

Dismissal of appeals for suppression of facts and lack of sufficient cause for condoning delay: NATIONAL COMPANY LAW APPELLATE TRIBUNAL CHENNAI BENCH

Mr. A Rajendra, Ex-Shareholder &
Suspended Board of Director of
Dharti Dredging & Infrastructure Ltd.

...Appellant

Mr. Gonugunta Madhusudhan Rao,
RP of Dharti Dredging & Infrastructure Ltd. & 4 Ors.

...Respondent

Case No: Company Appeal (AT) (CH) (Ins.) No. 364/2023

Date of Judgement: 18th January, 2024

Judges:

Justice Rakesh Kumar Jain – Member (Judicial)

Shreesha Merla – Member (Technical)

For Appellant: Mr. Srinath Sridevan, Ms. Harshini Jhothiraman, Mr. Arjun Suresh, Advocates

For Respondent: Mr. Arun Kathpalia, Ms. Disha Parekh, Mr. P.H. Arvindh Pandian, Mr. Abhijeet Sinha, Ms. Neha Bhosale, Mr. Adith Manoj Kalarikkal, Ms. Laveena Tejwani, Mr. Anisha Didwania, Ms. Anuja Divadkar, Mr. P.H. Arvindh Pandian, Mr. Kumar Anurag Singh, Zain A, Khan, Advocates

Facts:

Two appeals filed against order dated 20.07.2023 – one dismissing application seeking direction to place appellant's resolution plan before CoC, another allowing application for approval of resolution plan of consortium including SRA. Both appeals filed on 28.08.2023 by same appellant A Rajendra. Appellant made declaration that appeals within limitation under Section 61. In first appeal, free certified copy dated 01.08.2023 appended. In second appeal, copy shared by RP on 07.08.2023 appended. In para 17 of both appeals, appellant stated he applied for certified copy on 01.08.2023 and received it on 10.08.2023 so 10 days to be excluded under Section 12 of Limitation Act. However, admitted later no certified copy applied for. Applications for condoning 10 days delay filed later alleging limitation to be counted from date free copy supplied, not order date. No sufficient cause shown. Respondents argued appellant approached court with unclean hands, untrue statements, new stands, no compliance with Rules. Delay not condoned as no sufficient cause shown nor any ground made out.

Court's Opinion:

Appellant guilty of suppression of facts and misleading court:

Declaration of appeals being within limitation in para 6 untrue. Statement regarding applying and receiving certified copy untrue admittedly. New stand taken in applications for condonation. Admitted no certified copy applied for though required under Rules. For condoning delay, sufficient cause has to be shown explaining why appeal could not be filed in limitation for reasons beyond control. Not mere apology. As per Supreme Court, for IBC appeals limitation starts from order date and certified copy mandatory. No sufficient cause shown by Appellant for condoning delay. Case fully covered by Supreme Court decisions in Nagarajan and Sanjay Pandurang Kalate cases.

Arguments:

Appellant:

First appeal filed when free certified copy supplied. If period between order date and copy date excluded, appeal within limitation. Non-filing of delay application initially not fatal. Can be cured later. For second appeal, copy shared by RP. Plea of copy lost in

transit incorrect due to office miscommunication. Condonation application not necessary for delay as held in Sesh Nath Singh case.

Respondents:

Appellant concealed facts, made false statements – approached court with unclean hands. Admission of not applying for certified copy contrary to statements in appeal. As per Supreme Court decisions, IBC appeal limitation starts from order date. Delay must be explained, not mere apology. Sesh Nath Singh case not applicable to IBC appeals but CIRP applications.

Sections:

Section 61(1) and (2) of IBC – appeals to be filed in 30 days. Delay beyond 30 days may be condoned up to 15 days if sufficient cause shown. Section 12 of Limitation Act – exclusion of time taken to obtain certified copy.

Cases Cited:

State of MP v Pradeep Kumar – delay application can be filed later to cure defect.

V Nagarajan v SKS Ispat & Power – IBC appeal limitation from date of order. Certified copy mandatory.

