

(2023) 05 SC CK 0105

In the Supreme Court Of India

Case No : Civil Appeal No. 748 Of 2023

Sanket Kumar Agarwal & Anr

APPELLANT

Vs

APG Logistics Private Limited

RESPONDENT

Date of Decision : 01-05-2023

Acts Referred:

National Company Law Appellate Tribunal Rules, 2016 — Rule 3, 14, 22, 103, 104
Insolvency and Bankruptcy Code, 2016 — Section 7, 61, 61(1), 61(2), 62, 238, 238A
Limitation Act, 1963 — Section 12, 12(1), 12(2)
Companies Act, 2013 — Section 420(3), 469

Citation : (2023) 05 SC CK 0105

Hon'ble Judges : Dr. Dhananjaya Y. Chandrachud, CJ; J B Pardiwala

Bench : Division Bench

Advocate : Mayuri Raghuvanshi, Vp Singh, Akshat Singh, Dacchita Shahi, Vyom Raghuvanshi, Bhanu Gupta, Rashmi Bansal

Final Decision : Allowed

Judgement

Dr. Dhananjaya Y. Chandrachud, CJ

1. Admit.

2. This appeal arises under Section 62 of the Insolvency and Bankruptcy Code 2016 ["IBC"] from a judgment dated 9 January 2023 of the National Company Law Appellate Tribunal ["NCLAT"]. The NCLAT dismissed the appeal against the order of the National Company Law Tribunal ["NCLT"] on the ground of limitation.

3. The appellant instituted an application under Section 7 of the IBC in June 2021 seeking the initiation of the Corporate Insolvency Resolution Process against the respondent. The application was dismissed by the NCLT by an order dated 26 August 2022. On 2 September 2022, the appellant filed an application for obtaining a certified copy of the order which was pronounced by the NCLT. The application was received by the Registry of NCLT on 5 September 2022. On 15 September 2022, the order was uploaded on the website of the NCLT and a

certified copy was provided to the appellant on the same day. The appellant lodged an appeal before the NCLAT on 10 October 2022 in the e-filing mode along with an Interlocutory Application ["IA"] seeking condonation of delay of five days. A physical copy of the appeal was filed on 31 October 2022.

4. The appellant submitted that the appeal had been filed within the period of limitation from the date the order was made available in the public domain i.e., 15 September 2022. However, as a matter of abundant precaution, the appellant had considered 26 August 2022 to be the date from which limitation would commence. The appellant stated that the prescribed time period of 30 days for filing the appeal ended on 5 October 2022, after accounting for the exclusion of 10 days (from 5 September 2022 to 15 September 2022 on account of the time taken to provide a certified copy). The appellant submitted that the inadvertent delay of 5 days in filing the appeal had been caused due to the additional time needed to obtain legal advice, collate documents and connect with counsel during the festive season.

5. In the background of the above sequence of events, the issue before NCLAT was whether the appeal was instituted within limitation. In its impugned order, NCLAT observed that the appeal was lodged through the e-portal on 10 October 2022, which was the 46th day after the order of the NCLT. It observed that while Section 61(2) of the IBC prescribes a 30-day deadline for preferring an appeal against an order of the adjudicating authority, the appellate tribunal can condone a delay of upto 15 days, if sufficient cause is shown. Furthermore, it held that the ingredients of Section 61 of the IBC do not visualize that an aggrieved person has to wait till he is in receipt of a certified copy of the impugned order before preferring an appeal. The tribunal held:

"31. It cannot be gainsaid, that the "Expiry of 30 days", after the "Pronouncement of the impugned order", dated 26.08.2022, was on 24.09.2022. The 30 days period in preferring the "Appeal", by any "Person Aggrieved", in respect of an "Order", passed by the "Adjudicating Authority", is the "deadline" prescribed as per Section 61 (2) of the Insolvency and Bankruptcy Code, 2016. If an "Appellate Tribunal" ("NCLA T"), is satisfied on "sufficient cause", being shown to its "subjective satisfaction", in regard to the preferring of an "Appeal" (after the "Expiry of 30 days period"), then, "such period, shall not exceed 15 days", as per Section 61 (2) of the Code. Admittedly, the "completion of 45 days" (30 + 15 days), was on 09.10.2022. In effect, the maximum 45 days being the outer limit (30 + 15 = 45 days), beyond which, the "Appellate Tribunal" ("NCLAT), is "bereft" of any power, to "condone the delay", in the teeth of the mandate, prescribed under the I & B Code, 2016, as opined by this "Tribunal"."

