NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
(APPELLATE JURISDICTION)

I.A No.774 of 2020 in Company App.(AT)(Insolvency)No.294 of 2020

(Application under Rule 11 of NCLAT Rules 2016 for condonation of delay in filing Company Appeal (AT)(Ins)No.294/2020 From the order dated 25.6.2020 passed by National Company Law Tribunal, Cuttack Bench in T.P.No.40/CTB/2019 in CP(IB)No.24/KB/2018.

In the matter of:

State Bank of India ....Appellant
Registered Office :
Stressed Assets Management Branch-I,11 & 13
Shakespeare Sarani (Nagaland House),
Kolkatta 700 071.

V.

Visa Steel Ltd. ...Respondent
(through Vishal Agarwal, vice-Chairman and
Managing Director),
Regd.Office : "Visa House", 11 Ekamra Kanan, Nayapalli,
Bhubaneshwar, Odisha 751 015

Present :

For Appellant: Mr.Arun Kathpalia, Mr.Mukul Rohatgi Sr.Advocates with Mr.Siddhartha Datta, Mr.Deepanjan Dutta Roy, Ms.Misha and M.S.Suhani Diwedi, Ms.Diksha Gupta and Ms.Moulshree Shukla, Advocates.

For Respondent : Mr.S.N.Mookherjee, Sr.Advocate with Sabyasachi Chaudhury, Ms.Nikita Jhunjhunwala, Advocates

ORDER

Venugopal M.J

Preamble

Contents of Application (IA No.774 of 2020 in Company Appeal (AT)(Ins) 294 of 2020 filed by the Appellant/Petitioner(Bank)

According to the Appellant/Petitioner(Bank), it being dissatisfied with the impugned order dated 25.6.2019 (first order) passed by the 'Adjudicating Authority' had approached the Hon'ble Supreme Court by means of an 'Interlocutory Application' in Civil Appeal No.3169 of 2019, filed by the Appellant in February 2019, in regard to the connected proceedings. As a matter of fact, the said application was filed within 10 days from the first impugned order.

2. It is the stand of the Appellant/Bank that on 29.7.219, when the matter was taken up before the Hon'ble Supreme Court, the Hon'ble Supreme Court permitted the Appellant to withdraw the 'Appeal' with a liberty to approach the 'Adjudicating Authority' for 'Review' of the first impugned order dated 25.6.2019.

3. Besides this, pursuant to the liberty given by the Hon'ble Supreme Court, an Application' for 'Review' of the first impugned order dated 25.6.2019 passed by the 'Adjudicating Authority' was filed in Civil Appeal No.87/CTB/2019 by the Appellant, before the 'Adjudicating Authority'. In fact, the 'Review Application' was filed within 30 days of the order of the Hon'ble Supreme Court.

4. It is represented on behalf of the Appellant/Petitioner that in 'Review Application', the petitioner/bank had taken a plea (i) there was an error apparent on the face of record in regard to the first impugned order dated 25.6.2019 passed by the 'Adjudicating authority', pertaining to the application of the judgement of the Hon'ble Supreme Court in 'Dharani Sugars' case, (ii) Section 7 of the 'Insolvency & Bankruptcy Code' proceedings were initiated in December 2017, based on the Reserve Bank of India letter dated 28.8.2017 and not the Reserve Bank of India Circular dated 12.2.2018, (iii) the 'Dharani Sugars' judgement had struck down only the Reserve Bank of India Circular dated 1.2.2018, (iv) the Reserve Bank of India Letter dated 28.8.2017 was issued pursuant to the authorisation and (v) the Reserve Bank of India Letter dated 28.8.2017 lists out the specific defaults, the Respondent being one of them. Therefore, it is the case of the Appellant/petitioner/bank that the first impugned order dated 25.6.2019 passed by the 'Adjudicating Authority' was patently wrong and hence it ought to have been 'Reviewed and Recalled'. Also that the Appellant/Petitioner had diligently pursued the 'Review Application'. (vi) In between August 2019 till January 2020 – approximately 140 days, the 'Review Application' was pending before the 'Adjudicating Authority'. (vii) there is no delay in filing the instant 'Appeal' arising out of the first impugned order dated 25.6.2019 passed by the 'Adjudicating Authority' since the Appellant/petitioner/bank was diligent and in a bonafide manner pursuing the matter etc. In reality, the 'Petition for Condonation of Delay'

is filed by the 'Appellant'/'Petitioner'/Bank, by way of abundant caution to prevent any technical objection being raised in filing of the 'Appeal'.

