(2025) 03 NCLAT CK 0661

In the National Company Law Appellate Tribunal

Case No : Company Appeal (AT) (Insolvency) No. 1510 of 2023

Aarif Ahsan Khan APPELLANT

Vs

Jayesh Sanghrajka & Ors. RESPONDENT

Date of Decision : 10-03-2025

Acts Referred:

Insolvency and Bankruptcy Code 2016 — Section 43,47,66,7,49

Citation : (2025) 03 NCLAT CK 0661

Hon'ble Judges : Rakesh Kumar Jain,Member (T);Naresh Salecha, Member (T);Arun Baroka, Member (T)

Bench : Full Bench

Advocate : Ankit Virmani, Ruchika Agarwal, Hrithik Sharma, Akshat Mishra , Amit Singh, Tishampati Sen, Riddhi Sancheti, Ashish Parwani, Devesh Juveker, Dikshat Mehra, Anurag Anand , Mukul Kulkarni

Final Decision : Dismissed

Judgement

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 17.08.2023 by which an I.A No. 2679 of 2023 filed by the Appellant has been disposed of.

2. Brief facts of this case are that the IDBI Trusteeship Services Limited (Financial Creditor) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short ‛ Code’) against Ornate Spaces Pvt. Ltd. (CD) before the National Company Law Tribunal, Mumbai Bench IV (in short ‘Tribunal’) which was admitted on 29.06.2020.

3. Shorn of unnecessary details, the Resolution Professional/ Respondent No. 1, on the basis of transaction audit report conducted by Jain Jagawat Kamdar & Co. dated 13.05.2021, filed I.A No. 1927 of 2021 on 17.07.2021 (PUFE Application) alleging certain transactions as PUFE transactions against the directors, promoters and other related parties of the CD. The appellant herein was arrayed as Respondent No. 6 alleging that the transaction related to sale of land to CD by

the proprietorship concern of the Appellant was misutilised and therefore, categorised the said transaction under Section 49 of the Code.

4. Exact prayer made in the application bearing I.A No. 1927 of 2021 filed under Section 43, 47 and 66 of the Code are as under:-

“a. Spending of Administrative and Licensing charges in cash amounting to Rs. 8.09 crores falling u/s 66 of the Code;

b. Loans advanced to related parties amounting to Rs. 116.26 crores falling u/s 43 of the Code;

c. Foreclosure of existing loans by transferring it from unrelated parties to related parties amounting to Rs. 16.24 crores falling u/s 43 of the Code;

d. Routing of sum received as interest on fixed deposits amounting to Rs. 2.10 crores falling u/s 43 of the Code;

e. Amount squared off by the Society by invoking bank guarantee amounting to Rs. 27 crores falling u/s 43 of the Code;

f. Cash transactions with Ornate Developers amounting to Rs. 5.75 crores falling u/s 66 of the Code;

g. Shifting of unsecured loans to booking advance in respect of "Grove Towers' amounting to Rs. 44.27 crores falling u/s 66 of the Code; and

h. Investment in Aryan Spaces by mis-utilising the funds of the Financial Creditors amounting to Rs. 1.20 crores falling u/s 49 of the Code.”

5. In the aforesaid prayer, prayer (h) is pertaining to the Appellant who alleged to have filed reply to the Application in which he had allegedly averred that the Appellant, the sole proprietor of Aryan Spaces, is the owner of land admeasuring 24,300 sq. ft. situated at village Savorali, Taluka, Talasari, District Thane bearing Bhumapan Kramank/Gat Kramank 112 Upvibhag 7/1B. It is alleged that the Appellant and the CD entered into a memorandum of understanding dated 14.08.2018 as per which the Appellant agreed to transfer right, title and interest in the said plot to the CD for a total sale consideration of Rs. 2,25,00,000/-. It is further alleged that a sum of Rs. 1,20,00,000/- was paid by the CD to the Appellant between 07.08.2018 and 17.09.2018 through various transactions. Thereafter, second memorandum of understanding dated 15.11.2018 was entered into as per which the CD was a confirming party and M/s Ornate Developers, a proprietorship firm, through its proprietor Mr. Vijay Machinder was substituted as the purchaser for the sale of the said plot but the second MOU was cancelled on 14.08.2018. It is further alleged that a sum of Rs. 35,00,000/-was paid to the Appellant before executing the said second MOU. It is also alleged that in clause 3 of the second MOU, it was recorded that litigation of the said property has been fully settled and the balance amount towards full and final payment of Rs. 70,00,000/- shall be paid within a period of three months from the date of execution of the second MOU. It is also the case of the Appellant that

in the transaction audit report dated 13.05.2021 the said transaction was not included under Section 49 of the Code.

