

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (INS) No. 138 of 2021
(Under Section 61 of Insolvency and Bankruptcy Code, 2016)
(Read with Rule 22 of the National Company Law Appellate Tribunal Rules, 2016)
(Arising out of the Order dated 04.03.2021 passed in IA No. 186 of 2020 in
CP(IB) No. 88/9/AMR/2020 passed by the Adjudicating Authority (Hon'ble
National Company Law Tribunal, Amaravati Bench)

In the matter of:

Jain Irrigation Systems Limited

Jain Plastic Park,

P. O. Box No. 72, N.H. No. 6,

Bambhori, Jalgaon,

Maharashtra-425001.

...Appellant/Operational Creditor

V

Empee Sugars and Chemicals Limited

Ayyapareddipalem,

Naidupet, Nellore District,

Andhra Pradesh-524126.

...Respondent/Corporate Debtor

Present:

For Appellant

:

Dr. K. S. Ravichandran

[Practising Company Secretary]

JUDGMENT
(VIRTUAL MODE)

Venugopal M(J)

Preface:

1. The 'Appellant'/'Applicant'/'Operational Creditor' has filed the 'instant Appeal' being aggrieved against the Order dated 04.03.2021 in IA/186/2020 in CP(IB)No.88/9/AMR/2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Amaravati Bench) in dismissing its Application filed under Section 5 of the Limitation Act, 1963.

2. The ‘Adjudicating Authority’ (National Company Law Tribunal, Amaravati Bench) while passing the ‘Impugned Order’ dated 04.03.2021 in IA/186/2020 in CP(IB)/88/9/AMR/2020 at paragraph 4 had observed the following:

“This application has been filed to condone delay of 241 days in filing the Company Petition vide CP (IB) NO.88/9/AMR/2020 under Section 9 of IBC, 2016 by the Petitioner/Operational Creditor against the Respondent/Corporate Debtor, which is filed beyond the limitation period. The Applicant invoked Section 5 of the Limitation Act, 1963. It is a settled law that Section 5 of the Limitation Act, 1963, is not applicable where there are cases are filing Company Petition beyond the limitation period and hence the application for condonation of delay is dismissed.”

3. According to the ‘Appellant’/‘Applicant’, the ‘Impugned Order’ dated 04.03.2021 in IA/186/2020 in CP(IB)/88/9/AMR/2020 is contrary to the well established principle and proposition of Law.

4. It is represented on behalf of the ‘Appellant’ that the ‘Adjudicating Authority’ in the ‘impugned Order’ had failed to appreciate that in as much as Section 238 A of the Insolvency and Bankruptcy Code, 2016 provides that the Limitation Act, 1963 shall apply as far as may be to the proceedings under the Code before the ‘Adjudicating Authority’ or the ‘Appellate Tribunal’.

5. The other contention advanced on behalf of the ‘Appellant’/‘Applicant’ is that the ‘Adjudicating Authority’ had not applied his judicial mind, as a whole.

6. It is the version of the ‘Appellant’ that even otherwise, if the ‘Appellant’/‘Applicant’ had been before the Authorities and Courts, and in the meantime, there was a change of law and judicial authority and application by the ‘Corporate Debtor’ itself, the ‘Appellant’/‘Applicant’ is entitled to the exclusion of time under Section 14 of the Limitation Act, 1963 and as such, the ‘Impugned Order’, is liable to be set aside, in the interest of justice.

7. The Learned Counsel for the 'Appellant' contends that the 'Impugned Order' is a non-speaking one and further it does not spell out the grounds as to why the instant delay took place and why those grounds had not satisfied the 'Adjudicating Authority' on the existence of 'Sufficient Cause', justifying the 'Condonation of Delay'.

8. The Learned Counsel for the 'Appellant' urges before this 'Tribunal' that in IA/186/2020 in CP(IB)/88/9/AMR/2020 at Paragraphs 9 and 10 the 'Appellant' had clearly mentioned that 'the Limitation is upto 3 years from 02.12.2016 and expires on 01.12.2019 and hence, there was a delay of 311 days, excluding the COVID-19 period, '241 days' of delay requires 'condoning'.

9. The Learned Counsel for the 'Appellant' points out that the term 'sufficient cause' includes within its meaning 'the complex and disruptive legal scenario that had brought sea changes'.

10. The Learned Counsel for the 'Appellant' submits that between the date of default, viz., 22.03.2011 (vide Page 28 of the Paper Book, Part IV of the application 'particulars of Operational Debt') and the order of Hon'ble High Court of Judicature for the States of Telangana and Andhra Pradesh viz. 20.07.2015, the 'Appellant' was directed to seek remedy before the 'BIFR', there was no expiry of limitation. As a matter of fact, the 'Appellant' was before 'BIFR' as could be seen (vide Pages 103 to 105 of the Paper Book wherein the 'Appellant's name is mentioned as Jain Irrigation Systems Ltd., Maharashtra, until the 'BIFR' proceedings stood abated pursuant to the coming into force of the SICA (REPEAL) Act, 2003 with effect from and Operationalization of the Insolvency and Bankruptcy Code. Therefore, it is the contention of the 'Appellant' that during this period also, there was no expiry of limitation.

