

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1429 of 2023 & I.A. No. 5116 of 2023

IN THE MATTER OF:

Aarif Ahsan Khan

...Appellant

Versus

Jayesh Sanghrajka & Ors.

...Respondent

Present:

For Appellant : Mr. Ankit Virmani, Mr. Amit Singh, Mr. Hrithik Sharma, Advocates

Mr. Kabeer Pansare, Ms. Ruchika

For Respondents : Mr. Tishampati Sen, Ms. Riddhi Sanchiti, Mr. Ashish Parwani, Mr. Devesh Juvekar, Mr. Dikshat Mehra, Mr. Chintan Gandhi, Mr. Anurag Anand, Mr. Himanshu K., Mr. Mukul K., Advocates

O R D E R

(Hybrid Mode)

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 part 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 pursuing 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 proposition 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.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

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