NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

I.A. No. 2095 of 2022 in

Company Appeal (AT) (Insolvency) No. 780 of 2022

IN THE MATTER OF:

V.R. Ashok Rao & Ors. **...Appellants**

Versus

TDT Copper Ltd. **...Respondent**

Present:

For Appellant: **Dr. Farrukh Khan, Ms. Akanksha Singh, Mr. Ateendra Saumya Singh and Ms. Ishita Mangla, Advocates.**

For Respondents: **Ms. Anshula Grover, Ms. Nitika Grover and Mr. Mayan Prasad, Advocates.**

With

I.A. No. 2211 of 2022 in

Company Appeal (AT) (Insolvency) No. 823 of 2022

IN THE MATTER OF:

Stressed Assets Stabilization Fund **...Appellant**

Versus

Delta International Ltd. **...Respondent**

Present:

For Appellant: **Mr. Abhijeet Sinha, Mr. Anand Varma, Mr. Aditya Shukla and Ms. Apoorva Pandey, Advocates.**

For Respondents: **Mr. Sumesh Dhawan, Ms. Vatsala Kak and Mr. Shaurya Shyam, Advocates.**

Cont'd.../

With

I.A. No. 2499 of 2022 in

Company Appeal (AT) (Insolvency) No. 913 of 2022

IN THE MATTER OF:

A'XY Kno Capital Services Pvt. Ltd. ...Appellant

Versus

Rattan India Power Ltd. ...Respondent

Present:

For Appellant: **Ms. Hima Lawrence and Mr. Chitwan Sharma, Advocates.**

For Respondents: **Mr. Alok Dhir and Mr. Karan Batura, Advocates.**

With

I.A. No. 2513 of 2022 in

Company Appeal (AT) (Insolvency) No. 914 of 2022

IN THE MATTER OF:

Bhagwati Singh ...Appellant

Versus

Incab Industries Ltd. ...Respondent

Present:

For Appellant: **Mr. Sanjib Kumar Mohanty, Mr. Akhilesh Sharma, Mr. Subesh Kumar Sahoo and Mr. Akash Sharmaand Ms. P.S. Chandralekha, Advocates.**

For Respondents: **Mr. Aditya Gauri and Mr. Amar Vivek, Advocates for R-1.**

O R D E R

ASHOK BHUSHAN, J.

This larger bench has been constituted to answer following two questions referred by a three-member bench of this Tribunal by its order dated 12.08.2022:

(a) Whether the law laid down by this Tribunal in "Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors" and three Member Bench Judgement in "Arul Muthu Kumaara Samy Vs. Registrar of Companies" that when the defect in appeal is cured and the Appeal is refiled before the Appellate Tribunal beyond seven days, the date of re-presentation of the Appeal shall be treated as a fresh Appeal, lays down correct law?

(b) Whether the limitation prescribed for filing an Appeal before this Appellate Tribunal under Section 61 of Insolvency and Bankruptcy Code, 2016 or Section 421 of the Companies Act, 2013 shall also govern the period under which a defect in the Appeal is to be cured and this Appellate Tribunal shall have no jurisdiction to condone the delay in refiling/re-presentation if it is beyond the limitation prescribed in Section 61 of the IBC or Section 421 of the Companies Act, 2013.

2. The question of refiling delay is involved in all these Appeals. We have heard learned counsel for the parties appearing in the above appeals

on the two questions as noted above. For answering the questions, it shall be sufficient to notice the facts pertaining to refiling delay in Company Appeal (AT) (Insolvency) No. 780 of 2022.

3. The Appeal has been filed against the Order dated 11.03.2022 passed by the National Company Law Tribunal, New Delhi Bench-V in CP (IB) No. 1093/(ND)/2022 by which application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'Code') by the Financial Creditor has been dismissed. The Appeal was presented in the office of this Tribunal on 13.04.2022. After scrutiny of the memo of the appeal defects were intimated to the Appellant on 19.04.2022. The Appellant refiled the memo of appeal on 08.06.2022. There being refiling delay of 43 days in appeal, the Registrar by office note dated 12.07.2022 placed the matter before the Court under the heading 'For Admission (Fresh Case) with defects'. A three-member bench heard the counsel for the parties on the question of refiling delay and expressed its doubt on two earlier judgments delivered by this Tribunal ***"Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors., (2017) SCC Online NCLAT 7"*** and ***"Arul Muthu Kumaara Samy Vs. Register of Companies, (2020) SCC OnLine NCLAT 671"***, resulting into reference to larger bench on the two questions, as noted above.