Sanjay Pandurang Kalate v Vistra ITCL – IBC appeal limitation starts from order date.

Sesh Nath Singh v Baidyabati Bank – condonation application not required. Distinguished – not applicable to IBC appeals.

Referred Laws:

Section 60(5), 35(1)(n) of IBC

Regulation 39(4) of IBBI Regulations 2016

Rule 22(2) of NCLAT Rules 2016

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Full Text of Judgment:

1.This order shall dispose of two appeals bearing CA (AT) (CH) (Ins) No. 364 of 2023 titled as Mr. A Rajendra Vs. Mr. Gonugunta Madhusudhan

Rao & Ors. (hereinafter referred to as 'first appeal') and CA (AT) (CH) (Ins) No. 365 of 2023 titled as Mr. A Rajendra Vs. Mr. Gonugunta Madhusudhan Rao & Ors. (hereinafter referred to as 'second appeal').

2.The first appeal has arisen from the order dated 20.07.2023 by which an application filed by A Rajendra, shareholder and suspended managing director of Dharti Dredging and Infrastructure Ltd. (Corporate Debtor), under Section 60(5) r/w Section 35(1)(n) of the Insolvency and Bankruptcy Code, 2016 (in short 'Code'), seeking a direction to the Respondent therein to place the resolution plan submitted by the him before the CoC for consideration alongwith other resolution plans and further to stay the voting results of the resolution plan, put up for voting pending disposal of the application filed by the Applicant, bearing I.A. No. 407 of 2023 filed in CP (IB) No. 329/7/HDB/2020, has been dismissed.

3.The second appeal has arisen from the order dated 20.07.2023 by which an application filed by Madhusudhan Rao Gonugunta, Resolution Professional(In short 'RP') of the Corporate Debtor, under Section 30(6) and 31(1) of the Code r/w Regulation 39(4) of the IBBI (Insolvency resolution process for corporate persons) Regulations, 2016 (in short 'Regulations'), for approval of the resolution plan dated 10.01.2023, of consortium of Yogayatan Ports Pvt. Ltd. and Dr. Rajendra Raja Bali Singh (SRA) has been allowed.

4.Notice was issued in both the appeals and parties were asked to complete their pleadings. Both the appeals have been filed by the same Appellant i.e. A Rajendra who has made a declaration in para 6 of the grounds of appeal that the Appeal is within the period specified in Section 61 of the Code. However, during the course of hearing, the Appellant filed I.A. No. 1315 of 2023 in the first appeal and I.A. No. 1316 of 2023 in the second appeal for condonation of delay of 10 days, in filing of the present appeals, both dated 06.12.2023. These applications for condonation of delay have been hotly contested by the Respondents.

5.We have heard Counsel for the parties regarding these two applications for condonation of delay and reserved the order.

6. Counsel for the Appellant in the first appeal has submitted that the appeal has been filed with the free certified copy which was made ready and available on 01.08.2023 and since the objection has been raised by the Respondents in this appeal that 10 days time, lost in obtaining the free certified copy, cannot be excluded to make the appeal fall within the period of limitation, has compelled the Appellant to file the present application for seeking condonation of delay of 10 days. It is submitted that the date of computation of limitation is to commence from the date on which the free certified copy is made ready but in order to avoid any technical objection and delay, the present application has been filed for seeking condonation of delay of 10 days in filing of the present appeal. It is averred in the application that after the pronouncement of the order on 20.07.2023, the Appellant instructed his counsel at Hyderabad to obtain a copy of the same. The free certified copy thereafter was made ready on 01.08.2023 and was given to the Appellant. It is further averred that the appeal has been filed on 28.08.2023 and if the limitation is to be computed from the date of pronouncement of the order, the period of 30 days would end on 19.08.2023 and therefore, the delay of 10 days has occurred but if the limitation is to be counted from the date when the free certified copy was made ready on 01.08.2023 and the appeal having been filed on 28.08.2023 then it is within the period of limitation. It is further averred that if the period from 20.07.2023 to 01.08.2023 i.e. the date until when the knowledge of the contents of the order were not known to the Appellant are excluded as sufficient cause then the appeal is maintainable having been filed on the 40th day from the date of pronouncement of the order. It is further submitted that non-filing of an application for condonation of delay alongwith appeal is not fatal as it is a curable defect. The application for condonation of delay, if it is found or pointed out that the appeal is filed with delay, can be cured later on and in this regard, reliance has been placed on a decision of the Hon'ble Supreme Court in the case of State of M.P. & Anr. Vs. Pradeep Kumar, (2000) 7 SCC 372. Counsel for the Appellant has further admitted that the paid certified copy has not been applied by the Appellant. It is submitted that even if the period of 30 days had expired, the appeal has been filed with

