

# V Nagarajan vs Sks Ispat And Power Ltd & Ors on 13 July, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 561 of 2020

[Arising out of Order 31st December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai, Bench, Chennai in M.A. No.908 of 2019 in I.A. No.38/2018 in Company Petition No.511/(I.B.)/2017]

IN THE MATTER OF:

Mr V Nagarajan Resolution Professional  
in respect of M/s Cethar Limited  
(under Liquidation) with office at:  
New No.29, Kavarai Street  
West Mambalam Chennai - 600033  
(Near AMR Kalyana Mandapam)  
Versus

...Appellant

1. SKS Ispat and Power Ltd.  
501B, Elegant Business Park  
Andheri Kurla Road, JB Nagar  
Andheri (East), Mumbai - 400059  
...Respondent No.1
2. Shri Krishna Structures P Ltd  
Ring Road No.2,  
Near Urla Telephone Exchange  
Raipur, Chhatisgarh 492002  
...Respondent No.2
3. Compact Agencies Private Limited  
20B, British Indian Street  
Room No. 1A, 5th Floor  
Kolkata - 700069  
...Respondent No.3
4. Ambition Commosales Private Limited  
20B, British Indian Street  
Room No. 1A, 5th Floor  
Kolkata - 700069  
...Respondent No.4
5. Labheswari Agencies Limited  
13BB, Ganguly Street  
Room No.207, 2nd Floor  
Kolkata - 700012  
...Respondent No.5
6. M/s Shubh Steel  
Y-6, LohaMandi, Naraina  
...Respondent No.6
7. M/s Natural Marmo Private Limited  
C-1/4, Ring Road  
Rajouri Garden  
...Respondent No.7

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8. M/s Shivam Iron & Steel Traders  
5565/75, Regarpura Karol Bagh  
New Delhi - 110005

...Respondent No.8

9. M/s Ratawal Building Material Suppliers  
74/5536, Raghapura Padam Singh Road  
Karol Bagh, New Delhi - 110005 ...Respondent No.9
10. SKS Power Generation Chattishgarh Ltd.  
501B, Elegant Business Park  
Andheri Kurla Road, JB Nagar  
Andheri East Mumbai - 400059 ...Respondent No.10
11. Citywings Private Limited  
No.69, New Santoshpur Main Road  
Ward-103, Kasba  
Kolkata, Bargaras South  
West Bengal - 700075 ...Respondent No.11
12. Mr K Subburaj  
No.15, Cethar Gardens  
KK Nagar, Trichy - 620201 ...Respondent No.12
13. Mr N K Pothuraj  
No.19, 20 Cethar Garden, Iyer Thottam  
K K Nagar, Trichy - 620021 ...Respondent No.13
14. M/s ICICI Bank Limited  
No.1 Cenatoph Road, Teynampet  
Chennai - 600018 ...Respondent No.14

Present:

For Appellant : Mr R. Subramanian, Advocate

For Respondent : Mr Ramji Srinivasan, Sr. Advocate with  
Mr Atul Shanker Mathur, Advocate for R-10

#### J U D G M E N T

[Per; V. P. Singh, Member (T)] This Appeal emanates from the Order dated 31st December 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Chennai, Bench, Chennai in M.A. No.908 of 2019 in I.A. No.38/2018 in C.P. No. 511(I.B.)/2017 whereby the Adjudicating Authority declined to interfere Company Appeal (AT) (Insolvency) No. 561 of 2020 2 of 11 with the invocation of performance guarantee given about another contract and thereby refused to grant interim relief to the Corporate Debtor.

This Appeal is against the Order dated 31st December 2019. The Registry of this Tribunal has objected about limitation, and in response to that, the Appellant has filed its reply, which is at page no.427 of the Appeal paper book and mentioned below.

"Defect Query on Limitation

1. The provisions of limitation applicable are as per Section 61 of the Insolvency and Bankruptcy Code 2016.
2. Appeal is to be filed within 30 days of Order.
3. Order was passed on 31.12.2019.
4. Certified Copy of Order not issued till date. Free Copy also not issued till date.
5. Unsigned Order was uploaded online on 12.03.2020 with wrong details of the Members who passed Order.
6. Corrected unsigned Order with correct named of Members uploaded thereafter.
7. So no order copy atleast till 12.03.2020.
8. Appeal due date 11.04.2020.
9. As per Order of Supreme Court dated 23.03.2020 in Suo Moto Civil WP 3/2020 all limitation stands extended from 15.03.2020.
10. That Order is continuing.
11. Appeal filed on 08.06.2020.
12. Hence within limitation and not barred."