4. Similarly, in all other three appeals which have been heard alongwith Company Appeal (AT) (Insolvency) No. 780 of 2022, there is refiling delay. In Company Appeal (AT) (Insolvency) No. 823 of 2022 refiling delay is 35 days. In Company Appeal (AT) (Insolvency) No. 913 of 2022 refiling delay

is 40 days and in Company Appeal (AT) (Insolvency) No. 914 of 2022 refiling delay is 105 days.

5. Learned counsel for the Appellant in support of their 'Application for Condonation of Refiling Delay' submits that as per Rule 26 of NCLAT Rules, 2016, the Registrar is fully empowered to pass appropriate orders if there is failure in rectifying the defects within the 7 days. The scheme of Rule 26 does not indicate that if the defects are not removed within seven days, the re-presentation of the appeal after removal of defects beyond 7 days shall be treated as fresh appeal. The first presentation of the appeal is the date which is to be reckoned for the purpose of computation of limitation in filing of appeal and the re-presentation of the appeal has no bearing on the question of computation of limitation. The judgments of this Tribunal in ***"Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors"*** and ***"Arul Muthu Kumaara Samy Vs. Register of Companies"*** holding that when the defects in the appeal is cured after 7 days and the appeal is re-presented, the appeal shall be treated as a fresh appeal does not lay down correct law. Learned counsel for the Appellant further submits that filing of appeal and re-presentation of the appeal with the Registry are two different concepts which have two different consequences. Under the Code or Rules, no limitation has been provided for re-presentation (refiling). The period of limitation provided under Section 61 of the Code and Section 421 of the Companies Act, 2013 are applicable with regard to filing of the appeal and the said limitation cannot be applied for the purpose of re-presentation (refiling) of the appeal. When the Legislature and Rule making Authority

have not provided any limitation for re-presentation/refiling, no period of limitation can be imported on the basis of limitation which is provided for filing of an appeal.

6. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that the defects in appeal has to be cured within the period of 7 days as provided under Rule 26 Sub-rule (2) and if the defects are not cured within 7 days and appeal was re-presented thereafter it should be treated as fresh filing and from the date of fresh filing, the limitation for filing appeal has to be computed. It is submitted that any delay in re-presentation of the appeal, if it is beyond the limitation prescribed for filing an appeal under Section 61 of the Code or Section 421 of the Companies Act, 2013 shall also be applicable on the re-presentation of the appeal which has been re-presented beyond 7 days provided for removal of defects. In event, defects are not cured within the time fixed for the same, the Registrar is obliged to decline to register the appeal and after such rejection to register the appeal, Appellant has to file appeal afresh and with regard to such appeal limitation has to be computed from the said fresh filing. The limitation prescribed for filing an appeal under Section 61 and Section 421 is a limitation prescribed by statute and there shall be no power to condone the delay on re-presentation which is beyond the limitation prescribed for filing of appeal under Section 61 of the Code and Section 421 of the Companies Act, 2013.

7. Learned counsel for the parties have relied on several judgments of this Tribunal, Hon'ble Supreme Court and of Delhi High Court which we shall notice hereinafter while considering the submissions.

8. The National Company Law Appellate Tribunal Rules, 2016 (NCLAT Rules) has been framed under Section 469 of the Companies Act, 2013 for carrying out the provision of the Companies Act, 2013. Part III of the Rules deals with 'Institution of Appeals – Procedure'. Rule 22 deals with 'Presentation of Appeal'. Rule 22 is as follows:

> *"**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.*
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> *(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."

9. Rule 26 deals with 'Endorsement and Scrutiny of Petition or Appeal or Document', which rule has come up for consideration and interpretation in the present appeal. Rule 26 is as follows:

"26. Endorsement and scrutiny of petition or appeal or document.-(1) The person in charge of the filing-counter shall immediately on receipt of appeal or document affix the date and stamp of the Appellate Tribunal thereon and also on the additional copies of the index and return the acknowledgement to the party and he shall also affix his initials on the stamp affixed on the first page of the copies and enter the particulars of all such documents in the register after daily filing and assign a diary number which shall be entered below the date stamp and thereafter cause it to be sent for scrutiny.