6. Be that as it may, the Tribunal allowed the application bearing I.A No. 1927 of 2021 partly with the following observations pertaining to the Appellant which read as under:-

“13. The Applicant has pointed out that a sum of Rs.1,20,00,000.00 is outstanding as on 31.03.2020 as "Investment in Aryan Space", owned by Mr. Aarif Ahsan Khan. The applicant claims this transaction to be it in nature of Preferential transaction u/s 49 of the Code. This fact is borne out from the report of by the Transaction Auditor also. Investment in Aryan Spaces by mis-utilising the funds of the Financial Creditors amounting to Rs. 1.20 crores falling u/s 49 of the Code. It is stated that the corporate debtor had entered into an un-registered MOU for purchase of land for a sum of Rs. 2,25,00,000/- with the said party; and the corporate debtor has diverted this money for buying the land, the title of which is disputed. The said amount is stated to have been paid from 7.8.2018 to 17.9.2018 in the transaction audit report. From the perusal of the transaction audit report, it is noticed that Annexure 1 contains one name Aarif Khan/ Mohammed Khan, who had advanced a sum of Rs. 2,23,00,000/- from 28.05.2018 to 27.08.2018 to the Corporate Debtor and such loan was transferred to Flat Booking on 1.4.2019, thereby entitling him to one flat in the proposed residential project of the Corporate Debtor. The dates on which transaction of advance against land to Aryan Spaces and date on which loan was taken from Aarif Khan raises a doubt as to whether both are same persons? There is nothing on record to suggest that these are same persons. However, in the interest of Corporate Debtor, the Bench is of the considered view that the Resolution Professional be directed to look into whether Mr. Aarif Ahsan Khan of Aryan Spaces and Mr. Aarif Khan is same person; and if both are same persons, the transaction of advance to Aryan Spaces, without any substance, is an act of concealing the facts with the connivance of such persons so as to benefit him by a sum of Rs. 1,20,00,000/-, which results into the injury to interests of the company or its creditors. In such case, Aryan Spaces shall be liable to contribute a sum of Rs. 1,20,00,000/- to the Corporate Debtor or the Corporate Debtor shall be entitled to set-off this amount from the amount of its proprietor's admitted claim.”

7. It is alleged by the Appellant that in the order dated 02.05.2023 the Tribunal has wrongly recorded that no reply was filed by the Appellant, therefore, the Appellant filed an application bearing I.A No. 2679 of 2023 for modification of the order dated 02.05.2023, however, the application bearing I.A No. 2679 of 2023 was disposed of on 17.08.2023.

8. It is alleged by the Appellant that he had challenged both the orders dated 02.05.2023 and 17.08.2023 by way of one appeal on 15.09.2023 but the appeal against the order dated 02.05.2023 was beyond the period of limitation, therefore, the application for condonation of delay was filed. The Appellant filed

the additional appeal on 27.09.2023 which was numbered as CA (AT) (Ins) No. 1429 of 2023 pertaining to the challenge to the first order dated 02.05.2023 and the appeal filed on 15.09.2023 was confined to the order dated 17.08.2023 and was given number as CA (AT) (Ins) No. 1510 of 2023.

9. CA (AT) (Ins) No. 1429 of 2023, in which I.A No. 5116 of 2023 was filed for condonation of delay, was dismissed by this Tribunal vide its order dated 08.12.2023 on the ground of limitation which is reproduced as under:-

"08.12.2023: I.A. No. 5116 of 2023. This is an application for condonation of delay in filing of the Appeal. The Appeal has been filed against the Order dated 2nd May, 2023 passed by the Adjudicating Authority deciding Preferential Transaction Application being I.A. No. 1927 of 2021 filed by the Resolution Professional. The Appellant was Respondent No. 6 in the said application. By the Order dated 2nd May, 2023, direction was issued against the Respondents including the Appellant herein to contribute sum. Appellant after passing the said order filed an application being I.A. No. 2679 of 2023 where following reliefs were sought:

"A. the Hon'ble Tribunal may be pleased to pass appropriate order after considering Affidavit in Reply and submissions made the Applicant during the course of hearing of I.A./1927/2021 on April 26, 2023 and order dated May 2, 2023 may kindly be modified.

B. that during the pendency of the present Application, the operations and implementation of order dated May 2, 2023 may kindly be stayed.

