

Gaurav Agarwal vs Ca Devang P Sampat on 28 September, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

I.A. No. 2588 of 2022
Company Appeal (AT) (Insolvency) No. 916 of 2022

(Arising out of Order dated 06.05.2022 passed by the Adjudicating
Authority (National Company Law Tribunal), Mumbai Bench, Court III in
I.A. No. 1253 of 2021 in C.P. (IB) No 2521 (MB)/2018)

IN THE MATTER OF:

Gaurav Agarwal
Ward No. 13, 01, near Railway Station
Post Bilha, Bilaspur, Chhattisgarh - 495 224. ...Appellant

Versus

CA Devang P Sampat
Liquidator of Maa Mahamaya Steels Pvt. Ltd.
No.615, Shivani Plaza, Plot No. 78/A
Marol Cooperative Industrial Estate
Off Andheri Kurla Road, Marol, Andheri (E)
Times Square, Mumbai
Maharashtra - 400 059. ...Respondent

Present:

For Appellant: Mr. Abhijeet Sinha, Mr. Naveen Hegde and Mr.
Saikat Sarkar, Advocates.

For Respondents: Mr. Kush Chaturvedi, Mr. Gaurav Adusumalli,
Ms. Priyashree Sharma and Mr. Syed Taraz
Alam, Advocates.

ORDER

ASHOK BHUSHAN, J.

This is an application under proviso to Section 61(2) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') praying for condonation of delay in filing the Appeal. The Appeal has been filed against the order dated 06.05.2022 in I.A. No. 1253 of 2021 in C.P. (IB) No. 2521(MB)/2018 filed by the Appellant. By the impugned order the Cont'd.../ application filed by the Appellant has been rejected. Challenging the order dated 06.05.2022 this Appeal has been filed on

06.07.2022.

2. The case of the Appellant under Delay Condonation Application is that the order was passed by the Adjudicating Authority on 06.05.2022, thereafter, the Appellant approached the Registry of the Adjudicating Authority to apply for certified copy of the order. The Appellant's case is that the Registry informed that the order is not uploaded, hence the application cannot be taken. The Appellant pleaded that on 15.06.2022, as neither the free copy nor the certified copy was received, the Appellant sent an email and application for certified copy. Appellant's case is that the impugned order was uploaded on 30.06.2022 and the Appellant downloaded the order on 30.06.2022 and thereafter took steps to file the Appeal. Certified copy of the order was received on 04.07.2022. The Appellant is entitled for exclusion of the period from 15.06.2022 to 04.07.2022 (date on which the certified copy was received) needs to be excluded. Hence, there is at worst, a delay of only 9 days.

3. The Respondent has filed a reply to Delay Condonation Application. It is submitted that the Appellant applied for the certified copy of the order on 15.06.2022 i.e. after expiry of 30 days period of limitation. Respondent's case is that he received an email from his counsel with copy of the order on 28.06.2022. Appellant has failed to show due diligence in filing the Appeal. Appellant failed to apply for certified copy within 30 days period. To the best of knowledge of the Respondent, the impugned order was uploaded on 28.06.2022. It is denied that the order was not available on I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 the NCLT Website and the certified copy could not have been applied. The Appeal is barred by time as filed beyond extended time of limitation prescribed under Section 61(2) of the Code. Respondent submits that there is delay of more than 15 days beyond 30 days period in filing the Appeal.

4. We have perused the application filed by the Appellant for condonation of delay as well as the reply filed by the Respondent.

5. The order impugned was passed on 06.05.2022. Appellant's case is that order of the NCLT was uploaded on 30.06.2022. His further case is that he applied for the certified copy on 15.06.2022. Under Section 12(2) of Limitation Act, 1963, the requisite period for obtaining certified copy of the order for filing an appeal is to be excluded for computing the limitation of appeal. Section 12(1) and (2) are as follows:-

"12. Exclusion of time in legal proceedings.--

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded."