condonation of delay
application on the 40th day.

7. Counsel for the Appellant, in the application bearing I.A. No. 1316 of 2023, filed in the second appeal has also taken the same stand but in this case, it is submitted that the appeal has not been filed with the free certified copy made available to the Appellant rather the copy was shared with the Appellant by the RP and has also filed an application I.A. No. 1118 of 2023 seeking dispensing with the filing of the certified copy alleging that the copy has been lost in transit. It is also submitted that the Appellant has not applied for paid certified copy at all.

8. On the other hand, Counsel for the Respondents, while contesting both the applications, has submitted that the Appellant has not come to the Court with clean hands and is guilty of suppressio veri and suggestio falsi. It is submitted that the memorandum of appeal is drafted by the Appellant under various paragraphs and in para 6, the Appellant, in both the appeals, stated that 'limitation-the Appellant declares that the appeal is within the period specified in Section 61 of the Code' and in Para 17 of the grounds of appeal, the Appellant has averred that 'whether the order appealed as communicated in original is filed? If not, explain the reason for not filing the same? The Appellant has filed for a certified copy of the order on 01.08.2023 and has received the same on 10.08.2023, therefore, a period of 10 days may be excluded from calculation of limitation period, in terms of Section 12(3) of the Limitation Act, 1963 (in short 'Act, 1963') and as per the judgment of the Hon'ble Supreme Court in the case of Sanket Kumar Agarwal & Anr. Vs. APG Logistics Pvt. Ltd., Civil Appeal No. 748 of 2023'.

9. It is submitted that the Appellant has been blowing hot and cold in the same breath as in para 6 of the grounds of appeal, he has declared that the appeal is within the period of limitation whereas in para 17 of the same grounds of appeal, he has alleged that he had applied for a certified copy (paid copy) of the order on 01.08.2023 and received the same on 10.08.2023. In this process, a period of 10 days has been

taken by the Adjudicating Authority which deserves to be excluded for the purpose of calculation of limitation under Section 12(3) of the Act, 1963 and has also relied upon a judgment of the Hon'ble Supreme Court in the case of Sanket Kumar Agarwal (Supra). The Appeal was filed on 28.08.2023 whereas the application for condonation of delay was filed on 06.12.2023 in which the Appellant has taken a new stand alleging that the free certified copy was made available to him on 01.08.2023 on the basis of which the appeal has been filed, therefore, a period of 10 days, spent from 20.07.2023 when the order was passed till 01.08.2023 when the free certified copy was made available should not be included in the period of limitation. It is nowhere mentioned in the applications for condonation of delay that the Appellant had applied for certified copy (paid copy) on 01.08.2023 and received the same on 10.08.2023 and therefore, the said period should be excluded. It is argued that the Appellant has not even come to the court with clean hands because the Appellant has admitted in both the cases that he has not applied for certified copy at all. It is further submitted that if this is the position that certified copy has not been applied at all then the averments made in Para 17 of the grounds of appeal for which declaration has been made and verification has been done is simply an act of overreaching the Court and on this ground alone the application deserves to be dismissed. It is further submitted that the Appellant in second appeal has filed I.A. No. 1316 of 2023 and alleged that the copy of the order was shared with the Appellant by the RP and had also applied for dispensing with the filing of the certified copy by way of I.A. No. 1118 of 2023 stating therein that the copy has been lost in transit but himself admitted and submitted that 'it was lost in transit' was incorrect and has arisen out of a miscommunication in the Appellant's office. It is submitted that since it was found that it has no legs to stand, therefore, the Appellant has changed its stand.