C. Ad-interim/interim reliefs.

D. Any other relief which this Hon'ble Tribunal deems fit and proper."

2. The Adjudicating Authority rejected the said application by a subsequent order dated 17th August, 2023. This Appeal has been filed challenging the first order dated 2nd May, 2023.

3. Learned Counsel for the Appellant in support of the Delay Condonation Application contends that since the Appellant has already filed an application being I.A. No. 2679 of 2023 which could be decided only on 17th August, 2023, the time taken during the period Application was pending should be excluded and he submits that since the Application decided by order dated 17th August, 2023 clarifying Respondent No. 6 has filed a Reply, earlier order shall merge in the order dated 17th August, 2023 hence the limitation be counted from 17th August, 2023 and the present appeal filed against order dated 2nd May, 2023 is well within time.

4. Learned Counsel for the Appellant in support of his submission has relied on Judgment of this Tribunal reported in 2023 SCC OnLine NCLAT 2179, Ashok Tiwari Vs. Tattva & Mittal Lifespaces Pvt. Ltd. as well as the Judgment of the Hon'ble Supreme Court in 2012 6 SCC 782, DSR Steel Pvt. Ltd. Vs. State of

Rajasthan & Ors.

5. Learned Counsel for the Respondent refuting the submissions of the Appellant submits that the limitation for filing the Appeal against the Order dated 2nd May, 2023 shall commence from 2nd May, 2023. Learned Counsel for the Appellant was present on 2nd May, 2023 when the matter was heard and the limitation for filing the Appeal shall not be suspended till 17th August, 2023 when subsequent application is decided. He further submits that there is no question of merger of the order dated 2nd May, 2023 in subsequent order dated 17th August, 2023.

6. We have considered the submissions of Learned Counsel for the parties and have perused the record.

7. The parties are not in dispute that on 2nd May, 2023, I.A. filed by the RP being I.A. No. 1927 of 2021 was decided and Respondent No. 6 the present Appellant was present in the hearing and court passed the order after hearing learned counsel for the Appellant. Limitation for filing the Appeal against the Order dated 2nd May, 2023 shall commence from the date of passing of the order.

8. The question which is now to be considered as contended by the Appellant is that by virtue of subsequent order dated 17th August, 2023, the earlier order shall merge and limitation should be counted from 17th August, 2023.

9. When we look into the order passed on 17th August, 2023, paragraph 2 which is to the following effect;

"2. The applicant in this application was respondent no. 6 in I.A-1927 of 2021. This bench had disposed of that IA vice order dated 02.05.2023 and due to inadvertence, it was stated that no reply has been filed by the Respondents. However, that statement was relevant to R-1 to R-5. The reply filed by Respondent No. 6 was duly considered while passing the order dated 02.05.2023, more specifically MOU dated 15.11.2018 entered amongst the applicant, the Corporate Debtor, and the proprietorship firm of director of Corporate Debtor M/s. Ornate Developers. It was noticed at that time that the said MOU bears the signature of Mr. Vijay Machinder on behalf of the director of the Corporate Debtor as well as proprietor of Ornate Developers, and the stamp of the Corporate Debtor was affixed on any of the place in the said MOU. Also, the said MOU had no witness, and Mr. Vijay Machinder has signed on each page, except last page, once thereby suggesting that the said signatures was on behalf of his proprietorship firm and not behalf of Corporate Debtor. Further, this agreement having been entered in the look back period deserve to be ignored. At the insistence of the applicant in 2679 of 2023 we clarify that the Respondent No. 6 in I.A.-1927 of 2021 had filed reply dated 28.12.2021, and this clarification shall form prat of our order dated 02.05.2023 in I.A.-1927 of 2021."

9. It is clear that court has also issued a clarification that Respondent No. 6 in I.A. No. 1927 of 2021 has filed Reply dated 28th December, 2021 which clarification was with regard to the order dated 2nd May, 2023. There is no

occasion for merger of earlier order with subsequent order.

10. The Judgment which has been relied by Learned Counsel for the Appellant in “Ashok Tiwari” as noted above was case where Appeal was filed against the subsequent order dated 12th May, 2023 which was an order passed on application filed by the Appellant for rectification of the earlier order dated 15th February, 2023. The rectification application was decided on 12th May, 2023 and the Appeal which came for consideration before the Tribunal was considered against the subsequent order dated 12th May, 2023. Observations were made by the Court were in reference to that context. Present Appeal is not against the subsequent order i.e. 17th August, 2023 rather the present Appeal is against the earlier order dated 02nd May, 2023. Hence the Judgment of this Tribunal in Ashok Tiwari does not render any help to the Appellant.

