

# Mr. Jitendra Virmani vs Mro-Tek Realty Ltd. & Ors on 15 May, 2017

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## NATIONAL COMPANY LAW APPELLATE TRIBUNAL COMPANY APPELLATE JURISDICTION

IA No. 221 of 2017  
in  
Company Appeal (AT) No. 138 of 2017

IN THE MATTER OF:

Mr. Jitendra Virmani .Appellant

Vs

MRO-TEK Realty Ltd. & Ors. .Respondents

Present: For Appellant: - Mr. Ajesh Kumar Shankar, Mr.  
Balaji Srinivasan, Ms. Divya Menon, Ms. Srishti  
Govil and Ms. Pratiksha Mishra, Advocates

For Respondents: - Mr. Uaamanyu Hazarika, Sr.  
Advocate with Mr. Shailesh Madiyal, Mr. Mahesh  
Thakur, Advocates for R- 11

### ORDER

15.05.2017- The Interlocutory Application under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (hereinafter referred to as 'NCLAT Rules 2016' for short) has been preferred by applicant/ appellant for review and recall of order dated 3rd May 2017 passed by Appellate Tribunal in Company Appeal (AT) No. 138 of 2017 which reads as follows: -

"This appeal was filed with number of defects on 30th March 2017. It was supposed to be re-filed within seven days after removing the defect(s). However, the defect (s) were not removed within seven days and filed as afresh case on 1st May 2017.

In this appeal, the appellant has challenged the order dated 5th January 2017 passed in T.P.No. 88/2016 in C.P. No. 22/2016 by National Company Law Tribunal, Bengaluru Bench whereby certain interim order has been passed. A petition for condonation of delay has been filed to condone delay of 54 days. As we find that as

the Appellate has no jurisdiction to condone the delay for more than 45 days, we dismiss the appeal on the ground of delay."

2. Learned counsel for the applicant submits that the Appellate Tribunal has inherent powers to the review and recall the impugned order as the Registrar of the NCLAT, after 7 days' period of removal of defects has not recorded any order nor given any notice to the appellant.
3. It is contended that apart from procedural review there is inherent power of Appellate Tribunal to set aside erroneous order passed under wrong apprehension by it.
4. Reliance is placed on Hon'ble Supreme Court decision in "Indian Oil Corporation Ltd. and Others Versus Union of India and Others, 1980 (Supp) SCC 426" wherein the Hon'ble Apex Court held as follows:-

"13. We are unable to appreciate the contention that merely because the ex parte award was based on the statement of the manager of the appellant, the order setting aside the ex parte award, in fact, amounts to review. The decision in Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghjif(1971) 3 SCC 844: AIR 1970 SC 12731 is distinguishable. It is an authority for the proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication. Sub-sections (1) and (3) of Section 11 of the Act themselves make a distinction between procedure and powers of the Tribunal under the Act. While the procedure is left to be devised by the Tribunal to suit carrying out its functions under the Act, the powers of civil court conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of power in the sense in which the words are used in Section 11. The answer to the question is, therefore, to be found in sub-section (1) of Section 11 and not in sub-section (3) of Section 11. Furthermore, different considerations arise on review. The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakershi case [(19 71) 3 SCC 844: AIR 1970 SC 12 731 held that no review lies on merits unless a statute specifically provides for it.

Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

5. Reliance was also placed on decision of Hon'ble Supreme Court in "Mannan Lal Versus MST Chhotaka Bibi", 1970 (1) SCC 769 to suggest that for removal of defects limitation cannot be prescribed.

6. From the impugned order it is evident that the Appellate Tribunal dismissed the appeal on the ground of delay as the Appellate Tribunal has no jurisdiction to condone the delay of more than 45 days.

7. For the determination of the question whether the case in hand is fit case for exercising inherent power under Rule 11 of the NCLAT Rules 2016, it is necessary to notice the relevant facts and the provisions of law.

