



GRAVITAS LEGAL

The Supreme Court carves in stone the limitation period for appeal before NCLAT under section 61 of IBC

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Introduction

In this Article the attempt shall be to discern the answer to two important issues in the realm of the Insolvency and Bankruptcy Code, 2016 (IBC) namely:

- (i) When will the clock for calculating the limitation period run for appeals filed under the IBC; and
- (ii) Is the annexing of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC?

The aforementioned issues have been squarely dealt by the recent Judgment pronounced by a three-Judge Bench of the Supreme Court *V. Nagarajan v. SKS Ispat and Power Ltd. & Ors.*ⁱ

Factual Exposition

In order to have a better grip of the matter, let us first navigate, in brief, through the factual matrix of the matter in *V. Nagarajan* (supra).

The Appellant, Mr. V. Nagarajan, was appointed as the Liquidator for the Corporate Debtor-Cethar Ltd., which after an unsuccessful attempt at resolution was undergoing Liquidation. The Appellant instituted before the relevant NCLT proceedings U/s 43 and 45 of the IBC to avoid certain preferential and undervalued transactions of the Corporate Debtor.

However, no relief was granted by the NCLT and when the order was pronounced by the NCLT on 31 December 2019, the Appellant was present in the Court. The copy of the said order was uploaded on the NCLT website only on 12 March 2020. However, the uploaded order set out the incorrect name of the Judicial member who had passed the order. The corrected order was uploaded on 20 March 2020.

Subsequent to the corrected order being uploaded, the Appellant claimed to have awaited the issue of a free copy and allegedly sought the free copy on 23 March 2020, under the provisions of Section 420(3) of the Companies Act, 2013 read with Rule 50 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) and owing to the lockdown on account of the COVID-19 pandemic, the appeal before the NCLAT was filed on 8 June 2020 with an application for exemption from filing a certified copy of the order, as the same had never been issued.

The NCLAT in its impugned order dated 13 July 2020, after relying upon Section 61(2) of the IBC dismissed the appeal as barred by limitation by noting that the statutory time limit of thirty days had expired and, in any event, proviso to Section 61(2) circumscribes the discretion to condone delays up to fifteen days, which had already elapsed.

Aggrieved by the aforesaid order of the NCLAT, the Appellant filed a Civil Appeal before the Supreme Court, U/s 62 of the IBC against the order of the NCLAT, only on the question of limitation.

Analysis and Reasoning

At the outset, it shall be condign to set out the relevant statutory provision, that is, the Section 61 of the IBC, the interpretation of which was the core issue, which the Supreme Court was dealing with in the case of *V. Nagarajan* (supra). The relevant part of the said provision reads as under:

“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.

XXX”

[Emphasis Added]

The contesting parties before the Supreme Court frescoed the different provisions of the IBC, Companies Act, Limitation Act, NCLT Rules and the NCLAT Rules.

The Court noted that an Appeal being a creature of the statute therefore, the question of limitation for filing appeals under the IBC would have to be answered by construing the provisions of the IBC and the Limitation Act, with the IBC having the overriding effect, as not only is the IBC a complete code in itself but since it prescribes a different period of limitation for filing Appeals, then by virtue of Section 29 of the Limitation Act, the period of limitation prescribed under the IBC shall be deemed to be period prescribed for the purpose of Section 3 of the Limitation Act.

In the course of its decision the Supreme Court referred to sub-section (3) to Section 420 of the Companies Act, which deals with the orders of the NCLT and creates a right in favour of the parties before the NCLT to receive a copy of every order of the NCLT and a corresponding duty on the part of the NCLT to send a copy of every order passed to all the parties concerned. Further, the Court referred to sub-section (3) of Section 421 of the Companies Act, which prescribes the period of limitation for filing an appeal to the NCLAT and specifies that the computation shall be made from the date when a copy of the order of the NCLT is “made available to the person aggrieved”. That apart, Rule 50 of the NCLT rules was adverted to, as the said Rule 50 operationalises Section 421(3) of the Companies Act by mandating the Registry of the NCLT to share a free certified copy of the order to the parties.