11. Learned Counsel for the Appellant has relied on another judgment of Hon’ble Supreme Court in the matter of DSR Steel Pvt. Ltd. as noted above, paragraph 25 of the Judgment which is to be following effect:

“25. Different situations may arise in relation to review petitions filed before a Court or Tribunal.

25.1 One of the situations could be where the review application is allowed, the decree or order passed by the Court or Tribunal is vacated and the appeal/ proceedings in which the same is made are re- heard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition.

25.2. The second situation that one can conceive of is where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified. Such an order shall then be a composite order whereby the Court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.”

12. In the said case, the Hon’ble Supreme Court was considering question of review application which review application was filed under the provisions of Electricity Act, 2003. There was power of review conferred on the commission as has been noticed in the Judgment of the Hon’ble Supreme Court. In the above context, the Hon’ble Supreme Court laid down preposition as noted in paragraph 25. Present is a case which is covered by Paragraph 25.3 of the above judgment where the Hon’ble Supreme Court has clearly held that even a case of rejection of review the original order has to be challenged within time stipulated by law and original decree not the order requesting the review can be taken for the purpose of limitation. Learned Counsel for the Appellant has relied on paragraph 25.2 and submits that present is a case covered by Paragraph 25.2. Paragraph 25.2 is a case where review petition allowed and decree order reversed or modified. Present is not a case where there was any modification of the Order dated 2nd May, 2023 more so present is not a case of review because the Tribunal does not have jurisdiction to review its Judgment, as noted above in the clarification order issued on 17th August, 2023, we thus are of the view that this Appeal having been filed beyond 15 days after expiry of the limitation and our jurisdiction to condone only 15 days hence the Delay Condonation Application is dismissed. Consequently, the Memo of Appeal is rejected.”

10. The appeal filed by the Appellant against the order dated 08.12.2023 was dismissed on 04.12.2024. The order dated 04.12.2024 passed by the Hon’ble Supreme Court is also reproduced as under:-

1. Heard learned senior counsel appearing for the appellant.

2. We concur with the view taken by the National Company Law Appellate Tribunal (NCLAT) that the appeal against order dated 2nd May, 2023 was barred by limitation. Therefore, we dismiss the appeal.

3. Our attention is invited to the fact that the appellant has preferred a separate appeal against an order dated 17th August, 2023 which is pending before the NCLAT. We make it clear that the observations made in the impugned order will not affect the merits of the pending appeal and the same shall be decided on its own merits.

4. All contentions in the pending appeal are kept open.

5. Pending application(s), if any, shall stand disposed of.

11. Counsel for the Appellant has submitted that firstly the Tribunal has wrongly recorded in the first order dated 02.05.2023 that no reply has been filed by the Appellant and has disposed of the application bearing I.A No. 1927 of 2021 without reference to the reply and secondly in the order dated 17.08.2023 the Tribunal has further committed an error that reply filed by the Appellant was duly

considered while passing the order dated 02.05.2023. The Appellant has submitted that the impugned order is against the principle of natural justice and deserves to be set aside.

12. It is further argued that the Tribunal instead of referring to the reply filed by the Appellant in the main proceedings has tried to justify its finding passed in the order dated 02.05.2023 and recorded new findings. He has further submitted that audit report relies only on first MOU and does not refer to second MOU but the Tribunal has given its own reasoning to discredit the second MOU. It is further submitted that the Tribunal has given finding that 2nd MOU bears the signature of Vijay Machinder on behalf of the director of the CD as well as proprietor of CD and that he has signed on each page except last page suggesting that the said signature were on behalf of his proprietorship firm and not on behalf of the CD. It is argued that it is nobody's case that the second MOU was not signed by Vijay Machinder on behalf of the CD. It is also submitted by the Appellant that the order passed in the first appeal no. 1429 of 2023 filed against the order dated 02.05.2023 does not affect the merit of the second appeal which has been protected by the Hon'ble Supreme Court in its order. It is also submitted that the first appeal against the order dated 02.05.2023 was dismissed only on the ground of limitation and not on merit and in this regard, he has relied upon an order of the Hon'ble Supreme Court in the case of Raja Mechanical Co. (P) Vs. CCE, (2012) 12 SCC 613 in which it has been held that "In view of the plethora of decisions of this Court, wherein this Court has categorically observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order would not merge with the orders passed by the first appellate authority".