11. The Learned Counsel for the 'Appellant' contends that by Notification No.3569(E) dated 25.11.2016, 01.12.2016 was announced as the date of coming into force of Clause (B) of Section 40 f SICA (REPEAL) Act and

by this Clause, a Proviso states that a company whose reference had abated could apply under the I & B Code, within 180 days without any fee from the date of commencement of the Code. Therefore, a plea is taken on behalf of the ‘Appellant’ that from the date of Order of Hon’ble High Court, namely 20.07.2021 to 30.05.2017 being the end of 180 days from 01.12.2016, there was no expiry of the period of Limitation. Furthermore, in as much as the Section 9 application of the I & B Code was filed on 08.10.2020, leaving the COVID-19 period, it would be deemed to have been filed on 15.03.2020 and therefore, between 30.05.2017, to the date of filing, there was no delay at all. But, when counted from 01.12.2016 itself, the delay appears, and as a matter of abundant caution, application for condoning the perceived delay was filed.

12.The Learned Counsel for the ‘Appellant’ proceeds to point out that the ‘Respondent’/‘Corporate Debtor’ in August, 2017 filed an application under Section 10 of the Code and withdrew the same during October, 2017. In short, when the proceedings before BIFR’ abated, there was no provision for continuing the winding up proceedings availing the liberty, since there was a complete change in law that had taken place. Apart from that, if the ‘CIRP’ had commenced the ‘Appellant’ would have been a ‘Claimant’.

13.The Learned Counsel for the ‘Appellant’ submits that the ‘Appellant’ in the instant case had shown ‘sufficient cause’ for the ‘condonation of delay’ and hence, the ‘impugned order’ is to be set aside by this ‘Tribunal’, by taking into account the aforesaid dates and the pending litigations and to remit the matter to the ‘Adjudicating Authority’ for considering the Section 9 application filed by the ‘Appellant’ in respect of the claim of Rs.10,56,78,747/-.

Appellant’s Decisions:

14.The Learned Counsel for the ‘Appellant’/‘Operational Creditor’ (‘Applicant’) refers to the decision of the Hon’ble Supreme Court in Sesh Nath

Singh v. Baidyabati Sheoraphuli Co-operative Bank Ltd. reported in 2021 SCC Online SC 244 wherein at paragraph 94, 101 and 102 it is observed as under:

94.“The use of words ‘as far as may be’, occurring in Section 238A of the IBC tones down the rigour of the words ‘shall’ in the aforesaid Section which is normally considered as mandatory. The expression ‘as far as may be’ is indicative of the fact that all or any of the provisions of the Limitation Act may not apply to proceedings before the Adjudicating Authority (NCLT) or the Appellate Authority (NCLAT) if they are patently inconsistent with some provisions of the IBC. At the same time, the words ‘as far as may be’ cannot be construed as a total exclusion of the requirements of the basic principles of Section 14 of the Limitation Act, but permits a wider, more liberal, contextual and purposive interpretation by necessary modification, which is in harmony with the principles of the said Section.

101. In our considered view, keeping in mind the scope and ambit of proceedings under the IBC before the NCLT/NCLAT, the expression ‘Court’ in Section 14(2) would be deemed to be any forum for a civil proceedings including any Tribunal or any forum under the SARFAESI Act.

102. In any case, Section 5 and Section 14 of the Limitation Act, are not mutually exclusive. Even in a case where Section 14 does not strictly apply, the principles of Section 14 can be invoked to grant relief to an applicant under Section 5 of the Limitation Act by purposively construing ‘sufficient cause’. It is well settled that omission to refer to the correct section of a statute does not vitiate an order. At the cost of repetition, it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay.”

15. The Learned Counsel for the ‘Appellant’ refers to the decision of the Hon’ble Supreme Court in N. Balakrishnan v. M. Krishnamurthy reported in AIR 1998 Supreme Court at Page 3222 at Special Page 3224 wherein it is observed as under:

“It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If, the explanation does not smack

of mala fides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor”.

16.The Learned Counsel for the ‘Appellant’ adverts to the decision of the Hon’ble Supreme Court in Ram Nath Sao @ Ram Nath Sahu and another v. Gobardhan Sao (2002) 3 SCC at Page 195 at Special Page 16 wherein at Paragraph 12 it is observed and held as under:

“The expression “sufficient cause” within the meaning of Section 5 of the Limitation Act, 1963 or Order 22 Rule 9 CPC or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of that case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. However, courts should not proceed with the tendency of finding fault with the case shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.”