(2) If, on scrutiny, the appeal or document is found to be defective, such document shall, after notice to the party, be returned for compliance and if there is a failure to comply within seven days from the date of return, the same shall be placed before the Registrar who may pass appropriate orders.

(3) The Registrar may for sufficient cause return the said document for rectification or amendment to the party filing the same, and for this purpose may allow to the party concerned such reasonable time as he may consider necessary or extend the time for compliance.

> *(4) Where the party fails to take any step for the removal of the defect within the time fixed for the same, the Registrar may, for reasons to be recorded in writing, decline to register the appeal or pleading or document."*

10. Sub-rule (2) of Rule 26 contemplates that if, on scrutiny, the appeal or document is found to be defective, such document shall, after notice to the party, be returned for compliance and if there is any failure to comply within seven days from the date of return, the same shall be placed before the Registrar who may pass appropriate orders. Sub-rule (3) empowers the Registrar to return the document for rectification or amendment, to the party and for which purpose he may allow to the party such reasonable time as he may consider necessary or extend the time for compliance. The power under Rule 26(3) is to be exercised after scrutiny under Sub-rule (2) when a defect is pointed out to the Appellant and there is failure to comply within 7 days from the date of return. Sub-rule (2) and (3) does not indicate that any penal consequences have been provided for removal of defects after 7 days. When specific power is there under Sub-rule (3) of Rule 26 to extend the time for compliance, the period of 7 days cannot be said to be mandatory period. The scheme of Rule 26 also does not indicate that when the appeal is re-presented after removal of the defects after 7 days, the appeal is to be treated as an appeal filed afresh.

11. In respect of the above submissions, one of the Judgements which have been relied by the Learned Counsel for the Respondent is two Member Judgement in the matter of "**Mr. Jitendra Virmani"** (supra). In the above

case, the Appeal was filed against the Order dated 05th January, 2017, Copy of the Order was served on the Appellant on 07th January, 2017 however the Appellant could file the Appeal (defective) only on 31st March, 2017. On 31st March, 2017, the Registry pointed out the defects which were noticed by the Appellant on 3rd April, 2017. Appellant did not cure the defect within seven days as prescribed in Rule, 26(2). This Appellate Tribunal passed an Order on 03rd May, 2017 dismissing the Appeal on the ground of the delay. The Order dated 03rd May, 2017 is extracted in paragraph 1 of the Judgment which is to the following effect:

> *"The Interlocutory Application under Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 (hereinafter referred to as 'NCLAT Rules 2016' for short) has been preferred by applicant/ appellant for review and recall of order dated 3rd May 2017 passed by Appellate Tribunal in Company Appeal (AT) No. 138 of 2017 which reads as follows: -*
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> > *"This appeal was filed with number of defects on 30thMarch 2017. It was supposed to be re-filed within seven days after removing the defect(s). However, the defect (s) were not removed within seven days and filed as afresh case on 1st May 2017.*
> >
> > *In this appeal, the appellant has challenged the order dated 5th January 2017 passed in T.P.No. 88/2016 in C.P. No. 22/2016 by National Company Law Tribunal, Bengaluru Bench whereby certain interim order has been passed. A petition for condonation of delay has*

> *been filed to condone delay of 54 days. As we find that as the Appellate has no jurisdiction to condone the delay for more than 45 days, we dismiss the appeal on the ground of delay.""*

12. The Appellant thereafter filed an Application to recall the said Order in which Application this Tribunal had occasion to consider the interpretation of Rule, 26(2), Section 421 and 422 of the Companies Act, 2013. In the above Judgement, the Appellate Tribunal held that if defects are not removed within seven days and the defects are removed after seven days, the Appeal is to be treated a fresh Appeal. In paragraph 17 and 20 following has been laid down:

> *"17. As per the provisions of the NCLAT Rules 2016 read with Section 422 of the Companies Act 2013, if defects are not removed within 7 days and the defects are removed after 7 days i.e. beyond the period prescribed under the rules, the appeal is treated to be a fresh appeal. Such procedure is followed so that the appellants may get advantage of 'court fee' prescribed under the NCLAT Rules and may use the same 'paper book' which are generally voluminous. If the Registrar General would have refused to register the appeal after 7 days, as per clause (4) of Rule 26, the appellant would have filed a fresh appeal with fresh court fee with separate sets of paper book, separate affidavit, separate vakalatnama which would be disadvantages to the appellants.*

.....