Thereafter, the Court also referred to its earlier three Judge Bench decision in *Sagufa Ahmed v. Upper Assam Plywood Products Pvt. Ltd.*ⁱⁱ, where the Court while interpreting Section 421(3) of the Companies Act dealt with the issue, whether limitation would start running once a free certified copy is made available to the party, sans an application from the aggrieved party. It was held that the aggrieved party could wait till it received its free copy U/s 420(3) of the Companies Act read with Rule 50 of the NCLT Rules and was not obligated to file an application for a certified copy for the purposes of the computation of limitation.

However, the Court in *Sagufa Ahmed* (supra) clarified that this would no longer apply once an application for a certified copy is made, in which case limitation period would then be computed from the date of receipt of the certified copy, irrespective of when the free certified copy is received U/s 420(3) of the Companies Act read with Rule 50 of the NCLT Rules.

Reverting to the IBC, a special Law, as well as a complete code, which over-rides any inconsistencies that may arise in the application of other laws, the three Judge Bench in *V. Nagarajan* (supra) noted that Section 61 of the IBC, begins with a non-obstante provision "*notwithstanding anything to the contrary contained under the Companies Act, 2013*" while prescribing the right of an aggrieved party to file an appeal before the NCLAT along within the stipulated period of limitation under sub-section (2).

As is evincible, the stark difference between the phraseology of the Companies Act and Section 61(2) of the IBC is the absence of the words "*from the date on which a copy of the order of the Tribunal is made available to the person aggrieved*". The Court was of the view that the legislature on purpose has chosen not to include the said terminology in Section 61(2) of the IBC, for adherence to strict timelines is the cardinal and the indispensable ingredient which the IBC as a watershed legislation seeks to achieve by overhauling the previous bankruptcy regime which was afflicted by delays and indefinite legal proceedings.

In a similar fashion, the Court opined that since adherence to strict timelines was the key to the success of the IBC, thus, unnecessarily reading in the requirement of an "*order being made available*" under a general enactment (Companies Act) would do violence to the special provisions of the IBC and an appeal, if considered expedient by an aggrieved party, the same should be filed forthwith without waiting for a free copy in terms of Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules.

On the question of a certified copy for filing an appeal against an order passed by the NCLT under the IBC, the Court noted that Rule 22(2) of the NCLAT Rules mandates that an appeal must be filed with a certified copy of the 'impugned order'. Therefore, the obligation to apply

for and obtain a certified copy for filing an appeal before the NCLAT remains a *sine qua non* and the right to receive a free copy U/s 420(3) of the Companies Act does not in any manner eliminate the Appellant's obligation to seek a certified copy through an application.

However, the delay, if any, in receipt of a certified copy, once an application for a certified copy has been filed, has to be excluded in computing the period of Limitation by virtue of Section 12 of the Limitation Act.

Referring to Section 12 of the Limitation Act, the Court stated that the said provision imposes a responsibility of applying for a certified copy of the impugned order, as 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 U/s 12 of the Limitation Act.

But the Court categorically stated that the time taken by the court to prepare the decree or order before an application for a certified copy is made cannot be excluded and thus, if no application for a certified copy has been made, no exclusion can ensue.

Rejecting the argument advanced on the behalf of the Appellant in the case to the effect that Rule 14 of the NCLAT Rules empowers the NCLAT to exempt parties from compliance with the requirement of any of the Rules in the interests of substantial justice by allowing a downloaded copy in lieu of a certified copy, the Supreme Court observed that it may well be true that waivers on filing an appeal with a certified copy are often granted for the purposes of judicial determination, but such waivers do not confer an automatic right on an Applicant/Appellant not to file a certified copy of the 'impugned order' and any other construction shall tantamount to rendering Rule 22(2) of the NCLAT Rules nugatory, as the act of filing an application for a certified copy is not just a technical requirement for computation of limitation but also an indication of the diligence of the aggrieved party in pursuing the litigation in a timely fashion.