10. Counsel for the Respondent has further submitted that it has been held by the Hon'ble Supreme Court that in the matter of IBC the period of limitation is to be counted from the date of order and it is mandatory to file the appeal alongwith a certified copy in view of the Rule 22(2) of the NCLAT Rules, 2016 (in short 'Rules, 2016'). In this

regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of V. Nagarajan Vs. SKS Ispat & Power Ltd., (2022) 2 SCC 244. He has also submitted that there is a distinction drawn by the Hon'ble Supreme Court in respect of appeal filed under the Companies Act, 2013 and the Code. In this regard, he has also relied upon another decision of the Hon'ble Supreme Court in the case of Sanjay Pandurang Kalate Vs. Vistra ITCL (India) Limited & Ors. Civil Appeal No. 7467-7468 of 2023. He has also argued that even for the purpose of condoning the delay of 10 days, the Appellant has to give sufficient reason in the application which is conspicuous by its absence as no reason much less sufficient has been given in the Comp. App (AT) (CH) (Ins.) Nos. 364 & 365/ 2023 Page 9 of 14 application for condonation of delay except for the Appellant tendering apology for not filing the appeal in time.

11. In rebuttal, Counsel for the Appellants has also referred to a decision of the Hon'ble Supreme Court in the case of Sesh Nath Singh & Anr. Versus Baidyabati Sheoraphuli Co-operative Bank Ltd and Anr., 2021 (7) SCC 313 to contend that for the purpose of condonation of delay, application is not required to be filed and in this regard, Counsel for the Respondents has submitted that Sesh Nath Singh (Supra) is in respect of filing of the application under Section 7 of the Code and not in regard to the filing of the appeal under Section 61 of the Code.

12. We have heard Counsel for the parties and perused the record with their able assistance.

13. The undisputed facts are that both the appeals have been filed against the order dated 20.07.2023. The first appeal has been filed when the application filed by the Appellant for seeking direction to the Respondent therein to place the resolution plan submitted by the Applicant before the CoC for its consideration alongwith other resolution plans and further to stay the voting results of the resolution plan, which is put for voting pending disposal of the application filed by the Applicant has been dismissed and the second appeal has been filed by the Appellant because the application filed by the RP of the Corporate Debtor for approval of the resolution plan submitted by SRA was approved. Both the appeals have been filed on

28.08.2023. The first Appeal has been filed with the free certified copy made available on 01.08.2023 whereas Comp. App (AT) (CH) (Ins.) Nos. 364 & 365/ 2023 Page 10 of 14 the second appeal has been filed with a copy of order which is alleged to have been shared by the RP on 07.08.2023. Section 61 of the Code deals with the appeals and appellate authority which is reproduced as under:-

“Section 61. Appeals and Appellate Authority.

(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 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.”

14. Section 61(1) and 61(2) are relevant in the present case. These two provisions has four parts (i) any person aggrieved can file an appeal against the order of the adjudicating authority (ii) the period of 30 days is prescribed to file such an appeal (iii) in case of expiry of 30 days, the appeal can still be filed within the period of 15 days alongwith an application for condonation of delay explaining the reason for not filing the appeal within the period of 30 days and (iv) no appeal can be filed after the expiry of 15 days. Both the appeals have been filed by the Appellants by making a declaration in para 6 of the grounds of appeal that the appeal is within the period specified in Section 61 of the Code. Meaning thereby, it is declared by the Appellant in both the appeals that both the appeals have been filed within the period of 30 days as prescribed under Section 61(2) of the Code. It is also borne out from the record that the first appeal has been filed by appending free certified copy dated 01.08.2023. It is admitted by the Appellant in the second appeal that free certified copy was not supplied to him rather the appeal has been filed on the basis of a copy shared by the RP on 07.08.2023. Since, the appeal has been filed in Form NCLAT -1 in terms of Rule 22 of the