17.The Learned Counsel for the ‘Appellant’ cites the decision of the Hon’ble High Court of Delhi in Union of India v C.P.Kukreja, 76(1998) Delhi Law Times at Page 871, at Pages 872 and 873 wherein it is observed that “the

Courts generally adopt a liberal approach, the Court feel that the delay deserves to be condoned as the appellant has been able to show sufficient cause”.

18.The Learned Counsel for the ‘Appellant’ cites the decision of the Hon’ble Supreme Court in GMG Engineering v Isa Green Power Solution and Ors. reported in 2015 (15) Supreme Court cases at Page 659 at Special Page 662 wherein at Paragraph 7 it is observed as under:

“It is well settled that the expression “sufficient cause” is to receive liberal construction so as to advance substantial justice. When there is no negligence inaction or want of bona fide is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is to see whether the applicant has acted with due diligence.”

Analysis:

19.As seen from the contents of IA/186/2020 (filed by the ‘Appellant’/ ‘Applicant’) it is evident that the ‘Appellant’/‘Applicant’ at Para 1 to 4 of the said Application had made the following averments:

1. “The respondent/corporate debtor is due of Rs.4,73,08,766/- (Rupees four crores and seventy three lakhs and eight thousand and seven hundred and sixty six only) as on 21.3.2011.
2. That since the respondent/corporate debtor did not pay the said amount, the Applicant/operational creditor filed a Company Petition bearing no.200 of 2013 before the Hon’ble High Court of Andhra Pradesh u/s 43(a) & (f) and 439 of the Companies Act, 1956, r/w Rule 9t of the Companies (Court) Rules, 1959 and prayed that M/s. Empee Sugars and Chemicals Limited, the Respondent herein be wound up in accordance with the provisions of the Companies Act, 1956.

The said Company Petition bearing No. 200 of 2013 was disposed on 20.07.2015 and the Hon’ble High Court made the order that a reference bearing case No.69/2014 under the Sick Industrial Companies (Special Provision) Act, 1985 qua the respondent company that the said reference

is still pending and that on this ground this Court has closed Company Petition No.180 of 2013 filed by another creditor against the respondent with liberty to seek revival of the same depending upon the orders passed by the BIFR.

In the light of the above facts, this Company Petition No.200 of 2013 is also closed with liberty to the petitioner to seek revival of the same depending upon the result of the case 69/2014 on the file of the BIFR.

3. Then the applicant filed an implead application before Hon'ble BIFR in the month of December, 2015.

4. The Hon'ble High Court vide its order dated 27.7.2016 directed applicant herein to submit the balance sheets, and profit and loss accounts along with Audited Reports etc., the said directional order dated 27.7.2016 is herewith filed. 5.4 While the said application was pending before BIFR, the said BIFR was dissolved and all the pending cases were transferred to National Company Law Tribunal, Hyderabad on 1.12.2016."

20.The real grievance of the 'Appellant' / 'Applicant' is that the Respondents/M/s.Empee Sugars & Chemicals Pvt. Ltd. intentionally made the other 'Creditors' as Respondents and did not make the applicant as Respondent in the Company Petition No. (IB)195/10/HYD/2017. Further the 'Appellant'/'Applicant' was not aware of the fact that there was a Petition filed by the Respondent before the National Company Law Tribunal, Hyderabad Bench, in terms of Section 10 of the Code. In reality, the 'Appellant'/'Applicant' came to know of the aforesaid fact in the year 2017. Therefore, the Limitation from 02.12.2016 to 01.12.2019 is three years and in this regard, there was a delay of 311 days – 77 days lockdown period (from 15.03.2020 to 31.05.2020) to be excluded, the actual delay comes to 241 days up to 08.10.2020.

21.According to the 'Appellant' the Respondent, as on 21.03.2011 together interest at 18% per annum is to pay the outstanding amount of Rs.4,73,08,766/-, which comes to Rs.5,83,62,981/- till 31.07.2020. As such, the total outstanding was Rs.10,56,78,747/- as averred by the 'Appellant'/'Applicant'

in para 11 of the IA/186/2020 in CP(IB) No.88/9/AMR/2020. Hence, the delay of 241 days is to be condoned, in the interest of the ‘Appellant’/‘Applicant’.

Discussions:

22.It is to be pointed out that Section 433 of the Companies Act and Section 238 of the I&B Code apply to the Provisions of the Limitation Act, as far as may be. As such, the Limitation period mentioned in the Code will not apply notwithstanding anything to the contrary mentioned in the Limitation Act.

