

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 12 of 2022

(Arising out of Order dated 14.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Court-V, New Delhi in IB-437/ND/2020)

IN THE MATTER OF:

Brandbaron Marketing Pvt. Ltd.
P-27 First Floor Main Market,
Malviya Nagar, New Delhi-110001.

.... Appellant

Vs

Times Internet Ltd.
(Through its Directors)
Regd. Office at Express Building,
9-10 Bahadur Shah Zafar Marg,
New Delhi-110002.

.... Respondent

Present:

For Appellant: Mr. Sanjeev Kumar, Advocate.

**For Respondent: Mr. Krishnendu Datta, Sr. Advocate, Mr. Manish
 Kumar Srivastava, Advocate.**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) has been filed against the order dated 14.10.2021 passed by National Company Law Tribunal, Court-V, New Delhi, rejecting the Application filed by the Appellant under Section 9 as time barred.

2. Brief facts of the case and sequence of events necessary to be noticed for deciding this Appeal are:

- (i) The Appellant is engaged in providing advertising and brand development services. It entered into a Service Agreement with Times Internet Ltd. dated 12.10.2012 as a service provider. The Agreement was valid from 12.10.2012 to 11.10.2014. The Appellant – Operational Creditor provided services to the Times Business Solutions Ltd., for which an amount of Rs.87,81,526.80/- became due.
- (ii) On 26.09.2014, Times Business Solutions Ltd., to whom the Operational Creditor provided services was merged with another entity (Respondent herein), that is, Times Internet Ltd. – Corporate Debtor. Company Petition No.682 of 2016 was filed by the Appellant against Times Business Solutions Ltd. under Sections 433(e), (f), 434(1)(a) & (c) read with Section 439 of the Companies Act, 1956 seeking winding up against the Respondent Company. The High Court of Delhi vide order dated 13.03.2019 disposed of the Company Petition observing that Petition under Section 433 (e) can only be entertained after statutory notice has been sent against the Company namely – Times Internet Ltd., with whom the Times Business Solutions Ltd. was merged by order dated 26.09.2014 passed by the High Court of Delhi under Section 393 and 394 of the Companies Act. The Company Petition was filed without serving notice to the transferee Company, hence, the Petition was dismissed.

(iii) After the dismissal of the winding up petition filed by the Appellant, a notice dated 01.12.2019 was issued by the Appellant to the Corporate Debtor – Times Internet Ltd. claiming outstanding amount of Rs.87,81,526.80/-, which notice was served on the Corporate Debtor on 04.12.2019. Reply dated 13.12.2019 was sent by the Corporate Debtor denying the claim of the Appellant. After which an Application under Section 9 was filed by the Appellant on 03.02.2020, which came to be dismissed by order dated 14.10.2021.

3. While entertaining the Company Appeal (AT) (Ins.) No.12 of 2022 on 11.01.2022 following order was passed:

“Learned Counsel for the Appellant is allowed three weeks’ time to file Additional Affidavit explaining the delay in filing the Application before the Adjudicating Authority. Shri Krishnendu Datta, Learned Senior Counsel who appears for the Respondent may also file reply to the said Affidavit.

List the matter on 15.02.2022.”

4. In pursuance of the order dated 11.01.2022, the Appellant has filed an affidavit of compliance dated 28.01.2022, to which a reply has also been filed by the Respondent.

5. We have heard learned Counsel for the Appellant and learned Counsel appearing for the Respondent.

6. The Learned Counsel for the Appellant submits that the Adjudicating Authority committed error in rejecting the Application under Section 9 as

barred by time, whereas the time during which the winding up petition filed by the Appellant was pending before the High Court of Delhi, the Adjudicating Authority ought to have excluded the time by giving benefit of Section 14 of the Limitation Act, 1963. It is further submitted that the High Court itself had granted liberty while dismissing winding up petition and in response to which liberty Section 9 Application was filed, hence, a short delay in filing Section 9 application consequent to the liberty granted by the High Court, ought to have been condoned. The Learned Counsel for the Appellant relied on the affidavit dated 28.01.2022, where explanation for delay including the claim for exclusion of time of two years, seven months and 10 days have been made. The learned Counsel for the Appellant submits that insofar as condonation of delay under Section 5 of the Limitation Act is concerned, the same can be allowed by the Court on there being sufficient cause without there being any formal Application for condonation of delay.

