and Conciliation Act, 1996 by [Section 43](#) of the said Act, which made the [Limitation Act](#) applicable to arbitrations as it applies to proceedings in Court.

21. [Section 14](#) of the Limitation Act deals with the exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before [Section 14](#) can be pressed into service:



- (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;
- (2) The prior proceeding had been prosecuted with due diligence and in good faith;
- (3) The failure of the prior proceeding was due to a defect of jurisdiction or other cause of like nature;
- (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;
- (5) Both proceedings are in a court.

22..... The principle is applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of the procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying [Section 14](#) should be applied to its fullest extent and time have taken diligently pursuing a remedy, in a wrong court, should be excluded.”

75. There can be little doubt that [Section 14](#) applies to an application under Section 7 of the IBC. At the cost of repetition, it is reiterated that the IBC does not exclude the operation of Section 14 of the IBC. The question is whether prior proceedings under the [SARFAESI Act](#) do not qualify for the exclusion of time under [Section 14](#), since they are not civil proceedings in a Court, as argued by Mr Dave.

76..... Much emphasis has been placed by Mr Dave on the explanation at the end of [Section 14](#), to argue that the Financial Creditor would not be entitled to the benefit of [Section 14](#) of the Limitation Act since the proceedings under the [SARFAESI Act](#) are still pending, as also the writ petition in the High Court.

77..... The substantive provisions of Sub-sections (1), (2) and (3) of [Section 14](#) do not say that [Section 14](#) can only be invoked on termination of the earlier proceedings, prosecuted in good faith.

81.....81. In our considered view, Explanation (a) cannot be construed in a narrow pedantic manner to mean that [Section 14](#) can never be 19 (1985) 1 SCC 591 invoked until and unless the earlier proceedings have been terminated for want of jurisdiction or other cause of such nature.

84. To sum up, [Section 14](#) excludes the time spent in proceeding in the wrong forum, which is unable to entertain the proceedings for want of jurisdiction, or other such cause. Where such proceedings have ended, the outer limit to claim exclusion under [Section 14](#) would be the date on which the proceedings ended.

87. In our view, since the proceedings in the High Court were still pending on the date of filing of the application under Section 7 of the IBC in the NCLT, the entire period after the initiation of proceedings under the [SARFAESI Act](#) could be excluded.

88..... However, the ultimate object of an application under [Section 7](#) or 9 of the IBC is the realization of a ‘debt’ by invocation of the Insolvency Resolution Process.

92. In other words, the provisions of the [Limitation Act](#) would apply mutatis mutandis to proceedings under the IBC in the NCLT/NCLAT.

94..... The expression ‘as far as may be’ is indicative of the fact that all or any of the provisions of the [Limitation Act](#) may not apply to proceedings before the Adjudicating Authority (NCLT) or the Appellate authority (NCLAT) if they are patently inconsistent with some provisions of the IBC.



95. If, in the context of proceedings under [Section 7](#) or 9 of the IBC, [Section 14](#) were to be interpreted with rigid and pedantic adherence to its literal meaning, to hold that only civil proceedings in Court would enjoy exclusion,

96. In our considered opinion, the judgment of the NCLAT in the case of Ishrat Ali is unsustainable in law. The proceedings under the [SARFAESI Act](#), 2002 are undoubtedly civil proceedings. ....The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by civil law or by statute and claims relief for breach thereof.

97. On a parity of reasoning, there is no rationale for the view that the proceedings initiated by a secured creditor against a borrower under the [SARFAESI Act](#) for taking possession of its secured assets,

22. AIR 1965 SC 1818 were intended to be excluded from the category of civil proceedings.

102. In any case, [Section 5](#) and [Section 14](#) of the Limitation Act are not mutually exclusive. Even in a case where [Section 14](#) does not strictly apply, the principles of [Section 14](#) can be invoked to grant relief to an applicant under [Section 5](#) of the Limitation Act by purposively construing 'sufficient cause'. It is well settled that omission to refer to the correct section of a statute does not vitiate an order. At the cost of repetition, it is reiterated that delay can be condoned irrespective of whether there is any formal application if there are sufficient materials on record disclosing sufficient cause for the delay.