In this case, owing to the specific language of Section 61(1) and 61(2), it is evident that limitation commenced once the order was pronounced and the time taken by the Court to provide the Appellant with a certified copy would have been excluded, as clarified in Section 12(2) of the Limitation Act, if the Appellant had applied for a certified copy within the prescribed period of limitation Under Section 61(2) of the IBC.

However, the mandate of the law is to impose an obligation on the Appellant to apply for a certified copy once the order was pronounced by the NCLT on 31 December 2019, by virtue of Section 61(2) of the IBC read with Rule 22(2) of the NCLAT Rules.

At this stage, it shall be apposite underscore, that the position of Law, which the Supreme Court in *V. Nagarajan* (supra) has concretized with regard to outer limit of filing an appeal before the NCLAT U/s 61 of the IBC was also dealt with, by the NCLAT itself in *National Spot Exchange Ltd. v. Mr. Anil Kohli RP of Dunar Foods Ltd.*ⁱⁱⁱ, where the NCLAT had also opined that Section 61(2) provides only empowers the NCLAT to only condone 15 days of delay over the period of appeal of 30 days.

Before recording omega, it deserves to be clarified that the benefit of the Supreme Court's *suo motu* order dated 23 March 2020, whereby the Supreme Court Under Article 142 of the Constitution, extended the limitation with retrospective effect from 15 March 2020, though is

generally available to all litigants alike, was however, denied to the Appellant in *V. Nagarajan* (supra) due to the fact that Appellant never submitted an application for a certified copy, which consequently made the appeal barred by limitation much prior to the *suo motu* directions were given by the Court *vide* its order dated 23 March 2020. The reason for the same was that the Court in *V. Nagarajan* (supra) held that the onus is on the party aggrieved by the order of the NCLT to apply for the certified copy of the order from which such party is dissatisfied, which in the facts of the case Appellant failed to do.

Conclusion

On the facts of the case, the Supreme Court ruled that the Appellant despite being present before the NCLT on 31 December 2019 when the miscellaneous application was dismissed, yet the Appellant chose not to file an application for a certified copy of the said order. Therefore, the period of limitation for filing an appeal Under Section 61(1) against the order of the NCLT dated 31 December 2019, expired on 30 January 2020 in view of the thirty-day period prescribed Under Section 61(2) and the scope for a condonation of delay expired on 14 February 2020, in view of the outer limit of fifteen days prescribed under the proviso to Section 61(2). The Court thus, dispelled the argument that the lockdown from 23 March 2020 on account of the COVID-19 pandemic and the *suo motu* order of the Supreme Court had no impact on the rights of the Appellant to institute an appeal in the case.

In view of the foregoing reasoning and analysis, the two questions, which the Supreme Court, framed for consideration in *V. Nagarajan* (supra) were answered as follows:

- (i) When will the clock for calculating the limitation period run for appeals filed under the IBC?

“Owing to the special nature of the IBC, the aggrieved party is expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail, in consonance with the requirements of Rule 22(2) of the NCLAT Rules. Section 12(2) of the Limitation Act allows for an exclusion of the time requisite for obtaining a copy of the decree or order appealed against. It is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy Under Section 420(3) of the Companies Act 2013 read with Rule 50 of the NCLT and prevent limitation from running. Accepting such a construction will upset the timely framework of the IBC. The litigant has to file its appeal within thirty days, which can be extended up to a period of fifteen days, and no more, upon showing sufficient cause.”

- (ii) Is the annexing of a certified copy mandatory for an appeal to the NCLAT against an order passed under the IBC?

“22. On the second question, Rule 22(2) of the NCLAT Rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals, and even this Court, may choose to exempt parties from compliance with this procedural requirement in the interest of substantial justice, as re-iterated in Rule 14 of the NCLAT Rules, the discretionary waiver does not act as an

automatic exception where litigants make no efforts to pursue a timely resolution of their grievance. The Appellant having failed to apply for a certified copy, rendered the appeal filed before the NCLAT as clearly barred by limitation.”

i 2021 SCC OnLine SC 959
ii 2021 (2) SCC 317
iii Company Appeal (AT) (Insolvency) No. 683 of 2019



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