(emphasis supplied)

6. The NCLAT held that even according to the version of the appellants, the period of 30 days would end on 4 October 2022 while the appeal was filed on 10 October 2022. It noted that 10 days (from 26 August 2022 to 4 September

2022) were spent prior to the application for a certified copy and between 15 September 2022 and 4 October 2022 another period of 20 days elapsed.

7. The NCLAT concluded that the appeal was barred by limitation on the ground that it was instituted on the 46th day following the order of the NCLT, exceeding the outer limit of 45 days that was permissible under Section 61 of the IBC.

8. The appellant questions the order of the NCLAT on limitation.

9. The following submissions have been urged by Mr Bhanu Gupta, counsel appearing on behalf of the appellant:

i. The NCLAT ought to have excluded the period from 5 September 2022, when an application for obtaining a certified copy was filed till 15 September 2022, when the certified copy was received, while computing the period of limitation;

ii. The NCLAT has erroneously taken the entire period between 26 August 2022 and 10 October 2022 by failing to exclude the date on which the order was pronounced, namely, 26 August 2022 in terms of Section 12(2) of the Limitation Act 1963 and Rule 3 of the National Company Law Appellate Tribunal Rules 2016 ["NCLAT Rules 2016"];

iii. The NCLAT has disregarded judicial precedents including the judgment of this Court in *V Nagarajan v. SKS Ispat and Power Limited & Ors* [(2022) 2 SCC 244 ("*V Nagarajan*")]; and

iv. Since the order of the NCLT was uploaded on the website on 15 September 2022 on which day the certified copy was also made available, it was impossible for the appellant to draft an appeal prior to 15 September 2022 based merely on the pronouncement of the order without knowledge of the grounds for dismissal.

10. On the other hand, Ms Rashi Bansal, counsel appearing on behalf of the respondent urged that:

i. The appeal was filed on 10 October 2022 in the electronic mode;

ii. On 3 January 2021, a circular was issued by the NCLAT notifying a Standard Operating Procedure ["SOP"] for e-filing in terms of which physical copies were required to be filed as per the procedure prescribed under the NCLAT Rules 2016 along with the e-filing receipt;

iii. On 21 October 2022, a further order was issued by the Registrar of NCLAT clarifying that the period of limitation shall be computed from the date of the presentation of the appeal as per Rule 22 of the NCLAT Rules 2016, the effect of which was that the period of limitation would cease to run only after a physical copy was presented;

iv. By an order of 24 December 2022, notified by the Registrar of the NCLAT, the earlier order dated 21 October 2022 was withdrawn and it was notified for the first time that limitation shall be computed with reference to the date of e-filing; and

v. Even the e-filing of the appeal on 10 October 2022 would not result in limitation ceasing to operate and it was only when a hard copy was filed that limitation would stop running.

11. The dispute in the appeal arises over the period of limitation applicable for filing an appeal against an order of the NCLT under the IBC. The IBC is a complete code. Section 238 of the IBC provides that the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Relevant provisions of the IBC, Limitation Act 1963, NCLAT Rules 2016 and administrative orders are extracted below and are referred to, in turn.

12. Section 61(1) of the IBC stipulates that notwithstanding anything to the contrary contained in the Companies Act 2013, any person aggrieved by the order of the adjudicating authority “under this Part” may prefer an appeal to NCLAT. Sub-Section (2) of Section 61 provides for a period of limitation in the following terms:

“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. [...]”

Sub-Section (2) of Section 61 provides for a limitation period of thirty days. The proviso to Section 61(2) provides that NLCAT may allow an appeal to be filed beyond a period of thirty days by a maximum of fifteen days on the demonstration of sufficient cause for the delay.

13. Section 238A, inserted in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act 2018, [The Insolvency and Bankruptcy Code (Second Amendment) Act 2018, Act No. 26 of 2018] contains a specific provision in regard to the Limitation Act 1963. Section 238A provides that the Limitation Act would inter alia apply “as far as may be” to appeals before the NCLAT:

“238A. Limitation — The provisions of the Limitation Act 1963, shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.”

14. The Central Government, in exercise of the powers conferred by Section 469 of the Companies Act 2013, has formulated the NCLAT Rules 2016. Rule 3 of the

NCLAT Rules 2016 stipulates that for computation of a time period as provided, the day from which the said period is to be reckoned shall be excluded. Rule 3 provides as follows:

"3. Computation of time period—Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Appellate Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Appellate Tribunal is closed, that day and any succeeding day on which the Appellate Tribunal remains closed shall also be excluded."