Company Appeal (AT) (Insolvency) No. 561 of 2020 3 of 11 Admittedly, this Appeal is preferred against the Order dated 31st December 2019 and filed before this Appellate Tribunal on 08th June 2020. Appellant has not submitted an application to Condone the delay despite being filed beyond 30 days statutory time limit. In reply to the objection, the Appellant contends that the impugned Order was passed on 31st December 2019, but the certified copy and free copy of the Impugned Order has not been issued to date. An unsigned copy of Order was uploaded on the website on 12th March 2020 with wrong details of the name of the Members, who had passed the Order. After that corrected unsigned copy of the Order with the correct name of Members was uploaded. Therefore, no copy of the Order was available till 12th March 2020.

Consequently, the Appeal could have been filed up to 11th April 2020. But as per Order of the Hon'ble Supreme Court dated 23rd March 2020 limitation stands extended from 15th March 2020 onwards. In the circumstances, it is claimed that Appeal is not time-barred.

2. We have heard the arguments of the Learned Counsel for the parties and perused the records.

3. Appellant has filed this Appeal on 08th June 2019 against the Order dated 31st December 2019 passed by the Adjudicating Authority/NCLT, Chennai Bench, Chennai. As per Section 61 of the Insolvency and Bankruptcy Code, 2016, the Appeal filed before this Appellate Tribunal against Order of the Adjudicating Authority can be filed within 30 days. The relevant provision of the Code is as under:

Company Appeal (AT) (Insolvency) No. 561 of 2020 4 of 11 "61. Appeals and Appellate Authority. -(1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the Order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every Appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the Appeal but such period shall not exceed fifteen days."

The proviso to Section 61 of the Insolvency and Bankruptcy Code provides that the Appellate Tribunal may allow an Appeal to be filed after the expiry of the statutory period of 30 days. Still, in no circumstances, such extended period shall exceed 15 days. The language of the proviso to Section 61(1) of the I&B Code makes it clear that this Tribunal does not have the power to extend the time limit beyond 15 days, in addition to the statutory time limit of 30 days. It is also clear that this extension of 15 days depends upon the satisfaction of the Appellate Tribunal, on being shown the sufficient cause for not filing the Appeal within the time limit.

4. Hon'ble the Supreme Court of India in the case of Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353 : 2017 SCC OnLine SC 1154 : (2018) 1 SCC (Civ) 311 at page 394 has also laid down the law about the time line to be observed in Section 61 of the Insolvency & Bankruptcy Code, 2016. Hon'ble the Supreme Court has held that:

Company Appeal (AT) (Insolvency) No. 561 of 2020 5 of 11 "35. Another thing of importance is the timelines within which the insolvency resolution process is to be triggered.

The corporate debtor is given 10 days from the date of receipt of demand notice or copy of invoice to either point out that a dispute exists between the parties or that he has since repaid the unpaid operational debt. If neither exists, then an application once filed has to be disposed of by the adjudicating authority within 14 days of its receipt, either by admitting it or rejecting it. An appeal can then be filed to the Appellate Tribunal under Section 61 of the Act within 30 days of the order of the adjudicating authority with an extension of 15 further days and no more.

36. Section 64 of the Code mandates that where these timelines are not adhered to, either by the Tribunal or by the Appellate Tribunal, they shall record reasons for not doing so within the period so specified and extend the period so specified for another period not exceeding 10 days. Even in appeals to the Supreme Court from the Appellate Tribunal under Section 62, 45 days' time is given from the date of receipt of the order of the Appellate Tribunal in which an appeal to the Supreme Court is to be made, with a further grace period not exceeding 15 days. The strict adherence of these timelines is of essence to both the triggering process and the insolvency resolution process. As we have seen, one of the principal reasons why the Code was enacted was because liquidation proceedings went on interminably, thereby damaging the interests of all stakeholders, except a recalcitrant management which would continue to hold on to the company without paying its debts. Both the Tribunal and the Appellate Tribunal will do well to Company Appeal (AT) (Insolvency) No. 561 of 2020 6 of 11 keep in mind this principal objective sought to be achieved by the Code and will strictly adhere to the time- frame within which they are to decide matters under the Code."

5. This Tribunal has also taken the same view in the case of Pr. Director General of Income Tax v. Spartek Ceramics India Ltd., 2018 SCC OnLine NCLAT 289. In the above mentioned case, this Tribunal has held that:

"53. As per sub-section (2) of Section 61, the appeal is required to be filed within thirty days before the NCLAT. The Appellate Tribunal is empowered to condone the delay of „another fifteen days after the expiry of the period of thirty days in preferring the appeal that too for sufficient cause. It has no power to condone the delay if appeal under Section 61 is preferred beyond fifteen days from the date of the expiry of the period of thirty days. Meaning thereby, no appeal under sub-section (1) of Section 61 can be entertained after forty-five days of knowledge of the order passed by the Adjudicating Authority."