7. The learned Senior Counsel for the Respondent Shri Krishnendu Datta refuting the submissions of the learned Counsel for the Appellant contends that the Appellant is not entitled to claim any benefit under Section 14 of the Limitation Act, since the dismissal of the winding up petition by the High Court of Delhi was not on ground of any defect of jurisdiction, but the Petition was dismissed since the Appellant failed to give Statutory Notice to the Corporate Debtor as required by Section 434 of the Companies Act, 1956. Thus, the reason for dismissal of the winding up petition cannot be a ground to the Appellant to claim benefit under

Section 14 of the Limitation Act. It is submitted that date of default as claimed by the Appellant itself in Section 9 Application is 02.01.2014, hence three years' period expired on 01.02.2017 and the Application under Section 9 having been filed on or after 30.01.2020 has rightly been dismissed by the Adjudicating Authority as barred by time. It is submitted that the Appellant has not filed any application before the Adjudicating Authority for condonation of delay under Section 5 or seeking benefit under Section 14 of the Limitation Act.

8. We have considered the submission of learned Counsel for the parties and perused the record.

9. From the submission of learned Counsel for the parties and the materials on record, following questions arise for consideration in this Appeal:

- (1) Whether the period during which winding up petition filed by the Appellant in the High Court of Delhi while Company Petition No.682 of 2016 remained pending, deserves to be excluded under Section 14 of the Limitation Act, 1963?
- (2) Whether, even if, the Appellant is entitled for exclusion for period during which winding up Petition remained pending in High Court of Delhi, the delay in filing Section 9 Application thereafter, can be condoned under Section 5 of the Limitation Act, 1963?

10. Before we proceed to consider the submission of learned Counsel for the parties, we may first notice the reasons which have been given by the

Adjudicating Authority while rejecting the Application under Section 9 of the Appellant. In paragraph 6 of the impugned order, the Adjudicating Authority has given the reasons for rejection of Section 9 Application. In paragraph 6 and 8, following has been held by the Adjudicating Authority:

“6. While applying aforementioned provisions over the facts of the present case, we first deal with the issue whether the Petition is barred by limitation or not. Admittedly, the invoices (pg 146 to 154) pertain to the period from November 2013 to February 2014 and were part of the undated demand notice under Section 8 of IBC sent by the Petitioner. It is contended by OC that the amount fell due on 03.4.14. Incidentally, the date of last invoice is 01.02.2014, therefore the due date should be 03.03.14 i.e., 30 days from the date of invoice as stated in the Agreement (Pg 44 clause 3.3). The law with respect to ‘date of default’ and ‘limitation’ under IBC has been clearly laid down by Hon’ble Supreme Court in several judgments and since the Limitation Act 1963 is applicable to applications filed under Sections 7 and 9 of IBC from the inception of IBC therefore, Article 137 of the Limitation Act 1963 gets attracted which is reproduced below:

<i>137. Any other application for which no period of limitation is provided elsewhere in this Division</i>	<i>3 yrs</i>	<i>When the right to apply accrues.</i>
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8. The Petitioner has filed the present petition on 30.01.20 and also failed to file any application for condoning the delay. Thus, three years from the date when the right accrues is the period when OC gets the right to trigger CIRP. The existence of debt and default

on the part of the CD cannot be established as the due debt is stated to be on 03.03.14, which is barred by limitation period which expired on the year 2017.”

11. From the above discussion of the Adjudicating Authority, it is clear that Adjudicating Authority proceeded on the premises that debt became due on 03.03.2014 and three years' period expired in 2017. Hence, filing of the Application on 30.01.2020 was beyond the time and further the Appellant failed to file any application for condonation of delay.

Question No.(1)

12. The question to be answered is as to whether the period during which winding up petition filed by the Appellant remained pending before the High Court of Delhi, deserves to be excluded under Section 14 of the Limitation Act?