5. The 'Review Application' was dismissed by the 'Adjudicating Authority' on the ground of 'lack of jurisdiction' without looking into the merits of the case.

6. The Respondent/Corporate Debtor will not be prejudiced in any manner if the delay of 193 days is condoned by this 'Tribunal', in the interest of justice.

Gist of Reply of Respondent/Corporate Debtor:

7. The Interlocutory Application filed by the Petitioner/Appellant/Bank is not maintainable in Law, because of the admitted fact that there is a delay of 193 days. Even assuming but not admitting that sufficient cause can be said to be made out, the Application is liable to be dismissed as the delay is beyond not only the initial period of 30 days but also the 'further period' as specified under the statute.

8. The Appellant/Petitioner filed Civil Appeal No.3169 of 2019 before the Hon'ble Supreme court on 23.2.2019 against the Interim Order dated 27.6.2018 which was passed by the Hon'ble High Court of Orissa in Writ Appeal No.237 of 2018. In fact, the Petitioner/Bank from February 2019 was aware that the proceedings in the Hon'ble Supreme Court were in relation to an order passed in Writ Appeal, then pending before the Hon'ble High Court of Orissa at Cuttack.

9. The judgement which was reserved on 29.6.2018 in Writ Petition was dismissed on 25.3.2019. The Civil Appeal before the Hon'ble Supreme Court' had become an infructuous one, in view of the dismissal of the original Writ Petition itself. Furthermore, the IA No.21 of 2019 in CP(IB) No.24 of 2018 filed before the 'Tribunal(Cuttack Bench) in April 2019 seeking dismissal of the said application filed by the Appellant under Section 7 of the 'Insolvency & Bankruptcy Code' was allowed on 25.6.2019 and CP(IB) No.24 of 2018 was dismissed (being the original application filed by the Appellant under Section 7 of the Insolvency & Bankruptcy Code).

10. Being aware that the pending Civil Appeal before the Hon'ble Supreme Court had already become an infructuous one, the Petitioner/Appellant/Bank projected IA No.96019 of 2019. After lapse of 2 days, the Petitioner/Appellant had applied for a certified copy of the order dated 25.6.2019 on 28.6.2019. The copy of the same was received by the Petitioner/Appellant on 3.7.2019 which is evident from the Interim Application IA No.96019 of 2019 in Civil Appeal No.3169 of 2019 which was confirmed and filed by the Appellant on 4.7.2019.

11. When the IA No.96019 of 2019 was taken up for the first time, the Petitioner/Appellant/Bank without pressing the said application or advancing any arguments whatsoever sought to withdraw the said 'Civil Appeal' itself (the said Civil Appeal in any event had become an infructuous one by reason of subsequent facts) and sought 'liberty' to approach the National Company Law Tribunal (Cuttack Bench) for 'Review' of the order

under challenge in 'Civil Appeal' No. 3169 of 2019, as seen from the order dated 29.7.2019.

12. In as much as the order under challenge in 'Civil Appeal' No.3169 of 2019 was the order dated 27.6.2018 passed by the Hon'ble High Court of Orissa, the liberty is sought for was of no consequence and in any event, the National Company Law Tribunal would not have any jurisdiction in respect of the same.

13. It comes to be known on 20.8.2019, the Petitioner/Appellant/Bank filed an application before the 'Tribunal' admitting Civil Appeal(IB)No.87 of 2019 for 'Review' of the order dated 25.6.2019 and even on 29.7.2019 or soon thereafter, no 'Appeal' was filed, and instead, the 'Tribunal' was approached by way of 'Review' (the personnel of the Learned Member who has passed the order on 25th June 2019 having undergone a change in the meantime).