8. The appeal was preferred by applicant against Order dated 5th January 2017 passed by National Company Law Tribunal (hereinafter referred to as the 'Tribunal' for short), Bengaluru Bench in T.P.No. 88/2016 (Mr. Jitendra Virmani Versus M/s M.R.O.-TEK Limited and Others) whereby the Tribunal rejected the prayer for interim relief. Certified copy of the (impugned) order was served on the applicant on 7th January 2017.

9. Section 421 of the Companies Act 2013 relate to 'Appeal from orders of Tribunal'. Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal except the order passed with the consent of the parties. Sub-section (3) of Section 421 prescribe 45 days from the date of copy of the order of the Tribunal is made available to prefer the appeal. Under proviso thereto the Appellate Tribunal has been empowered to entertain an appeal after the expiry of the period of 45 days, but limited with the power as it can condone delay of another 45 days, if it is satisfied that appellant was prevented by sufficient cause from filing the appeal within that period, as quoted below: -

"421. Appeal from orders of Tribunal. -- (1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period offorty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such jrm, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period offorty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal."

10. Though the impugned order was passed on 5th January 2017 and copy was served on applicant on 7th January 2017 but the applicant sat over the matter till 31st March 2012, when the defective appeal was filed. One of the defect was that the proof of service was not filed and other defect was non filing of the declaration signed by the counsel. On the same date i.e. 31st March 2017, the court pointed out the defects and the appellant noticed the defect on 3rd April 2017, but did not chose to cure the defects within 7 days as prescribed under NCLAT Rules.

11. Rule 26 of NCLAT Rules 2016 relate to filing and scrutiny of appeal etc. Sub-Rule (2) of Rule 26 of NCLAT Rules 2016 deals with defective filing, which reads as follows: -

"26. Endorsement and scrutiny of petition or appeal or document.-(1) The person in charge of the filing-counter shall immediately on receipt of appeal or documents affix the date and stamp of the Appellate Tribunal thereon and also on the additional copies of the index and return the acknowledgement to the party and he shall also affix his initials on the stamp affixed on the first page of the copies and enter the particulars of all such documents in the register after daily filing and assign a diary number which shall be entered below the date stamp and thereafter cause it to be sent for scrutiny.

(2) If, on scrutiny, the appeal or document is found to be defective, such document shall, after notice to the party, be returned for compliance and if there is a failure to comply within seven days from the date of return, the same shall be placed before the Registrar who may pass appropriate orders.

(3) The Registrar may for sufficient cause return the said document for rectification or amendment to the party filing the same, and for this purpose may allow to the party concerned such reasonable time as he may consider necessary or extend the time for compliance.

(4) Where the party fails to take any step for the removal of the defect within the time fixed for the same, the Registrar may, for reasons to be recorded in writing, decline to register the appeal or pleading or document."

12. As noticed, the appellant did not chose to remove the defects within 7 days though the defects were general in nature. After removal of defects and after more than one month the appeal was filed on 1st May 2017.

13. Section 422 of the Companies Act 2013 deals with expeditious disposal of petitions by Tribunal and Appeals by Appellate Tribunal. Therein it is stipulated that the appeal should be disposed of expeditiously and endeavour should be made to dispose of the appeal within 3 months from the date of filing of the appeal. For proper appreciation it is desirable to quote Section 422, quoted below: -

"422. Expeditious disposal by Tribunal and Appellate Tribunal.--(1) Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously, as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

(2) Where any application or petition or appeal is not disposed of within the period specified in sub-

section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary."

14. If Section 422 is read along with Rule 26 of the NCLAT Rules, it will be clear that out of 90 days (3 months) for disposal in case of a defective appeal, the party takes 7 days to cure the defects, and thereby, the Tribunal gets only 2 months 3 weeks' time to dispose of the appeals. In this background, normally the Appellate Tribunal list the case either on the same date, if the party so desire or on the next day or at best the date next to that i.e. third day from the date of filing and not beyond the said period.

15. In the present case the grievance of the appellant is that Registrar of the NCLAT has not made any endeavour to decline to register the appeal on failure to remove the defects within 7 days as prescribed under sub-clause (4) of Rule 26.

16. The aforesaid submissions in no manner will be advantageous to the appellant for the following.

17. If the Registrar General would have rejected to register the appeal, then also the appellant could not have got any relief till a fresh appeal is filed against the same very impugned order.