13. Section 14 of the Limitation Act provides as follows:

14 Exclusion of time of proceeding bona fide in court without jurisdiction. — (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been

prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

14. We need to now find out the details of winding up proceeding and the reasons for rejection of the said winding up petition by the High Court of Delhi. In the affidavit of compliance filed by the Appellant in this Appeal, the date of filing of winding up petition is mentioned as 03.08.2016. In

Section 9 Application, which was filed by the Appellant before the Adjudicating Authority, the detailed reference of the winding up proceedings were mentioned. The order dated 13.03.2019 passed by the High Court of Delhi in Company Petition No.682 of 2019 has also been filed along with Section 9 Application and the details of filing of winding up petition and the orders passed were also given. In the list of dates, which is part of Section 9 Application in Item Nos.7 and 8, following has been stated:

"07	14/07/2016	<i>The Operational Creditor filed a Petition for winding up under the sections 433(e),(f), 434(1) (a) & (c) Read with Section 439 of the Companies Act, 1956.</i>
08	13/03/2019	<i>That the Petition by the Order of the High Court of Delhi at New Delhi was disposed of and dismissed with the Liberty to the Petitioners to take steps as per Law against the actual entity. That the Petition filed by the Operational Creditor had made Times Business Solutions Ltd the Respondent in the winding up petition which had ceased to exist. The company Times Business Solutions Ltd and merged into Times Internet Ltd. by virtue of an Order passed by this Court on 26/09/2014 under sections 391-394 of the Companies Act. The Operational Creditor impleaded the new entity however, as per the order of the High Court of Delhi in view of the fact that the statutory Notice under section 434(1)(a) of the Companies Act was not issued to the proposed respondent i.e., Times Internet Ltd., the said company cannot be impleaded or subjected to a winding up proceedings. Thus the winding up petition was dismissed with the liberty to the petitioner to take steps as per the Law against the actual entity."</i>

15. As noted above, the contract was entered by the Appellant with Times Business Solutions Ltd., to whom services were provided by the Appellant. After the services were provided by the Appellant to the Times Business Solutions Ltd. by order of the High Court of Delhi dated 26.09.2014, the Times Business Solutions Ltd. was merged with the Times Internet Ltd. However, winding up petition was filed by the Appellant against the Times Business Solutions Ltd., which winding up petition was dismissed by the High Court on the ground that no notice has been served to the Times Internet Ltd., with whom Times Business Solutions Ltd. was merged by order dated 26.09.2014. There being non-compliance of Section 434 of the Companies Act, winding up petition was dismissed by the High Court of Delhi vide order dated 13.03.2019. The relevant part in paragraph 6 of the judgment is to the following effect:

“6. Hence, a company is unable to pay its debt only when a demand is served at the registered office of the company to pay the sum so due and the company despite lapse of 3 weeks neglects to pay the sum or to secure the same. A petition under Section 433(e) can only be entertained after compliance of the mandatory procedure of Section 434(1)(a) of the Companies Act. As no statutory notice has been sent against the company, namely, Times Internet Ltd., the said company cannot also be impleaded or subjected to a winding up proceeding. The present petition is accordingly dismissed with liberty to the petitioner to take steps as per law against the actual entity.”

16. Winding up petition, thus, stood dismissed, since the real entity, that is, Times Internet Ltd., with whom the Times Business Solutions Ltd. was merged from 26.09.2014 was neither noticed nor impleaded in winding up petition. No statutory notice having been sent to the Times Internet Ltd., the winding up petition was dismissed. Thus, the winding up petition stood dismissed due to defect of procedure as noticed in paragraph 6 of the judgment of the High Court of Delhi. Present is not a case where High Court of Delhi had no jurisdiction to entertain the winding up petition, but whether the proceedings were not entertained due to “defect of jurisdiction and other causes of like nature” is the issue to be answered.

17. In this context, we may now refer to few judgments of the Hon’ble Supreme Court where Section 14 of the Limitation Act came for consideration. In **Roshanlal Khuthalia and Ors. vs. R.B. Mohan Singh Obrai – (1975) 4 SCC 628**, while interpreting Section 14 of the Limitation Act, the Hon’ble Supreme Court made following observation:

“27.....Moreover, the defects that will attract the provision are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits, comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right [See(1971) 2 SCR 397 at 401 [India Electric Works Ltd. v. James Mantosh, AIR 1971 SC 2313, 2316 : (1971) 2 SCR 397, 401]]. In the Associated Hotels case (i. e. the very lis in its earlier round on the

execution side) this Court pointed out [(1961) 1 SCR 259 at 272 [Associated Hotels of India Ltd. v. R.B. Jodhu Mal Kuthalia, AIR 1961 SC 156, 163]] that the question was one of initial jurisdiction of the Court to entertain the proceedings. Thus in this very matter, the obstacle was jurisdictional and the exclusionary operation of Section 14 of the Limitation Act was attracted.”