15. Part III of the NCLAT Rules 2016 deals with the procedure for the institution of appeals. Rule 22 provides that an appeal has to be presented at the filing counter of the Appellate Tribunal, and should be accompanied by a certified copy of the order under challenge. Rule 22 provides that:

"22. Presentation of appeal—

(1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

(2) Every appeal shall be accompanied by a certified copy of the impugned order.

(3) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.

(5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.

(6) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal."

16. In terms of Rule 103, the Appellate Tribunal may allow the filing of an appeal or proceedings through electronic mode. Rule 103 provides that:

"103. Filing through electronic media— The Appellate Tribunal may allow filing of appeal or proceedings through electronic mode such as online filing and provide for rectification of defects by e-mail or internet and in such filing, these rules shall be adopted as nearly as possible on and from a date to be notified separately and the Central Government may issue instructions in this behalf from time to time."

17. On 3 January 2021, NCLAT notified a Revised SOP for the hearing of cases

through the virtual mode, using its e-filing portal. The SOP notices that an e-filing facility was available for filing of appeals and related documents, and exhorts "all concerned" to "avail the same through NCLAT e-filing portal". The circular provides as follows:

"It may be noted that it is mandatory that Ld. Advocates/ Authorised Representatives/ Parties-in-Person shall file the Appeal/Interlocutory Application/ Reply/ Rejoinder etc. in hard copy also as per the procedure prescribed in NCLAT Rules, 2016 along with the e-filing receipt. The online filing & hard copies must match with proper pagination. The Court Fee shall be paid through Bharat Kosh (<https://bharatkosh.gov.in>) and the payment receipt should be attached."

18. Subsequently, on 21 October 2022, the Registrar of NCLAT issued another order [NCLAT, F.No. 10/37/2018-NCLAT, dt. 21 October 2022] with regard to computing limitation for the purpose of filing an appeal before the Appellate Tribunal. The order notices that while Rule 22 of the NCLAT Rules 2016 provides for the presentation of an appeal at the filing counter of the NCLAT, Rule 103 permits the filing of appeals or proceedings through the electronic mode. After advertng to the SOP dated 3 January 2021, the order indicates as follows:

"The SOPs and directions issued by the Appellate Tribunal do not contain any direction with regard to computation of limitation as to whether limitation is to be computed from the date of e-filing of the Appeals or from the date when Appeals are presented before the Appellate Tribunal as per Rule 22 of the NCLAT Rules, 2016. The Competent Authority has, therefore, decided to issue directions in exercise of power conferred by Rule 104 of the NCLAT Rules, 2016 with regard to computation of limitation for the purposes of filing an Appeal in the Appellate Tribunal.

Hence, with regard to computation of limitation in Appeals, following directions are hereby issued by the Competent Authority: -

(1) The period of limitation shall be computed from the date of presentation of Appeal as per Rule 22 of the NCLAT Rules, 2016.

(2) The requirement of filing Appeals by electronic mode shall continue along with mandatory filing of the Appeals as per Rule 22 of the NCLAT Rules, 2016.

(3) This order will be effective with effect from 1st November, 2022."

All concerned shall ensure that Appeals are presented as per Rule 22 of the NCLAT Rules, 2016 within the period of limitation at the filing counter."

19. The above order dated 21 October 2022 indicates that the SOPs and directions which were issued by the NCLAT did not contain any provision for the computation of limitation, more specifically on whether limitation has to be computed with reference to the date of e-filing or from the date on which the appeal is presented before the NCLAT, in terms of Rule 22. Hence, in exercise of the power conferred by Rule 104, it was notified that the period of limitation

would be computed with reference to the date of the presentation of the appeal in terms of Rule 22. Moreover, the requirement of filing appeals by the electronic mode was directed to continue together with the mandatory filing of appeals under Rule 22. The order dated 21 October 2022 was to be effective from 1 November 2022.

20. Eventually, on 24 December 2022, another order was issued by the Registrar of NCLAT in the following terms:

“It is seen that appeals are e-filed from different parts of the country where the appellant in some cases is located in far away places and time is taken to file physical copy. It is further seen that physical copy is filed within seven days of e-filing.

Hence, with regard to computation of limitation in Appeals, following directions are hereby issued by the Competent Authority: -

(1) The order F.No.10/37/2018-NCLAT dated 21.10.2022 is hereby withdrawn and superseded by this order.

(2) Limitation shall be computed from the date of e-filing. The hard copy has to be filed within 7 days of e-filing. However, the competent authority is at liberty to notify to extend the period of filing hard copy in case of any unforeseen exigency. In a case where hard copy is filed after 7 days, the appeal will be placed before the Tribunal for appropriate order.