6. The reason assigned by the Appellant is that the certified and free copy of impugned Order was not issued to him and unsigned Order was uploaded on the website on 12th March 2020. Therefore, 30 days' time limit was available until 11th April 2020. After that, by the general Order of the Hon'ble, the Supreme Court dated 23rd March 2020 limitation period extended from 15th March 2020 onwards. Therefore, Appellant claims that the Appeal is within time.

7. The Appellant has not filed any Application showing sufficient cause for not filing the Appeal within time. The contention of the Appellant that Company Appeal (AT) (Insolvency) No. 561 of 2020 7 of 11 certified and a free copy of Order was not issued to him is unsupported by any evidence. The Appellant has not filed any Application for Condonation of delay. In contrast, Section 61(1) of the Code provides that the Appellate Tribunal can extend 15 days' time subject to being satisfied with the sufficient cause for not filing the Appeal within time. Since the Appellant has not submitted any application showing enough reason for not filing the Appeal within time, therefore the question of automatic extension of time limit does not arise.

8. It is pertinent to mention that Hon'ble the Supreme Court of India in the case of Mobilox Innovations Private Limited (supra) has already held that "The Appeal can be filed to the Appellate

Tribunal under Section 61 of the Act within 30 days of the order of the Adjudicating Authority with an extension of 15 further days and no more." Hon'ble Supreme Court has further held that the strict adherence of these time lines is of essence to both the triggering process and the Insolvency Resolution Process.

9. This Tribunal in the case of Pr. Director of Income Tax (supra) has held that no appeal under Sub-Section 1(61) can be entertained after 45 days of knowledge of the order passed by the Adjudicating Authority. In this case the Appellant contends that delay in filing in appeal was caused due to non-availability of certified/free copy of order till 12th March 2020. Appellant has not pleaded that he was not having knowledge of the impugned order of the Adjudicating Authority dated 31st December 2019. Appellant has neither filed any Application for Condonation of Delay nor filed any evidence to prove that certified/free copy was not supplied to the Appellant on the date Company Appeal (AT) (Insolvency) No. 561 of 2020 8 of 11 of order. This Tribunal cannot extend the time limit of filing of appeal without any application for Condonation of Delay. It is also important to mention that this Tribunal has very limited jurisdiction to extend the time limit of 15 days on satisfaction and sufficient cause only.

10. It is also pertinent to mention that Rule 22 of the National Company Law Appellate Tribunal Rules provides that:

"Every appeal shall be accompanied by a certified copy of the impugned order."

11. This Appeal has been filed without any certified copy of the Order. Appellant has also not filed any proof to substantiate its claim that certified copy of the Order had not been issued to him. Even the Appellant is contention regarding the delay in filing is unsupported by affidavit. In the circumstances, the Appeal is not maintainable and barred by limitation.

12. The Appeal before us is against the Order of the Adjudicating Authority in not granting the interim relief about the invocation of the performance bank guarantee given by the bankers, on behalf of the Corporate Debtor.

13. It is essential to the point that proviso to Section 3(31) of the I&B Code provides that:

Sec "3(31):

"Security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction Company Appeal (AT) (Insolvency) No. 561 of 2020 9 of 11 which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;

Thus, it is clear that security interest as defined in I&B Code does not include performance guarantee. It is further necessary to point out that Moratorium order under Section 14 prohibits any action to foreclose, recover or enforce any security interest created by the Corporate Debtor during Corporate Insolvency Resolution Process.

Section "14(3) of the I&B Code provides that;

The provisions of sub-section (1) shall not apply to-- [(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

14. Thus it is clear that the moratorium order passed under sub-section (1) to Sec 14 of the I& B Code does not apply to the surety in a contract of guarantee to a Corporate Debtor. Therefore, in the circumstances, the Adjudicating Authority passed the Order that "the performance guarantee given by the bankers on behalf of the Corporate Debtor, whereby simply to set off the money in the event of an order was passed in favour of the Company Appeal (AT) (Insolvency) No. 561 of 2020 10 of 11 Corporate Debtor, cannot be interfered with the performance guarantee with regard to another contract".

15. Therefore, the Adjudicating Authority has rightly refused to grant an interim relief about the invocation of bank guarantee given by bankers on behalf of the Corporate Debtor.

16. In view of our observation aforesaid, even on merits no interference is called for against the impugned Order dated 31st December 2019. Therefore, Appeal fails--no order as to costs.

[Justice Bansilal Bhat] Acting Chairperson [V. P. Singh] Member (Technical) [Alok Srivastava] Member (Technical) NEW DELHI 13th JULY, 2020 pks/gc Company Appeal (AT) (Insolvency) No. 561 of 2020 11 of 11