In the above case, Hon’ble Supreme Court while interpreting Section 14 held that any circumstance legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits, comes within the scope of the section and liberal touch must inform the interpretation of the Limitation Act.

18. In **(2004) 3 SCC 458 – Union of India and Ors. vs. West Coast Paper Mills Ltd. and Anr.** again question arose regarding extension of benefit of Section 14 of the Limitation Act. In the above case, the Respondent - West Coast Paper Mills Ltd. had filed writ petition under Article 226, which was dismissed on 29.10.1973. The question arose as to whether the period during which writ petition remained pending can be excluded under Section 14 of the Limitation Act. Hon’ble Supreme Court held that period lost during the pendency of the writ proceedings is liable to be excluded from computing the period of limitation under Section 14(2) of the Limitation Act. In paragraphs 14 and 15, following was laid down:

“14. *In the submission of Mr Malhotra, placing reliance on CST v. Parson Tools and Plants [(1975) 4 SCC 22 : 1975 SCC (Tax) 185] to attract the applicability of Section*

14 of the Limitation Act, the following requirements must be specified: (SCC p. 25, para 6)

“6. (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) the prior proceedings had been prosecuted with due diligence and in good faith;

(3) the failure of the prior proceedings was due to a defect of jurisdiction or other cause of a like nature;

(4) both the proceedings are proceedings in a court.”

*In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be “defect of jurisdiction or other cause of a like nature” within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression “other cause of like nature” came up for the consideration of this Court in *Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi* [(1975) 4 SCC 628] and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are*

not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.

15. *The issue as to the legality and reasonability of the rates charged by the Railway Administration having been finally adjudicated upon by this Court, there is nothing wrong in the respondent West Coast Paper Mills Limited having proceeded on an assumption that what had remained to be done was a simple direction to the Railway Administration to refund the amount of freight to which it had already been adjudged not entitled to recover. However, the High Court was not inclined to grant such relief in exercise of its writ jurisdiction and, therefore, left open the remedy of civil suit available to the respondents. By no stretch of imagination, it can be said that West Coast Paper Mills Limited was actuated by mala fides or want of good faith in instituting the writ proceedings. In our opinion, the period lost during the pendency of the writ proceedings is liable to be excluded from computing the period of limitation under Section 14(2) of the Limitation Act. Not only we have independently arrived at this finding on the submissions made by the learned counsel for the appellant, but we may also refer to the finding recorded by the three-Judge Bench vide paragraphs 17 and 18 of the judgment dated 5-2-2004 [(2004) 2 Scale 285 : (2004) 2 SCC 747] wherein it has been specifically held that the respondents were*

also entitled to get the period during which the writ petition was pending excluded from computing the period of limitation and in that view of the matter, the civil suit was filed within the prescribed period of limitation. The finding recorded by the trial court as also the High Court that the respondents were entitled to the benefit of Sections 14 and 15 of the Limitation Act, 1963 has been expressly upheld by the three-Judge Bench holding, “We have no reason to take a different view.”

19. To the same effect is the subsequent three Judge judgment of the Hon’ble Supreme Court reported in **(2008) 7 SCC 169 – Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and Ors.**, wherein in paragraphs 21 and 22, following was laid down:

“21. Section 14 of the Limitation Act deals with 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 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 the proceedings are in a court.*

22. *The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly 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 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 taken diligently pursuing a remedy, in a wrong court, should be excluded.”*

20. When we apply the ratio of above judgments of the Hon'ble Supreme Court in the facts of the present case, it is clear that winding up petition filed by the Appellant could not be decided on merit due to reason, which is fully covered in the expression "*or other cause of a like nature*" as appeared in Section 14(2) of the Limitation Act. As noted above, winding up petition could not be entertained since the statutory notice could not be given by the Appellant to the Times Internet Ltd., with whom Times Business Solutions Ltd. got merged on 26.09.2014, that is, after providing services by the Appellant to Times Business Solutions Ltd. We, thus, are of the considered opinion that period during which the winding up petition filed by the Appellant was pending before the High Court needs to be excluded within the meaning of Section 14, sub-section (2). We may further notice that all details regarding winding up petition and the order of the High Court of Delhi passed in winding up petition dated 13.03.2019 were brought on record in the Section 9 Application. Thus, ample foundation has been laid down for exclusion of time under Section 14(2) of the Limitation Act. The Question No.(1) is answered accordingly.