13. He has also relied upon a decision of the Hon'ble Supreme Court in the case of Chandi Prasad & Ors. Vs. Jagdish Prasad & Ors., (2004) 8 SCC 724 to contend that when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply.

14. He has further argued that if no merger applies then the order dated 02.05.2023 is capable of being rectified/ reviewed/recalled and in this regard, he has relied upon a decision of the Hon'ble Supreme Court in the case of Kunhayammed Vs. State of Kerala, (2000) 6 SCC 359 and for the purpose of recall, relied upon a decision of this Court in the case of Union Bank of India Vs. Dinkar T. Venkatasubramanian & Ors., 2023 SCC Online NCLAT 283 and quoted para 21 in which it has been held that the power to review is not conferred upon this Tribunal but power to recall its judgment is inherent in this Tribunal since inherent power of the Tribunal are preserved, powers which are inherent in the Tribunal as has been declared by Rule 11 of the NCLAT Rules, 2016. Power of recall is not power of the Tribunal to rehear the case to find out any apparent error in the judgment which is the scope of a review of the judgment. Power of recall of a judgment can be exercised by this Tribunal when any procedural error is committed in delivering the earlier judgment.

15. On the other hand, Counsel appearing on behalf of the Respondent has submitted that the application bearing I.A No. 1927 of 2921 was reserved for orders on 26.04.2023 in which the order was pronounced on 02.05.2023. He has further submitted that I.A No. 2679 of 2023 was reserved for orders on 05.07.2023 and the order was pronounced on 17.08.2023. He has also argued that the application I.A No. 1927 of 2021 was disposed of partly by order dated 02.05.2023 which was challenged by way of appeal bearing CA (AT) (Ins) No. 1429 of 2023 and the same was dismissed on 08.12.2023 on the issue of limitation. The said order was upheld by the Hon'ble Supreme Court in the appeal by the order dated 04.12.2024. It is further submitted that the Tribunal, on the application filed by the Appellant bearing I.A No. 2679 of 2023, has passed the impugned order in which it was categorically observed that no reply has filed was in relation to Respondent No. 1 to 5 and not respondent no. 6 which has been inadvertently recorded and then passed the order in the application. It is submitted that since the Appellant has already challenged the order dated 02.05.2023 passed in I.A No. 1927 of 2021 unsuccessfully up to the Hon'ble Supreme Court, he cannot get the order dated 02.05.2023 recalled in the garb of this appeal having been filed against the order dated 17.08.2023. It is further submitted that once the Tribunal has observed in the order dated 17.08.2023 that reply filed by Respondent no. 6/Appellant was duly considered while passing the order dated 02.05.2023 and specifically the MOU dated 15.11.2018, nothing survives for the Appellant to raise an issue about the reply having not been considered by the Tribunal in the order dated 02.05.2023.

16. We have heard Counsel for the parties and perused the record.

17. The facts of this case are not in dispute about filing of the application by Respondent bearing I.A No. 1927 of 2021, filing of the reply by the Appellant/ Respondent to the Application and that the application bearing I.A No. 1927 of 2021 was allowed partly by the Tribunal while discussing the case of the Appellant in para 13 of the said order. There is also no dispute about the fact that the Appellant filed an application for recall of the order dated 02.05.2023 which was disposed of by the order dated 17.08.2023 and that the Appellant filed two separate appeals i.e. CA (AT) (Ins) No. 1429 of 2023 against the order dated 02.05.2023 which was dismissed by this Court on 08.12.2023 though on the issue of limitation and the said order has been confirmed by the Hon'ble Supreme Court when the Civil Appeal No. 1526 of 2024 filed by the Appellant was dismissed on 04.12.2024.

18. The grievance of the Appellant has been looked into by the Tribunal about the wrong recording of the fact that no reply has been filed by the Appellant and in this regard the Tribunal has categorically recorded in its order that the non-filing of the reply was in respect of Respondent No. 1 to 5 which was inadvertently recorded in respect of Respondent No. 6 but reply filed by Respondent No. 6/Appellant was duly considered while passing the order dated 02.05.2023 particularly qua the MOU dated 15.11.2018 entered amongst the

Applicant, CD and the proprietorship firm of director of CD. All these facts have been considered already by the Tribunal in the order dated 17.08.2023 and the application was not even pursued by the Appellant because he was not present at the time of hearing.

19. Thus, in view of the aforesaid facts and circumstances, we hardly find any merit in this appeal and the same is hereby dismissed. No costs.

I.As, if any, are hereby closed.