20. Appeal was filed on 31st March 2017, and the defect was to be removed within 7 days i.e. by 7th April 2017. Therefore, no extension of time could have been granted even by the Registrar to remove the defects particularly when the Appellate court has no power to condone delay after 90 days of receipt of judgement which expired on 7th April 2017 in the present case."

13. This Appellate Tribunal ultimately dismissed the Appeal holding that refiling on 01st May, 2017 was beyond the period of 90 days from the date of receipt of Judgement and hence the Appellate Tribunal has no jurisdiction to entertain the Appeal. Paragraph 23 and 24 is as follows:

"23. Curiously, even when defects were pointed out by the registry on 31st March 2017, why they sat tight over the matter for 31 days in removing the defects.

24. Though it was open to the applicant to file a petition before Appellate Tribunal with prayer to ignore the minor defects, no such application was filed by appellant. The appeal was taken back on 3rd April 2017 and they re-filed on 1StMay 2017 i.e. beyond the period of 90 days from the date of receipt of judgement passed by Tribunal, when Appellate Tribunal had no jurisdiction to entertain the appeal."

14. The next Judgment relied on by the Learned Counsel for the Respondent is "**Arul Muthu Kumaara Samy"** (supra). In the above case, Appeal under Section 421 of the Companies Act, 2013 was filed against the Order dated 27th May, 2019 passed by the NCLT, Chennai Bench, Chennai. The Appeal was filed on 28th August, 2019. The Registry after scrutiny of the Appeal on 01.10.2019 returned the Appeal to the Appellant for removal of the defect. The Appellant refiled the Appeal on 28th July, 2020 and filed an Application for condonation of delay of 338 days in refiling the Appeal. The facts of the case have been noted by this Tribunal in paragraph 9 of the Judgement which is to the following effect:

> *"9. Admittedly, the Impugned Order was passed by the Tribunal on 27.05.2019 certified copy of the Order was delivered on 10.07.2019. As per Section 421 of the Act. The Appellant was required to file the Appeal within 45 days i.e. till 24.08.2019. However, the Appellant has filed the Appeal on 28.08.2019 i.e. beyond the period of Limitation. The Office after scrutiny of the Memo of Appeal intimated the defect to the Appellant on 01.10.2019 and on the same day the Memo of Appeal was returned to the Appellant. The Appellant was supposed to cure the defects within 7 days and has to file the Appeal on or before the 08.10.2019. However, the Appellant has refiled the Appeal on 28.07.2020 i.e. a delay of 338 days."*

15. The Tribunal relied on Judgement of "**Mr. Jitendra Virmani"** (supra) and extensively quoted the Judgment of the 'Mr. Jitendra Virmani' in Paragraph 11 and consequently, in paragraph 12, this Tribunal took the view that this Tribunal cannot condone the delay beyond 45 days, hence, the Application for condonation of delay of 338 days is dismissed. The three Member Judgment in "**Arul Muthu Kumaara Samy"** is based on earlier Judgment of "Mr. Jitendra Virmani" (supra)."

16. The judgment of this Tribunal in ***'Jitendra Virmani'*** in Para 17, as noted above, has observed that if defects are not removed within 7 days and defects are removed after 7 days, the appeal is treated to be a fresh appeal. The judgment does not elaborate as to what is the basis for coming to the conclusion that when the defects are removed after 7 days and appeal is re-presented thereafter, the appeal would be treated as fresh appeal. The above conclusion is contrary to the scheme of Rule 26, as noticed above. The second three-member bench of this Tribunal in ***"Arul Muthu Kumaara Samy Vs. Register of Companies" (supra)*** has relied on judgment of ***'Jitendra Virmani'*** and no separate reasoning has been given as to why appeal shall be treated as fresh appeal if it is filed beyond 7 days period prescribed for removal of defects.