(3) The requirement of filing Appeals by electronic mode shall continue along with mandatory filing of the Appeals as per Rule 22 of the NCLAT Rules, 2016.

(4) This order will be effective with immediate effect.

All concerned shall ensure that Appeals are presented as per Rule 22 of the NCLAT Rules, 2016 within the period of limitation at the filing counter.”

21. Hence, by the order dated 24 December 2022, it was clarified that limitation shall be computed with reference to the date of e-filing while the physical copy would have to be filed within seven days of e-filing. The order clarifies that the requirement of filing appeals by the electronic mode shall continue together with the mandatory filing of appeals in terms of Rule 22 of the NCLAT Rules 2016.

22. Having regard to the above sequence of Rules and administrative orders, it is evident that on the one hand, Rule 22 of the NCLAT Rules 2016 requires the presentation of an appeal at the filing counter in the prescribed mode, but on the other, NCLAT also envisages e-filing of appeals. This is made evident in the SOP dated 3 January 2021 which mandates the filing of a physical copy of an appeal as per the procedure prescribed in the NCLAT Rules 2016, while referring to the procedure for the hearing of cases through the virtual mode, using the e-filing portal. The subsequent order dated 21 October 2022 acknowledges that there was an absence of clarity in regard to the period with reference to which limitation would commence. Hence, the order purported to state that the period

of limitation shall be computed from the date of the presentation of an appeal under Rule 22. Significantly, the above order was to be effective from 1 November 2022. In the present case, admittedly, the appeal was e-filed on 10 October 2022 and even a physical copy was lodged on 31 October 2022 prior to the date on which the order of the Registrar dated 21 October 2022 was to come into effect. The order dated 21 October 2022 was subsequently withdrawn on 24 December 2022. The order dated 24 December 2022 now clarifies that limitation would be computed with effect from the date of e-filing but a physical copy would have to be filed within seven days of e-filing.

23. In the present case, the order was pronounced by the NCLT on 26 August 2022. Rule 3 of the NCLAT Rules 2016 stipulates that the date from which the period of limitation has to be reckoned (i.e., the date of the pronouncement of the order) would have to be excluded. Hence, the date on which the order was pronounced by the NCLT, namely 26 August 2022 would have to be excluded from the computation of limitation. This is in line with Section 12(1) of the Limitation Act 1963. As noted earlier, the provisions of the Limitation Act 1963 are made applicable, inter alia, to appeals before the NCLAT by virtue of Section 238A of the IBC. Section 12(1) of the Limitation Act 1963 provides 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.

[...]”

24. Between 26 August 2022, when the order was pronounced by the NCLT, and 10 October 2022, when the appeal was e-filed, a period of 45 days elapsed after excluding the date on which the order was pronounced. The NCLAT has erroneously proceeded on the basis that the appeal was lodged on the 46th day whereas correctly computed, the appeal was lodged on the 45th day. This is evident from the following table:

S. No.

Period

Days

1

Between 26 August to 31 August

05 days

2

Between 1 September to 30 September

30 days

3

Between 1 October to 10 October

10 days

TOTAL (5+30+10)

45 days

25. The power of condoning a delay of up to 15 days beyond the original period of 30 days lies within the discretionary power of the NCLAT. The appeal was instituted within the outer limit of 45 days.

26. Furthermore, in terms of Section 12(2) of the Limitation Act 1963, the time requisite for obtaining a copy of the order appealed from has to be excluded while computing the period of limitation. The Explanation to Section 12 clarifies that the time taken by the court to prepare an order before an application for a copy thereof is made shall not be excluded. The relevant part of Section 12 provides as follows:

“12. Exclusion of time in legal proceedings.—

(1)

(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.

(3)

(4)

Explanation.— In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.”

27. In *V Nagarajan (supra)*, a three judge Bench of this Court observed that Rule 22(2) of the NCLAT Rules 2016 mandates that an appeal has to be filed with a certified copy of the impugned order. The Court held that limitation commences once the order was pronounced and the time taken by the court to provide the appellant with a certified copy would be excluded, as clarified in Section 12(2) of the Limitation Act 1963, if the appellant had applied for a certified copy within the prescribed period of limitation under Section 61(2) of the IBC. In the facts of the case, this Court held that the appeal was barred by limitation as the appellant demonstrated no effort to secure a certified copy and only relied on the date of the uploading of the order of the website. This Court held that:

29. On the question of a certified copy for filing an appeal against an order

passed by NCLT under IBC, Rule 22(2) of the NCLAT Rules mandates that an appeal has to be filed with a certified copy of the “impugned order” [...] Therefore, it cannot be said that the parties can automatically dispense with their obligation to apply for and obtain a certified copy for filing an appeal. Any delay in receipt of a certified copy, once an application has been filed, has been envisaged by the legislature and duly excluded to not cause any prejudice to a litigant's right to appeal.