14. As a matter of fact, the purported 'Application' for 'Review' was filed after 47 days, since passing of the order dated 25.6.2019. By an order dated 10.1.2020, the 'Review' was held to be not maintainable and the same came to be dismissed by the 'Tribunal'.

15. The Petitioner/Appellant being fully aware that the order dated 25.6.2019 had achieved finality in seeking to prefer an application by challenging both the orders dated 25.6.2019 and 10.1.2020 on the misconceived pretext of 'Doctrine of Merger'. The Petitioner/Bank is

endeavouring to do what it could not do directly and the same cannot be countenanced.

16. Section 61 of the 'Insolvency & Bankruptcy Code' speaks of filing of an 'Application' within 30 days before the 'Tribunal' and a further period of 15 days is provided only if , ' sufficient cause' is made out for preferring the 'Appeal' within the extended period. If the 'Application' for 'Condonation of Appeal' is allowed, then Section 61 of the Insolvency & Bankruptcy Code will become an 'otiose' one.

17. There is no 'Balance of Convenience' in favour of the 'Petitioner'/'Appellant' and that the 'Application is liable to be dismissed.

Appellant's Rejoinder Pleas:

18. The order of the Hon'ble Supreme Court dated 29.7.2019 in 'Civil Appeal' is a material fact to be considered by this 'Tribunal' for adjudicating the 'Application' for condoning the delay by exclusion of time spent in the 'Review Proceedings'. Application for condonation of delay is filed based on bonafide results and keeping in public interest, due to the large exposure of various banks to the Respondent including the 'Appellant'.

19. The prescription of time mentioned in Section 61(2) of the 'Insolvency & Bankruptcy Code' does not exclude the 'Application' of Section 14 of the 'Limitation Act, 1963. This 'Tribunal' has the power to exclude time spent in Civil Proceedings pursued diligently and in good faith by the Appellant/Bank before the Hon'ble Supreme Court and the 'National Company Law Tribunal' based on the broad principles of Section 14 of the

'Limitation Act, 1963. In fact, the time spent before the 'Court of Law' or the 'Tribunal' can be excluded if the same turned out to be an abortive 'proceedings' for the purpose of filing an 'Appeal' before any 'Tribunal' in respect of 'Appeal(s)'.

20. In all, 223 days had expired from the date after the impugned order dated 25.6.2019, till the filing of the present appeal on 4.2.2020. If the period of 30 days as available under Section 61(2) of the Code is deducted from 223 days, then, a period of 193 days remain to be condoned by way of exclusion of time for the Civil proceedings which were pursued by the Appellant on an application of the ingredients of Sec.14 of the 'Limitation Act'.

21. It is settled Law that the substantive right of the Appellant could not be allowed to be defeated on technical grounds by taking hyper technical view on limitation. Also that, the 'Review Application' remained pending for 5 months before the 'Tribunal' from August 20, 2019 to January 10, 2020 and the judgement itself was reserved for 2 months and such pendency of the 'Review Application' for 5 months before the 'Tribunal cannot be put to the prejudice of the Appellant. The Appellant had acted in diligent manner and with full transparency.

22. Appellant's Citations

(i) The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court in P.Sarathy V State Bank of India, reported in (2000) 5 Supreme Court Cases at Page 355 at

Sp.Pg.361 at Para 14 and 15, it is observed as under : Para 14. IN Pritam Kaur V.Sher Singh (AIR 1983 P&H 363) the proceedings before the Collector under the Redemption of Mortgages (Punjab) Act (2 of 1913) were held to be civil proceedings. It was held that the "court', contemplated under Section 14 of the Limitation Act, does not necessarily mean the 'civil court' under the Code of Civil Procedure. It was further held that any tribunal or authority, deciding the rights of parties, will be treated to be a "court". Consequently, benefit of Section 14 of the Limitation Act was allowed in that case. This decision was followed by the Himachal Pradesh High Court in Bansi Ram v Khazana (AIR 1993 HP 20). Para 15: Applying the above principles in the instant case, we are of the opinion that the Deputy Commissioner of Labour (Appeals), which was an authority constituted under Section 41(2) of the Tamil Nadu Shops and Establishments Act, 1947 to hear and decide appeals, was a "court" within the meaning of Section 14 of the Limitation Act and the proceedings pending before him were civil proceedings. It is not disputed that the appellant could file an appeal before the Local Board of the Bank, which was purely a departmental appeal. In this view of the matter, the entire period of time from the date of institution of the departmental appeal as also the period from the date of institution of the

appeal under section 41(2) before the Deputy Commissioner of Labour(Appeals) till it was dismissed will, therefore, have to be excluded for computing the period of limitation for filing the suit in question. If the entire period is excluded, the suit is not disputed, would be within time.

