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Financial Creditor/Operational Creditor to whom the Corporate Debtor owes a Time Barred Debt – Whether can Move the Adjudicating Authority, under the Insolvency and Bankruptcy Code, 2016, for Initiating an Insolvency Resolution Process?*

Under section 7 of the Insolvency and Bankruptcy Code, 2016 ('the Code'), the trigger for filing of an application by a financial creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Likewise under section 8 of the Code the trigger for filing an application before the Adjudicating Authority is when a default in respect of an operation debt has occurred. In this article, the author examines a question that may arise as to whether this trigger can be availed of in respect of a time-barred financial debt or operational debt?

Terms 'Debt', 'Financial Debt' and 'Operational Debt' Explained

1. Under clause (11) of section 3 of the Code, the term 'debt' has been defined to mean 'a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt'. The term 'financial debt' has been defined in detail in clause (8) of section 5 of the Code and includes 'money borrowed against payment of interest'. In view of this definition the loans given by financial institutions and banks to the corporate debtor would undoubtedly be a financial debt. Such a financial debt would include subscription to the debentures or other loan instruments issued by a corporate debtor because the subscription by a person to be debentures is in effect a borrowing from that person by the corporate debtor issuing the debentures and has to pay interest on it. This relationship would be so whether the debenture or other debt instrument is secured or not. The deposits made by a person with the corporate debtor under its deposit scheme would also be a financial debt for in respect of the deposit the corporate debtor makes a borrowing from the depositor and the deposit carries payment of interest as one of the conditions on which the deposit is made. The term 'operational debt' has been defined in clause (21) of section 5 to mean, 'a claim in respect of the provision of goods or services including employment or a debt in respect of repayment of the dues arising under any law for the time being in force or payable to the Central Government, any State Government or any local authority'. It is possible that

**Also see M/s. Speculum Plast Pvt. Ltd. v. PTC Techno Pvt. Ltd. [2018] 1 IBJ (JP) 158 (NCLAT) and Insolvency Law Committee Report, Ministry of Corporate Affairs (March, 2018)*

the debentures issued by the corporate debtor have not been redeemed for a considerable period after the same fell due for redemption. Similarly, the deposit would have remained unpaid for a long period after the date set for its repayment. In the case of the operational debt, the same would be the case, i.e., the payment has not been made for a considerable time in respect of goods provided or services rendered.

Rules of Limitation are not Meant to Destroy Rights of Parties

2. Normally in respect of such dues a demand is made from the corporate debtor for payment of the amount due and if there is no response or if he refuses to make the payment, a suit is filed to recover the amount due, before an appropriate court. Under section 3 of the Limitation Act, 1963, every suit instituted, appeal preferred, application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. The period has been prescribed in the Schedule appended to the Limitation Act. In respect of the debts referred to earlier the period of limitation is three years. In other words, if the unpaid redemption amount of debentures is claimed after three years from the date of redemption and if the amount of deposits made is claimed after three years from the date the deposit became repayable or the dues for provision of goods or services were claimed after three years from the date on which they fell due for payment, then pursuant to the provisions of section 3 of the Limitation Act, the respective claimant would not get a favourable decree as the concerned court is bound to dismiss the claim. The provisions of this section are imperative, Mandatory. It should, however, be noted that the rules of limitation are not meant to destroy the rights of parties. These are meant to see that parties do not start deviation tactics but seek their remedy within a time fixed by the Legislature. If the destruction of rights is the objective, the Legislature could have spelt so in simple terms as it has done in section 27 of the Limitation Act, 1963 which provide for extinguishment of right to property on the determination of the period of limitation in the following terms:

“At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished”.

In the case of debt, the Legislature has not done so and as such the amount in question would continue to be a debt. Such a debt has to be shown in the accounts of the corporate debtor as a debt and in equity he is bound to repay the said debt as and when he is in a position to do so. The provisions of the Limitation Act extinguish the rights of such a debtor to recover the debt in question with the help of a court of law. In other words it bars a debtor from filing a suit for the recovery of the debt.

Occurrence of default in the repayment of debt is the trigger for initiation of insolvency resolution process

3. As set out in the beginning of this write-up, under sub-section (1) of section 7, a financial creditor, either by itself, or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Similar provisions exist in the Code in regard to triggering the insolvency resolution process by an operational debtor. Thus, the trigger for initiating insolvency resolution process is the occurrence of default. The term ‘default’ has been defined in clause (12) of section 3 to mean ‘non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be’. Thus, the trigger for initiation of proceedings pursuant to the provisions of the Act is the occurrence of default in the repayment of a debt. It is immaterial whether such a debt can be realised through the medium of a Court of Law or is time barred and cannot be realised through the medium of a Court of Law.

Code can be resorted to even if debt due to financial creditor or operational creditor is time barred.

4. The objective of the Insolvency and Bankruptcy Code, 2016, as enunciated in its preamble is ‘to consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all

the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith and incidental thereto.’ Thus, it is not a or one of the objectives of the Act to aid in the recovery of a debt and as such the provisions of the Limitation Act would not apply to the provisions of the Act. Further, under section 238 of the Act ‘the provisions of the Code shall have effect, notwithstanding therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law’. If that had been so, the Act which is quite exhaustive and self-contained definitely would have contained a provision to the effect that the provisions of the Act can be resorted to only in case a legally realisable debt exists. In view of what has been stated above it is crystal clear that the provisions of the Code can be resorted to even if a debt due to a financial creditor or operational creditor is time barred consequent on the applications of the

provisions of the Limitation Act, 1963. In this regard it is pertinent to point out that in *Neelkanth Township & Construction (P.) Ltd. v. Urban Infrastructure Trustees Ltd.* [2017] 140 CLA 235, the National Company Law Appellate Tribunal has held that the provisions of the Act is can be triggered even in respect of a time barred debt in the following words :

“There is nothing on the record that Limitation Act, 1963 is applicable to the Code. Learned Counsel for the appellant also failed to lay hand on any of the provision of the Code to suggest that Law of Limitation, 1963 is applicable. The Code is not an Act for recovery of any money claim, it relates to initiation of corporate insolvency resolution process. If there is a debt which includes interest and there is default of debt and having continuous course of action, the argument that the claim of money by respondent is barred by Limitation cannot be accepted.”