I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022

6. The present is a case where the Appellant has applied for the certified copy of the order on 15.06.2022 i.e. after expiry of period of 30 days of limitation for filing an appeal. When application for obtaining certified copy of the order is applied after the period of limitation, Appellant is not entitled for benefit under Section 12(2) of the Limitation Act. Bombay High Court in "Rajanarayan Singh Avadhraj Singh V. Smt Vidhyadevi, 2003 AIHC at page 3742 (Bom)" has held that where an applicant slept for an entire period of limitation for filing an appeal and thereafter filed an application for certified copy of the judgment and decree, the benefit of Section 12(2) cannot be availed.

7. Learned counsel for the Appellant submits that since the order was uploaded on 30.06.2022 and he filed the application for certified copy on 15.06.2022, thirty days period ended on 05.06.2022 and extended 45 days period also ended on 20.06.2022 but after giving the benefit of Section 12(2), there is delay of only 9 days.

8. The issue as to date from which period of limitation for filing shall commence in reference to an Appeal under Section 61 of the Code has been considered by the Hon'ble Supreme Court in "V. Nagarajan vs. SKS Ispat & Power Ltd. & Ors., (2022) 2 SCC 244". In the case before the Hon'ble Supreme Court, NCLT passed an order on 31.12.2019. The copy of the order was not uploaded until 11-12 March, 2020. Corrected copy of order was uploaded on 20.03.2020. Appellant requested for free copy from the Registry and thereafter filed appeal on 08.06.2020 with the downloaded copy. NCLAT dismissed the Appeal as barred by time which order was I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 challenged before the Hon'ble Supreme Court. One of the questions formulated by the Hon'ble Supreme Court was when will the clock for calculating the limitation period run for appeals filed under IBC. Para 16.1 contains the question no.1 to the following effect:

"16.1. (i) when will the clock for calculating the limitation period run for appeals filed under the IBC; and"

9. Hon'ble Supreme Court after noticing the provision of Rule 22(2) of the NCLAT Rules, 2016, Section 12 of the Limitation Act as well as Section 421 of the Companies Act, 2013 recorded its conclusions in Paras 33, 34 and 35, which are to the following effect:-

"33. The answer to the two issues set out in Section C of the judgement- (i) when will the clock for calculating the limitation period run for proceedings under the IBC; and (ii) is the annexation of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC - must be based on a harmonious interpretation of the applicable legal regime, given that the IBC is a Code in itself and has overriding effect. Sections 61(1) and (2) of the IBC consciously omit the requirement of limitation being computed from when the "order is made available to the aggrieved party", in contradistinction to Section 421(3) of the Companies Act. Owing to the special nature of the IBC, the aggrieved party is expected to exercise due

diligence and apply for a certified copy upon pronouncement of the order it seeks to I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 assail, in consonance with the requirements of Rule 22(2) of the NCLAT Rules. Section 12(2) of the Limitation Act allows for an exclusion of the time requisite for obtaining a copy of the decree or order appealed against. It is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy under Section 420(3) of the Companies Act 2013 read with Rule 50 of the NCLT and prevent limitation from running. Accepting such a construction will upset the timely framework of the IBC. The litigant has to file its appeal within thirty days, which can be extended up to a period of fifteen days, and no more, upon showing sufficient cause. A sleight of interpretation of procedural rules cannot be used to defeat the substantive objective of a legislation that has an impact on the economic health of a nation.

34. On the second question, Rule 22(2) of the NCLAT Rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals, and even this Court, may choose to exempt parties from compliance with this procedural requirement in the interest of substantial justice, as re-iterated in Rule 14 of the NCLAT Rules, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. The appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation.

I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022

35. The appellant was present before the NCLT on 31 December 2019 when interim relief was denied and the miscellaneous application was dismissed. The appellant has demonstrated no effort on his part to secure a certified copy of the said order and has relied on the date of the uploading of the order (12 March 2020) on the website. The period of limitation for filing an appeal under Section 61(1) against the order of the NCLT dated 31 December 2019, expired on 30 January 2020 in view of the thirty-day period prescribed under Section 61(2). Any scope for a condonation of delay expired on 14 February 2020, in view of the outer limit of fifteen days prescribed under the proviso to Section 61(2). The lockdown from 23 March 2020 on account of the COVID-19 pandemic and the suo motu order of this Court has had no impact on the rights of the appellant to institute an appeal in this proceeding and the NCLAT has correctly dismissed the appeal on limitation. Accordingly, the present appeal under Section 62 of the IBC stands dismissed."