17. The filing of appeal (presentation) and refiling (re-presentation) are two different concepts and have been separately dealt with in the Rules. Rule 22 deals with the presentation of the appeal whereas Rule 26 envisages the re-presentation of the appeal after removal of the defects notified to the Appellant. Section 61(2) of the Code provides that appeal

under Section 61(1) shall be filed within 30 days before the NCLAT. The expression 'filing' as occurring in Section 61(2) is for filing of the appeal/presentation of the appeal.

18. Hon'ble Supreme Court in *"Indian Statistical Institute vs. M/s Associated Builders & Ors, (1978) 1 SCC 483"* laid down that condonation of delay as prescribed in an appeal is different from petition for excusing the delay in re-presentation. In Para 11 following has been laid down:

> *"11. In a recent judgment of this Court delivered on August 3, 1977 in Mahant Bikram Dass v. Financial Commissioner and Ors.,(1) it is pointed out that the petition under section 5 of the Limitation Act seeking to condone the delay in preferring an* appeal is different from a petition for excusing the delay in re-presentation."

19. Division Bench of Delhi High Court in ***"S.R. Kulkarni vs. Birla VXL Ltd., (1998) 3 RCR (Civil) 436"*** had also laid down that question of condonation of delay in refiling has to be considered from a different angle and view point as compared to consideration of condonation of delay in initial filing. Following observations have been made by the Delhi High Court in Para 7 of the judgment:

> *"7. Notwithstanding which of the aforesaid Rules are applicable, the question of condensation of delay in refiling of an application has to be considered from a different angle and viewpoint as compared to consideration of condensation of delay in initial filing. The delay in refiling is not*

subject to the rigorous tests which are usually applied in excusing the delay in a petition filed under Section 5 of the Limitation Act (See Indian Statistical Institute Vs. M/s. Associated Builders and others AIR 1978 Supreme Court 335)."

20. The judgment of Hon'ble Supreme Court which need to be noticed is the judgment reported in ***"(2017) 11 SCC 234, Northern Railway vs. Pioneer Publicity Corporation Pvt. Ltd."*** which was a case where learned single judge of Delhi High Court has refused to condone delay of 65 days in refiling the objections under Section 34 of the Arbitration and Conciliation Act, 1996. Deputy Registrar of the Delhi High Court granted 7 days' time on 23.01.2013 to remove the defects in the objections which was not done. The Appellant refiled the matter on 21.03.2013 much beyond the 7 days' time as allowed by Deputy Registrar. The High Court refused to condone the delay, against which matter was taken before the Hon'ble Supreme Court. A contention was raised before the Supreme Court that refiling beyond the period prescribed under Section 34(3) is not permissible. The said submission was rejected and the Hon'ble Supreme Courte laid down that Section 34(3) has no application in refiling the petition which only applies to the initial filing. It is useful to extract the entire judgment of the Hon'ble Supreme Court:

"ORDER

1. Leave granted. The appellant is aggrieved by the decision of the Delhi High Court dated 1.9.2015 in FAO (OS)NO.436 OF 2015 refusing to condone a period of 65 days in re-filing the

objections under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act'). The award was delivered on 29.10.2012. Admittedly, the objections under Section 34 were filed within the time stipulated under Section 34 of the Act. However, since there was objections, time was granted on 23.1.2013 by the Deputy Registrar of the High Court to remove the objections within a period of 7 days. This was not done.

2. Eventually, the appellant re-filed the matter on 21.3.2013. the explanation given by the appellant is that the amount of court fees to the extent of Rs.8,94,000/- was to be arranged and that took some time. The appellant is the Northern Railway and while it is difficult to condone such inefficiency which seems to be a persistent reality with the organisation, such as the Northern Railway, that took time in arranging even the small things.

3. Mr. Amarjeet Singh Chandiok, learned senior counsel appearing for the respondent submitted that Section 34(3) of the Act bars re-filing beyond the period stipulated therein. The said sub-Section reads as follows:

> *"34(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal.*
>
> *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said*

period of three months it may entertain the application within a further period of thirty days, but not thereafter."

4. We find that said section has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act. It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing.

5. We are not inclined to accept this contention particularly since the petitioner has offered an explanation for the delay for the period after the extensions.