Rules, 2016, therefore, it is averred by the Appellant in para 17 that the Appellant has filed for a certified copy of the order on 01.08.2023 which has been received on 10.08.2023, therefore, a period of 10 days which has been consumed in obtaining the certified copy may be excluded in terms of Section 12 of the Act, 1963. Although, the Appellant has made this statement of fact in para 17 of the appeal and has declared it to be true while making a declaration and verification of the contents of appeal but as a matter of fact, no certified copy was applied at all much less on 01.08.2023, therefore, it was never received on 10.08.2023 as stated and no certified copy has been appended with the grounds of appeal as well even after it has been filed. The question would thus arise as to why the Appellant has made false averments in the grounds of appeal? The averment made in the grounds of appeal are further declared to be true and also that nothing has been suppressed and concealed and an affidavit has been filed in support of the appeal. In para 2 of the affidavit, he has averred that the contents of the accompanying appeal are true and correct to his knowledge and belief as also derived from the records of the company and in the affidavit it is also verified that the declaration of the contents of the affidavit are true and correct. However, in the application filed for seeking condonation of delay, the Appellant took a summersault and changed the entire case alleging that the first appeal has been filed with the free certified copy and the period of limitation is to be counted from the date when the free certified copy is made available and not from the date of pronouncement of the order i.e. 20.07.2023. In so far as the delay of 10 days is concerned, no sufficient reason has been given as to why the Appeal has been filed belatedly because it has been held by the Hon'ble Supreme Court now that the reason should be an explanation and not an excuse and explanation can be only that the appeal could not be filed within the period of limitation because filing of the appeal was beyond the control of the Appellant for a particular reason. The Hon'ble Supreme Court in the case of V. Nagarajan (Supra) has categorically held that the filing of the certified copy (paid copy) is not a mere formality rather the compliance of Rule 22(2) of the Rules is mandatory. It has also been held that that the limitation in so far as the appeal, filed under the Code is concerned, is to be

counted from the date of the order. Similarly, in the case of Sanjay Pandurang Kalate (Supra), the Hon'ble Supreme Court has stated that the limitation would be start from the date of pronouncement.

15. Thus, from the aforesaid discussion, three issues emerges in this case, firstly, the Appellant is guilty of suppressio veri and suggestio falsi who has made a totally wrong averments in para 6 and 17 of the grounds of appeal which has been declared and verified to be correct and also filed an affidavit in support of it because, firstly, the appeal is not within the limitation though a declaration is made in para 6 of the grounds of appeal that the Appeal is within the period specified in Section 61 of the Code and secondly the Appellant has obtained the certified copy (paid copy) applying the same for it on 01.08.2023 and received the same on 10.08.2023, therefore, the period of 10 days deserves to be excluded in terms of the Section 12 of the Act, 1963. Secondly, the Appellant has not even applied for the certified copy (paid copy) at all in filing of the appeals and even one application has been filed i.e. I.A. No. 1118 of 2023 for dispensing with the filing of the certified copy. Thirdly, the Appellant has taken totally a new stand in the application for condonation of delay when an objection was raised by the Respondents that the appeal is not within the period of limitation. In the application filed for condonation of delay, the ground taken is that the limitation is to be counted from the date when free certified copy was made available in so far as the first appeal is concerned whereas no such plea has been taken in so far as the second appeal is concerned in which the averment has been made that the appeal has been filed with the copy given by the RP and lastly even if there is a delay of 10 days for which the application has been filed for condonation of delay, no ground has been made out for the purpose of condoning the delay which would fall within the parameters of sufficient cause and finally the case of the Respondent is fully covered by the decisions of the Hon'ble Supreme Court rendered in the case of V. Nagarajan(Supra) and Sanjay Pandurang Kalate (Supra).

16. Thus, from the aforesaid facts and circumstances, we do not find any merit in the present applications and the same are hereby

dismissed. Since, we have dismissed the applications for condonation of delay by an order of even date, therefore, the present appeals are not found to be duly constituted and the same are hereby dismissed.