

Regulatory Alert: Winding up application barred by limitation not re-admissible under IBC: Supreme Court

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Summary

The Supreme Court (SC) set aside¹ the decision of the National Company Law Appellate Tribunal (NCLAT) and held that a petition for winding up under the Insolvency and Bankruptcy Code, 2016 (IBC) was time barred on the basis that the winding up petition filed was beyond three years from the date of default effecting the petition under the Limitation Act, 1963. Further, the SC held that since the claimants did not exercise the remedy under the existing laws within the prescribed limitation period, they cannot take fresh opportunities under the IBC.

Facts of the case

- IL&FS Financial Services Ltd. (IL&FS) agreed to purchase equity shares of MCX Stock Exchange Limited (MCX-SX) from Multi-Commodity Exchange India Limited (MCX) through a share purchase agreement (SPA) on 20 August 2009.
- Pursuant to the agreement, La-Fin Financial Services Pvt. Ltd. (La-Fin), a group company of MCX, issued a letter of understanding (LOU) to IL&FS to purchase investment in MCX-SX after a period of one year but before a period of three years from the date of investment.
- Pursuant to the LoU, IL&FS asked² La-Fin to purchase the shares. La-Fin declined³ by responding that they were under no legal obligation to buy those shares.
- On 19 June 2013, IL&FS filed a suit⁴ in the Bombay High Court (HC) for specific performance under the LOU or pay for damages. The cause of action for suit arose on 12 August 2012, i.e., when La-Fin refused to honour its obligation under the LOU.
- On 13 October 2014, the Bombay HC passed an order curtailing La-Fin from selling assets pending the disposal of the suit filed.
- On 3 November 2015, a statutory notice⁵ for winding up was issued by IL&FS to La-Fin as it was not in a financial position to pay the debt owed to them.
- IBC came into force on 1 December 2016 and as per its Rules⁶, the winding up petition was transferred to the National Company Law Tribunal (NCLT). The statutory forms under IBC were filed mentioning the date of default as 19 August 2012.
- On 28 August 2018, the winding up petition under IBC was admitted by the NCLT on the grounds that financial debt was incurred by La-Fin.
- On further appeal by the shareholder, the National Company Law Appellate Tribunal (NCLAT) upheld the order of the NCLT and

¹ Jignesh Shah and Anr. v Union of India & Anr. (W.P. Civil 455 of 2019)

² On 03 August 2012

³ On 16 August 2012

⁴ Suit No. 449 of 2013

⁵ Under Section 433 and 434 of the Companies Act, 1956

⁶ Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and Section 7 of the Code

held that the transaction fell within the meaning of a financial debt under IBC and the bar of limitation would not be attracted as the winding up petition was filed within three years of IBC coming into force.

- Aggrieved by the orders, the shareholders (Appellants) filed a writ petition⁷ challenging the constitutionality of certain provisions of the IBC admitting the winding up petition.

Timelines in brief

Date	Event
20 Aug 2009	<ul style="list-style-type: none"> • SPA entered between IL&FS and MCX • La-Fin issues LoU to IL&FS.
3 Aug 2012	<ul style="list-style-type: none"> • IL&FS enforces LoU of La-Fin
16 Aug 2012	<ul style="list-style-type: none"> • La-Fin declines to buy shares
19 Jun 2013	<ul style="list-style-type: none"> • Suit for specific performance filed by IL&FS before Bombay HC
3 Nov 2015	<ul style="list-style-type: none"> • Statutory notice for winding up of La-Fin issued by IL&FS
21 Oct 2016	<ul style="list-style-type: none"> • Winding-up petition under the Companies Act filed
1 Dec 2016	<ul style="list-style-type: none"> • Introduction of IBC • Application for winding up filed before NCLT.
28 Aug 2018	<ul style="list-style-type: none"> • Winding up petition under IBC admitted by NCLT
21 Jan 2019	<ul style="list-style-type: none"> • NCLAT upholds order of NCLT

Appellants arguments

- **Limitation Act applies in IBC proceedings:** The Appellant relied on the erstwhile SC ruling⁸ and argued that provisions of the Limitation Act, 1963 applied to the corporate insolvency resolution process filed under IBC.
- **Winding up application has become time-barred:** Thus, the Appellant argued that since the winding up petition was filed on 21 October 2016, i.e., after three years of the cause of action in August 2012, the case has become barred by limitation against IL&FS.
- **Time barred petition could not be revived under IBC:** Further, the Appellant argued that once the winding up petition filed under the Companies Act becomes time-barred, it cannot be revived under IBC.
- **Suit for specific performance would not impact limitation period for filing winding up petition:** The Appellant also relied on various judgements⁹ to argue that mere filing of a suit for specific performance would not impact the limitation period for the winding up petition. It further argued that the winding up petition, being an independent petition, is required to be filed within three years of cause of action.

Respondent's arguments

- **Cause of action for suit and winding up different:** It was argued that the cause of action for the suit and the cause of action for the winding up petition were separate and distinct. Further, it was submitted that the reason for filing the winding up petition arose in 2015/ 2016 after the Appellant was

⁷ Writ Petition (Civil) No. 455 of 2019 and Civil Appeal (Diary No. 16521 of 2019)

⁸ B.K. Educational Services Pvt. Ltd. V. Parag Gupta and Associates 2018 SCC OnLine 1921

⁹ Judgement of HC of USA, Hariom Firestock Limited v. Sunjal Engineering Pvt. Ltd, Ferro Alloys Corporation Ltd. V. Rajhans Steel Ltd. and few other cases

arrested, assets of La-Fin were attached and assets value had fallen.

- **Debt was alive when the winding up petition was filed:** Based on various judgements¹⁰, it was argued that a winding up petition filed during the pendency of the suit for specific performance kept alive such debt notwithstanding that it was filed after the limitation period had lapsed from the course of action for the suit.

SC observation and ruling

- The SC referred the reason for the introduction of the Limitation section¹¹ under IBC and stated that the intent of IBC was to not to give a new lease of life to time-barred debts.

- The SC relied on the intent of IBC and erstwhile judgement and held that provisions of the Limitation Act apply to the winding up petition made under IBC as well.
- Further, it held that if on the date on which the winding up petition is filed it is barred by limitation, such petition would not get a new lease under IBC.
- Thus, the SC noted the facts of the case and observed that the winding up petition was barred by limitation as it was filed beyond the period of three years from August 2012, which is when the default of repayment had occurred.

Our comments

Based on the SC judgement, it is clear that IBC should not be used as a tool to revive time-barred debt. Further, the SC has reiterated that provisions of the Limitation Act apply to proceedings under IBC as well.

Interestingly, it may be noted that the SC has refrained from commenting on the proceedings around the suit for specific performance itself.

¹⁰ Bombay HC in case of Bhimli Nanji and Co., Rajender Singh and Ors. v Santa Singh and Ors., M/s Madhusudan Gordhandas & Co. v. Madhu Wollen Industries Pvt. Ltd.

¹¹ Section 238A of the Code

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