6. Having regard to the overall circumstances of the case, we consider it appropriate in the interest of justice to set aside the impugned order.

7. Accordingly, the appeal is allowed and the impugned order of the High Court is set aside. We further direct that the objections of the appellant under Section 34 be taken on the file of the court and the matter be disposed of in accordance with law. The parties are directed to appear before the appropriate court on 28th November, 2016 after obtaining certified copy of this order."

21. In the above case Hon'ble Supreme Court clearly laid down that limitation for filing of the objection as contained in Section 34(3) does not govern the limitation for re-filing. The submission before the Hon'ble Supreme Court relying on Rule 5(3) of Delhi High Court Rules (Original Side Rules 1967) that any re-filing beyond 7 days would be a fresh institution was expressly rejected. In para 4 of the judgment following has been observed:

> *"4. We find that said section has no application in re-filing the petition but only applies to the initial filing of the objections under Section 34 of the Act. It was submitted on behalf of the respondent that Rule 5(3) of the Delhi High Court Rules states that if the memorandum of appeal is filed and particular time is granted by the Deputy Registrar, it shall be considered as fresh institution. If this Rule is strictly applied in this case, it would mean that any re-filing beyond 7 days would be a fresh institution. However, it is a matter of record that 5 extensions were given beyond 7 days. Undoubtedly, at the end of the extensions, it would amount to re-filing."*

22. At this stage, we may notice the Rule 5(3) of Delhi High Court Rules as referred to in Para 4 of the judgment. Rule 5 (1), (2) & (3) inserted in Delhi High Court Rules w.e.f. 01.12.1988 is as follows:

> *"**Rule 5(1)** The Deputy Registrar/Assistant Registrar, In-charge of the Filing Counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment*

and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

Rule 5(2) *If the memorandum of appeal is not taken back, for amendment within the time allowed by the Deputy Registrar/Assistant Registrar, in charge of the Filing Counter under sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.*

Rule (3) *If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, in charge of the Filing Counter, under sub-rule (1) it shall be considered as fresh institution."*

Note - The provisions contained in Rule 5 (1), 5(2) and 5(3) shall mutatis mutandis apply to all matters, whether Civil or Criminal."

23. It is relevant to notice that Rule 5(3) of Delhi High Court Rules contemplated that if the memo of appeal is filed beyond time allowed by the Deputy Registrar, it shall be treated as fresh institution but Hon'ble Supreme Court held in the judgment that extension of time granted for refiling will amount to refiling. In any view of the matter, in Rule 26 of NCLAT Rules, 2016, as noticed above, there is no indication of concept of fresh filing, if defects are not cured in 7 days as has been expressly provided in Delhi High Court Rules. We, thus, are of the view that in reference of Rule 26, re-presentation beyond 7 days in no manner said to be fresh filing.

The judgment of this Tribunal in ***'Jitendra Virmani' (supra)*** cannot be held to lay down a correct law.

24. Another Judgment relied on by the Learned Counsel for the Appellant is the Judgment of Delhi High Court in the matter of **"Dr. Narender Kumar Sharma & Ors. vs. Maharana Pratap Educational Center & Anr.,** ***(2018) SCC OnLine Del 13146*****"**. In the above case, Written-objections were filed within time and there was delay in refiling. The submission was raised before the Delhi High Court that refiling tantamount to fresh filing. The Delhi High Court relying on an earlier Judgment of the Delhi High Court and two judgments of the Hon'ble Supreme Court allowed the Appeal.

25. We may now also consider submissions of learned counsel for the parties with regard to Question no. (b).

26. Section 61 of the Code and Section 421 of the Companies Act, 2013 lay down limitation for filing of appeal. Section 61(2) of the Code and Section 421 of the Companies Act are as follows:

> *"**61(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."*

> ***"421. Appeal from the orders of Tribunal.*** *– (1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.*
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> *(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.*
>
> *(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:*
>
> *Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.*
>
> *(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against*
>
> *(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal."*

27. The limitation which has been provided under Section 61(2) and Section 421 is the limitation for filing an appeal. The Rules, neither the

Code nor the Companies Act, 2013 lay down any limitation for re-presentation/refiling of the appeal. Rule 26 of NCLAT Rules, 2016, which govern the re-presentation/refiling of the appeal does not provide for any limitation. When Sub-rule (3) of Rule 26 empowers the Registrar to allow the parties concerned a reasonable time or to extend the time for compliance, which power is not hedged by any period of limitation, it can be safely said that no limitation is prescribed for re-presentation/refiling of an appeal.