17. As per the provisions of the NCLAT Rules 2016 read with Section 422 of the Companies Act 2013, if defects are not removed within 7 days and the defects are removed after 7 days i.e. beyond the period prescribed under the rules, the appeal is treated to be a fresh appeal. Such procedure is followed so that the appellants may get advantage of 'court fee' prescribed under the NCLAT Rules and may use the same 'paper book' which are generally voluminous. If the Registrar General would have refused to register the appeal after 7 days, as per clause (4) of Rule 26, the appellant would have filed a fresh appeal with fresh court fee with separate sets of paper book, separate affidavit, separate vakalatnama which would be disadvantages to the appellants.

18. As noticed, the re-filing/fresh filing of the appeal was made on 1st May 2017.

19. As per the provisions of the Act and Rules framed there under, the appellant having received the copy of the order on 7th January 2017 was required to file within 45 days i.e. by 21st February 2017. For the purpose of condonation of delay under proviso to sub-section (2) of Section 421, the Appellate Tribunal could have condoned the delay if it would have been filed within another 45 days i.e. by 7th of April 2017. After 7th April 2017, the Appellate Tribunal has no jurisdiction to condone the delay or to entertain the appeal.

20. Appeal was filed on 31st March 2017, and the defect was to be removed within 7 days i.e. by 7th April 2017. Therefore, no extension of time could have been granted even by the Registrar to remove the defects particularly when the Appellate court has no power to condone delay after 90 days of receipt of judgement which expired on 7th April 2017 in the present case.

21. Learned counsel for the appellant submitted that the Appellate Tribunal has inherent power to condone the delay and thereby to do substantive justice. We do not subscribe to such submissions in view of the specific provision made under sub-section (2) of Section 421 and the decision of Hon'ble Supreme Court in "Union of India Vs. Popular Construction Company", (2001) 8 SCC 470, wherein the Hon'ble Apex Court held that when the legislature prescribed a special limitation for the purpose of appeal, the court cannot entertain an appeal beyond the extended period, if prescribed therein, Relevant portion of which reads as under: -

"11. Thus, where the legislature prescribed a special limitation for the purpose of the appeal and the period of limitation of 60 days was to be computed after taking the aid of Sections 4, 5 and 12 of the Limitation Act, the specific inclusion of these sections meant that to that extent only the provisions of the Limitation Act stood extended and the applicability of the other provisions, by necessary implication stood excluded [Patel Naranbhai Marghabhai v. Dhulabhai Galbabbhai, (1992) 4 SCC 264].

12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are "but not thereafter"

used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase "but not thereafter" wholly otiose. No principle of interpretation would justify such a result."

22. In the present case, curiously the applicant has not explained the delay and laches on his part. It has not explained that why the appeal was not filed within 45 days of receipt of the certified copy of the judgement i.e. by 21st February 2017. They have also not explained the delay for preferring the appeal for another 38 days i.e. till 31st March 2017 when it was filed.

23. Curiously, even when defects were pointed out by the registry on 31st March 2017, why they sat tight over the matter for 31 days in removing the defects.

24. Though it was open to the applicant to file a petition before Appellate Tribunal with prayer to ignore the minor defects, no such application was filed by appellant. The appeal was taken back on 3rd April 2017 and they re-filed on 1st May 2017 i.e. beyond the period of 90 days from the date of receipt of judgement passed by Tribunal, when Appellate Tribunal had no jurisdiction to entertain the appeal.

25. The aforesaid unexplained delay on the part of the applicant and laches on his part show that applicant does not deserve exercise of inherent power.

26. We find no merit in this application. The Interlocutory Application is dismissed with cost of Rs. 50,000/- to be paid by applicant for the Library of Appellate Tribunal. Demand draft in the name of Pay and Accounts Officer, Ministry of Corporate Affairs, New Delhi be deposited within 30 days with the Registrar of the Appellate Tribunal.

(Justice S .J. Mukhopadhaya) Chairperson (Mr. Balvinder Singh) Member (Technical