10. The Hon'ble Supreme Court has held that a litigant has to file an appeal within thirty days which can be extended upto 45 days and not more. In the facts of the said case, Hon'ble Supreme Court held that the period provided for filing an appeal under Section 61(1) against the order dated 31.12.2019 expired on 30.01.2020. The dated of uploading of order as was claimed as 12.03.2020, in the above case, was not given any credence by the Hon'ble Supreme Court while computing the

period of limitation for filing the appeal. Hon'ble Supreme Court has held in Para 33 I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 that owing to the special nature of IBC, the aggrieved party is expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail.

11. In the facts of the present case, when order was passed on 06.05.2022, the period of 30 days expired on 06.06.2022. 15 days period upto which delay is condonable under Section 61(2) also expired upto 20.06.2022. The appeal by the Appellant having been filed on 06.07.2022 is clearly beyond the 45 days. Hon'ble Supreme Court in Para 33 has also clearly held that it is not open to a person aggrieved by an order under IBC to await the receipt of a free certified copy and prevent limitation from running. When we look into the certified copy which has been annexed with the Appeal by the Appellant which is sought to be challenged, the certified copy annexed by the Appellant is "free of cost" copy issued on 04.07.2022. It is also to be noticed that the learned counsel for the Applicant (Appellant) was present when the order was pronounced by the Adjudicating Authority on 06.05.2022, which is noted in the order passed on 06.05.2022. When judgment is delivered by the Adjudicating Authority in open court, period of limitation starts running and could not be prevented and Appellant can neither wait for free of cost certified copy and nor he is prevented from applying for certified copy of the order sought to be challenged in appeal. He is entitled to take benefit of Section 12(2) by excluding the period during which certified copy was under preparation.

12. In the present case, as noted above, certified copy is claimed to be applied by the Appellant on 15.06.2022 i.e. after expiry of limitation. We, I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 thus, are of the view that present appeal has been filed beyond 45 days from date of the order dated 06.05.2022 and delay of more than 15 days beyond the period of 30 days cannot be condoned by this Tribunal in exercise of its jurisdiction under Section 61(2) of the I&B Code.

13. Learned counsel for the Appellant has placed reliance on the judgment of this Tribunal dated 02.09.2022 in "Bhawanishankar Harishchandra Sharma vs. Feedback Highways OMT Pvt. Ltd., Company Appeal (AT) (Ins) No. 217/218 of 2022". In the above case, this tribunal has allowed the appeal and set aside the order of the Adjudicating Authority. The Adjudicating Authority in the said case has held that the order dated 10.01.2019 was not pronounced by the Bench competent to do so. This Tribunal held that order dated 10.01.2019 was not passed in accordance with law. Appellate Tribunal in Para 16 has held that order dated 10.01.2019 is void ab-initio. Following observations have been made in Para 16 of the judgment:-

"16. Thus, from the resume of the aforesaid facts and circumstances, it is clear to us that law does not permit that the case is heard by one entity and the order is pronounced by another who has not heard the case at all. In such circumstances, the question posed hereinabove is hereby answered in favour of the Appellant and it is held that the order dated 10.01.2018, having been passed by a bench in which one of the member was not a member of the bench who had heard the matter at the time I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022 when it

was reserved, is patently illegal and void ab-initio."

14. The above judgment of this Tribunal dated 02.09.2022, thus, does not come to any help to the Appellant in the facts of the present case. In the present case, the order has been pronounced in open court in the presence of learned counsel for the Appellant.

15. We, thus, do not find any good ground to allow section 5 application filed by the Appellant. Delay condonation application is dismissed. In result, Memo of Appeal stands rejected.

[Justice Ashok Bhushan] Chairperson [Barun Mitra] Member (Technical) NEW DELHI 28th September, 2022 Archana I.A. No. 2588 of 2022 in Company Appeal (AT) (Insolvency) No. 916 of 2022