28. It is well accepted principle of statutory interpretation that if the meaning of words is plain effect must be given to it. The statute at best declare intent of Legislature. If the Legislature or Rule making Authority intended provision of limitation for re-presentation/refiling the same could have been done in unambiguous words. Hon'ble Supreme Court in ***"Lalu Prasad Yadav & Anr vs. State of Bihar & Anr., (2010) 5 SCC 1"*** laid down following in Paras 23 and 24:

> *"23. In Sussex Peerage[6], the House of Lords, through Lord Chief Justice Tindal, stated the rule for the construction of Acts of Parliament that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature.*

24. A Constitution Bench of this Court in Union of India &Anr. v. Hansoli Devi and Others[7], approved the rule exposited by Lord Chief Justice Tindal in The Sussex Peerage's case[6] and stated the legal position thus: (Hansoli Devi case[7], SCC p.281, para 9)

> *"9. …It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd.[8] Lord Reid pointed out as to what is the meaning of "ambiguous" and held that: (AC p.735)*
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> > *'A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."*
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> *It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices*

and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. PatanjaliSastri, C.J. in the case of Aswini Kumar Ghose v. Arabinda Bose[9], had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In Quebec Railway, Light Heat & Power Co. Ltd. v. Vandry[10]it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent

ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective....."

29. To the similar effect, in another judgment in the matter of ***"Nemai Chandra Kumar & Others vs. Mani Square Ltd. & Others, (2015) 14 SCC 203",*** Hon'ble Supreme Court laid down following in paras 32 and 33:

"32. Ordinarily, the Court resorts to the plain meaning rule (also Known as literal rule) for statutory interpretation. The said rule emphasis that the starting point in the statutory interpretation is statute itself and if the language of statute is Clear and unambiguous there is no need to look outside the statue.

33. The intention of the legislature is primarily to be gathered from the language used in the statute, "thus paying attention to what has been said as also to what has not been said" as observed by his Court in Dental Council of India v. Hari Prakash[7]. Relevant part of which is quoted hereunder:

"7. The intention of the legislature is primarily to be gathered from the language used in the statute, thus paying attention to what has been said as also to what has not been said. When the words used are not ambiguous, literal meaning has to be applied, which is the golden rule of interpretation.""

30. We do not find any support from the NCLAT Rules, 2016 or the Code and Companies Act, 2013 to the submission of learned counsel for the Respondent that limitation prescribed for filing an appeal shall also govern the limitation for re-presentation/refiling. We may also refer to the judgment of Hon'ble Delhi High Court in ***"Delhi Development Authority v. Durga Construction, 2013 (139) DRJ 133 [DB]"***, where the question of condonation of delay in refiling came for consideration. An application for refiling was rejected. Paras 1and 2 of the judgment notice the facts and the issue involved, which is to the following effect:

> *"1. The appellant has preferred the present appeal impugning the order dated 06.04.2011 passed by a learned Single Judge of this court in O.M.P. No.89/2009 (hereinafter referred as the "impugned order"). By the impugned order, the learned Single Judge has dismissed the application bearing I.A. No.1711/2010 filed by the appellant under section 151 of CPC for condonation of delay of 166 days in re-filing the Objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act").*
>
> *2. The controversy involved in the present case is whether the delay of 166 days in re-filing the Objection under section 34 of the Act can be condoned beyond the statutory period of limitation of three months and thirty days as prescribed under section 34(3) of the Act."*

31. Delhi High Court laid down that filing of an application and refiling the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. In Paras 16 and 17 following has been laid down:

> *"16. In our view, filing of an application and re-filing the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. It is now well-settled that limitation does not extinguish an obligation but merely bars a party to take recourse to courts for availing the remedies as available to the party. Thus, in the event a party fails to take expeditious steps to initiate an action within the time as specified, then the courts are proscribed from entertaining such action at the instance of such a party. The rationale of prescribing time limits within which recourse to legal remedies can be taken has been explained by the Supreme Court in the case of* ***Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.: (1971) 2 SCC 860*** *as under:-*
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> > *"7. ..... The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jura*

> *subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. ...."*

17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing. A similar view in the context of Rules 1 & 2 of Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in ***Ashok Kumar Parmar v. D.C. Sankhla: 1995 RLR 85****, whereby a Single Judge of this Court held as under:-*

> *"Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing*

after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit."