30. [...]

31. The import of Section 12 of the Limitation Act and its Explanation is to assign the responsibility of applying for a certified copy of the order on a party. A person wishing to file an appeal is expected to file an application for a certified copy before the expiry of the limitation period, upon which the “time requisite” for obtaining a copy is to be excluded. However, the time taken by the court to prepare the decree or order before an application for a copy is made cannot be excluded. If no application for a certified copy has been made, no exclusion can ensue. In fact, the Explanation to the provision is a clear indicator of the legal position that the time which is taken by the court to prepare the decree or order cannot be excluded before the application to obtain a copy is made. It cannot be said that the right to receive a free copy under Section 420(3) of the Companies Act obviated the obligation on the appellant to seek a certified copy through an application. The appellant has urged that Rule 14 of the NCLAT Rules empowers NCLAT to exempt parties from compliance with the requirement of any of the rules in the interests of substantial justice, which has been typically exercised in favour of allowing a downloaded copy in lieu of a certified copy. While it may well be true that waivers on filing an appeal with a certified copy are often granted for the purposes of judicial determination, they do not confer an automatic right on an applicant to dispense with compliance and render Rule 22(2) of the NCLAT Rules nugatory [....]

(emphasis supplied)

28. In the present case, the application for a certified copy was sent from Delhi to Chennai on 2 September 2022, which was received on 5 September 2022, within the period of limitation of 30 days specified in Section 61(2). This aspect lies in contrast to the facts as they obtained before this Court in the judgment in V Nagarajan (supra) where even the application for obtaining the certified copy was not filed. In the present case, the appellant exercised due diligence and applied for a certified copy upon pronouncement of the order in terms of Rule 22(2) of the NCLAT Rules 2016. The certified copy was provided to the appellant on 15 September 2022. Hence, the period of 10 days between 5 September 2022 and 15 September 2022 taken by the court to provide a certified copy of the order ought to be excluded when determining the period of limitation under Section 61(2) of the IBC.

29. In view of the above discussion, we have come to the conclusion that the

NCLAT was in error in dismissing the appeal on the ground of limitation. The explanation which was advanced by the appellant for condoning the period of 5 days (beyond the period of 30 days stipulated for the filing of an appeal) was, in our view, sufficient and the delay should have been condoned within the four corners of the statute.

30. Before concluding, we cannot but fail to notice the flip-flops on the part of the NCLAT in providing administrative guidance on whether limitation would commence from the date of e-filing or from the presentation of the appeal at the filing counter. With technological advances, the country's judiciary and tribunals must move towards e-filing. This process has already commenced and is irreversible. The Union Government must have a fresh look at the rules to encourage e-filing across tribunals. Perhaps one way forward would be to constitute a Working Group to make a comprehensive assessment of the position across tribunals and suggest regulatory changes. Moreover, it is utterly incomprehensible why NCLAT should insist on physical filing in addition to e-filing. This unnecessarily burdens litigants and the Bar and is a disincentive for e-filing. A lawyer or litigant who is compelled to file physical copies in addition to e-filed documents will have no cogent reason to resort to e-filing. This duplication of effort is time consuming. It adds to expense. It leaves behind a carbon footprint which is difficult to efface. The judicial process has traditionally been guzzling paper. This model is not environmentally sustainable. If some judges are uncomfortable with e-files, the answer is to provide training to them and not to continue with old and outmoded ways of working. The judiciary has to modernize and adapt to technology. The tribunals can be no exception. This can no longer be a matter of choice. The IBC is a significant prong in economic reforms. It has radically reshaped the law relating to insolvency and bankruptcy. The manner in which the law is administered will have to keep pace with technology. Both the Union government in its rule making capacity and the administrative heads of tribunals must ensure a seamless transition to working in the electronic mode.

31. A copy of this judgment shall be forwarded to the Chairperson of the NCLAT and to the Secretaries to the Union Government respectively in the Ministries of (i) Finance; (ii) Corporate Affairs; and (iii) Law and Justice for ensuring compliance and remedial steps.

32. We accordingly allow the appeal and set aside the order of the NCLAT dated 9 January 2023.

33. The appeal shall accordingly be restored to the file of the NCLAT for disposal on merits.

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