23.Indeed, the Limitation Act, 1963 is applicable to all applications filed under Section 7 and 9 of the I & B Code from the inception of the Code. Therefore, Article 137 of the Limitation Act, 1963 gets attracted.

24.Also that, it is to be borne in mind that an application under Section 7, 9 or 10 are the only applications which are filed for initiation of ‘CIRP’ under chapter 2 of Part II cannot be filed, if prohibited, as per Section 11 of the Code. In fact, Section 11 of the I&B Code has a restricted application and it only prohibits the ‘Corporate Debtor’ from initiating a Petition under Section 10 of the Code in respect of whom a ‘Liquidation Order’ was made. Moreover, the ‘Company’/‘Corporate Debtor’ has the right under substituted subsection (b) of Section (4) of SIC Repeal Act to file reference for its own Insolvency.

25.It is significantly pointed out that the ‘condonation of delay’ cannot be claimed as a matter of right. Of course, the ‘condonation of delay’ is a matter of ‘discretion’ of the ‘Court’/‘Tribunal’. It cannot be forgotten that ‘limitation’ is a prescription of repose and unless the statute allows the Court, an element of discretion, by way of an application for ‘condonation of delay’, the ‘Court’/‘Tribunal’ has no power to find out a method in granting relief to a person who may appear to have suffered. When there is want of ‘due care and attention’ or want of ‘due diligence’, the ‘Tribunal’ may decline to entertain an application, as there is no ‘sufficient cause’ for the delay. A glance of the ingredients of Section 5 of the Limitation Act, 1963 unerringly points out that the ‘explanation

of delay' must be to the satisfaction of the 'Court/Tribunal'. To put it candidly, an acceptance of explanation is the only 'criterion' for 'condonation of delay'.

26.As far as the 'instant Appeal' is concerned, even though the 'Appellant'/'Applicant' has come out with pleas in IA/186/2020 in CP(IB) No.88/9/AMR/2020 on the file of the 'Adjudicating Authority' (National Company Law Tribunal, Amaravati Bench) to the effect that the 'Respondent' / Company filed CP No.(IB)195/10/HYD/2017 (under Section 10 of the I & B Code, 2016) which was disposed of as withdrawn on 16.10.2016 and in the said proceedings, the 'Respondent'/Company, had not made the present 'Appellant'/'Applicant' as 'Respondent' intentionally, and further that the 'Appellant' was unaware about the filing of CP No.(IB)195/10/HYD/2017 by the 'Respondent' before the 'Adjudicating Authority', yet it is to be pertinently pointed out by this 'Tribunal' that the 'Appellant'/'Applicant' through its 'Authorized Signatory' in IA/186/2020 in CP(IB)No.88/9/AMR/2020 had tacitly mentioned at Paragraph 9 that the 'Limitation is upto three years' from 02.12.2016 which 'expires on 01.12.2019' and there was a delay of 311 days, and after excluding the period of 'Lockdown' of 77 days (calculating from 15.03.2020 to 31.05.2020), there was a delay of 241 days upto 08.10.2020, which is to be condoned. Therefore, there is no two opinion of a prime fact that CP No.(IB)88/9/AMR/2020 (under Section 9 of the Code) was filed by the 'Appellant'/'Operational Creditor' against the 'Respondent'/'Corporate Debtor' before the 'Adjudicating Authority' beyond the period of 'Limitation'.

27.Be that as it may, notwithstanding the fact that the Limitation' Act, 1963 is applicable to the 'Applications' projected under Section 7 and 9 of the Code from the I & B Code and hence, the ingredients of Article 137 of the Limitation Act, gets attracted. As such, the 'Right to sue' accrues when a 'Default' occurs and if the 'Default' had occurred beyond three years, the

Limitation period for filing of an application under Sections 7 and 9 starts sticking from the date of 'Default' committed by the 'Corporate Debtor'.

28.Of course, based on the facts of a given case Section 5 of the Limitation Act, 1963 may be pressed into service to condone the delay in filing necessary 'interlocutory application', in the considered opinion of this 'Tribunal'. However, it is for the 'Applicant'/'Appellant' to explain the delay that has occasioned to the subjective satisfaction of the 'Tribunal'. In the instant case, this 'Tribunal' is not subjectively satisfied as to the occurrence of the long and inordinate delay of 241 days and therefore, this 'Tribunal is not inclined to extend its 'helping hand of judicial arm of generosity', based on the facts and circumstances of the case which float on the surface. Viewed in that perspective, the 'Appeal' is 'devoid of merits'.

Conclusion:

29.In fine, the 'instant Appeal' (AT)(CH)(INS) No.138 of 2021 is dismissed. However, there shall be no order to costs. Connected 'Interlocutory Applications' are closed.

**[Justice Venugopal M]
Member (Judicial)**

**[V. P. Singh]
Member (Technical)**

**15.07.2021
SE**