A Division Bench of this Court upheld the aforesaid view in ***D.C. Sankhla v. Ashok Kumar Parmar: 1995 (1) AD (Delhi) 753*** *and while dismissing the appeal preferred against decision of the Single Judge observed as under:-*

"5. ..... In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules,1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act.""

32. Delhi High Court also laid down that in condonation of delay in refiling, the time limit specified for filing original application is not to be applied. In Paras 20 and 25 following has been laid down:

"20. It follows from the above that once an application or an appeal has been filed within the time prescribed, the question of condoning any delay in re-filing would have to be considered by the Court in the context of the explanation given for such delay. In absence of any specific statute that bars the jurisdiction of the Court in considering the question of delay in re- filing, it cannot be accepted that the courts are powerless to entertain an application where the delay in its re-filing crosses the time limit specified for filing the application.

…..x…….x……x….

> *25. Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the delay in re-filing an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred."*

33. We, thus, are of clear opinion that limitation prescribed for filing an appeal under Section 61 and Section 421 of Companies Act cannot be imported while considering condonation of delay in refiling/ re-presentation. We may, however, hasten to add that condonation of delay in refiling/re-presentation has to be examined on case to case basis. As noticed above, the criterion for considering an application for condonation of delay under Section 5 may not be strictly applicable when question of

condonation of delay in refiling/re-presentation arises. A party who is exercising its right to file a statutory appeal in time has not to be shut out on some procedural or technical defects and when defects notified have been removed although with some delay, question to be considered is as to whether there was justifiable cause for delay or not. The time period allowed for removal of the defects is only directory. Hon'ble Supreme Court in ***"Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Ltd. & Ors., (2017) 16 SCC 143"*** came to consider the proviso to Section 7(5), 9(5) and 10(4) of the Code which prescribed 7 days period for removal of defects in application for initiation of Corporate Insolvency Resolution Process. Appellate Tribunal has held that 7 days period is mandatory and rejected the application for non-compliance. Hon'ble Supreme Court has allowed the appeal and held that the period of 7 days cannot be held to be mandatory rather it is directory. Following was laid down in Paras 24 and 25:

> *"24. Further, we are of the view that the judgments cited by the NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to sub-section (5) of Section 7, Section 9 or sub-section (4) of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained.*

Therefore, it is in the interest of the applicant to remove the defects as early as possible.

*25. Thus, we hold that the aforesaid provision of removing the defects within seven days is directory and not mandatory in nature. However, we would like t*o enter a caveat."

34. In view of the foregoing discussion, reasons and conclusions, we answer the two questions in following manner:

(a) The law laid down by this Tribunal in "Mr. Jitendra Virmani Vs. MRO-TEK Realty Ltd. & Ors" and three Member Bench Judgment in "Arul Muthu Kumaara Samy Vs. Registrar of Companies" that when the defects in appeal are cured after seven days and the same is refiled, it shall be treated as a fresh Appeal, does not lay down a correct law. The re-presentation of appeal after expiry of a period of 7 days or after extended period shall not be a fresh filing and shall only be refiling/re-presentation.

(b) The limitation prescribed in filing an appeal under Section 61 of the Code or Section 421 of the Companies Act, 2013 shall not govern the period taken in an appeal for removal of the defects in refiling/re-presentation. Even if, there is a delay in refiling/re-presentation which is more than the period of limitation prescribed for filing an appeal under Section 61 of

the Code and Section 421 of Companies Act, 2013, the same can be condoned on sufficient justification.

The reference is answered accordingly.

35. Let the Appeals be listed for consideration of condonation of delay in refiling/re-presentation in accordance with law. List the Appeals on 01st September, 2022.

[Justice Ashok Bhushan]
Chairperson

[Justice Rakesh Kumar]
Member (Judicial)

[Justice M. Satyanarayana Murthy]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI
30th August, 2022

Archana