Question No.(2)

21. Although in the Section 9 Application date for filing of the winding up petition has been mentioned as 14.07.2016 as noted above, but in the affidavit dated 28.01.2022, the date of filing of winding up petition has been mentioned as 03.08.2016. Thus, even if, we take 03.08.2016 as the date of filing the winding up petition, which got dismissed on 03.03.2019 and

remained pending for period of two years, seven months and 10 days, the said period deserves to be excluded from the period of limitation, under which Section 9 Application was to be filed by the Appellant. As noted above, the Adjudicating Authority proceeded on the premises that date of debt due was 03.03.2014 and did not exclude the time during which the winding up petition was pending. In the affidavit it is stated by the Appellant that after excluding the time during which winding up petition was pending there was delay of only 79 days in filing Section 9 Application. The notice under Section 8 was also given by the Appellant. The Adjudicating Authority has also observed that no Application under Section 5 of the Limitation Act has been filed for condonation of delay. The learned Counsel for the Appellant has relied on the judgment of the Hon'ble Supreme Court in **(2021) 7 SCC 313 – Sesh Nath Singh and Anr. vs. Baidyabati Sheoraphuli Co-operative Bank Limited and Anr.** Before the Hon'ble Supreme Court, one of the questions, which was noticed for consideration was as to whether delay in filing Application under Section 7 can be condoned in absence of Application under Section 5 of the Limitation Act. In paragraph 55, two issues, which came up for consideration have been noticed in following manner:

“55. The issues involved in this appeal are:

55.1. (i) Whether delay beyond three years in filing an application under Section 7 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?

55.2. (ii) *Whether Section 14 of the Limitation Act, 1963 applies to applications under Section 7 IBC? If so, is the exclusion of time under Section 14 is available, only after the proceedings before the wrong forum terminate?”*

Hon’ble Supreme Court laid down that Section 5 does not speak of any application and held that even without a formal Application, if there are sufficient cause, the Court can condone the delay in exercise of its discretion. In paragraphs 61 and 62, following has been held:

“61. *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, in order 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 delay, in the absence of a formal application.*

62. *A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the court might condone delay beyond the time prescribed by limitation for filing an application or*

appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the court is satisfied that the appellant applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.”

In the above judgment, it was further laid down that Section 5 and Section 14 are not mutually exclusive.

22. It is also relevant to notice that the High Court while dismissing the winding up petition on 13.03.2019 granted liberty to the petitioners (Appellant herein) to take steps as per law against the actual entity. It was in exercise of the said liberty that subsequent Section 9 Application has been filed by the Appellant. Thus, while considering the exercise of discretion for condonation of delay under Section 5, the above facts also have to be taken into consideration, under which liberty was granted to the Appellant to proceed against the real entity, that is, Times Internet Ltd. The affidavit dated 28.01.2022 filed in this Appeal makes out sufficient cause for condonation of 79 days' delay in filing Section 9 Application by the Appellant, after giving the benefit of exclusion of period during which

winding up petition of the Appellant remained pending. The present is a fit case to exercise discretion given under Section 5 of the Limitation Act to condone the short delay in filing Section 9 Application. Question No.(2) is answered accordingly.

23. In view of the foregoing discussion, we are satisfied that Adjudicating Authority has committed error in rejecting the Application filed under Section 9 by the Appellant as barred by time. A perusal of the order of the Adjudicating Authority indicates that only two grounds were considered by the Adjudicating Authority, that is, Application having barred by time and pre-existing dispute as raised by the Corporate Debtor. The claim of the Corporate Debtor of genuine dispute was rejected in paragraph 7 of the judgment of the Adjudicating Authority.

24. In result, we allow the Appeal, set aside the order dated 14.10.2021 passed by the Adjudicating Authority. The matter is remitted to the Adjudicating Authority to pass an order of admission on Section 9 Application after giving an opportunity to the parties to enter into settlement, if any. No costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

23rd May, 2022

Ash/NN