(ii) In the decision of M.P.Steel Corporation V. Commissioner of Central Excise (2015)7 Supreme Court Cases at P.58 at Sp.Pg.59, wherein it is observed that "so long as the plaintiff or applicant is bona fide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of cause of action of an appellate or revisional proceeding is also to be excluded if such appellate/revisional proceeding is from an order in an original proceeding which turns out to be abortive".

(iii) Consolidated Engineering Enterprises V. Principal Secretary, Irrigation Department (2008) 7 Supreme Court Cases 169 at Sp.pg.173, it is observed as under :

"There is fundamental distinction between discretion to be exercised under Section 5 of the limitation Act and exclusion of time provided in Section 14 of the said Act. The power to excuse delay and grant an extension of time under Section 5 is discretionary whereas under Section 14 exclusion of time is mandatory, if the requisite conditions are satisfied. Section 5 is broader in its sweep than Section 14 in the sense that a

number of widely different reasons can be advanced and established to show that there was sufficient cause in not filing appeal or application within time. The ingredients in respect of Sections 5 and 14 are different. The effect of Section 14 is that in order to ascertain what is the date of expiration of the "prescribed period", the days excluded from operating by way of limitation, have to be added to what is primarily period of limitation prescribed. (para 28).

To attract provisions of Section 14 of the Limitation Act, five conditions (as indicated in para 21 of the judgement), have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that prior proceeding should have been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation

Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard-and-fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. Mere filing of an application in wrong court would prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith". (Para 31).

(iv) J.Kumaradasan Nair V IRIC Sohan (2009)12 Supreme Court Cases at Page 175 at Sp.Pg.176 and 177, where it is observed as under:

"only because a mistake has been committed by or on behalf of the appellants in approaching the appropriate forum for ventilating their grievances, the same would not mean that Section 14(2) of the Limitation Act, which is otherwise available, should not be taken into consideration at all.(para 15)

The provisions contained in Sections 5 and 14 of the Limitation Act are meant for grant of relief where a person has committed some mistake. The provisions of Sections 5 and 14 of the Limitation Act are alike should, thus, be applied in a broad-based manner. When sub-section (2) of Section 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Section 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature. (Para 16)

There cannot furthermore be any doubt whatsoever that having regard to the definition of "suit" as contained in Section 2(l) of the Limitation Act, a revision application will not answer the said description. But, although the provisions of Section 14 of the Limitation Act per se are not applicable, the principles thereof would be applicable for the purpose of condonation of delay in filing an appeal or a revision application in terms of Section 5 thereof. (Para 17).

It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, be itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider

whether it has the source to exercise such power or not. The court will not apply the beneficent provisions like Sections 5 and 14 of the limitation Act in a pedantic manner. When the provisions are meant to apply and in fact found to be applicable to the facts and circumstances of a case there is no reason as to why the court will refuse to apply the same only because a wrong provision has been mentioned. In a case of this nature, sub-section (2) of Section 14 of the Limitation Act per se may not be applicable, but, as indicated hereinbefore, the principles thereof would be applicable for the purpose of condonation of delay in terms of Section 5 thereof."

(v) In the decision of Suryachakra Power Corporation V Electricity Department (2016)16 Supreme Court Cases P.152 at Sp.pg.152 wherein it is held that "principles under S.14 of Limitation Act, 1963 can be applied even when S.5 of 1963 is not applicable, is no more res integra".

(vi) In the decision of Hon'ble Supreme Court in Baleshwar Dayal Jaiswal V. Bank of India (2016) Supreme Court Cases at P.444 at Sp.pg.445 and 446, wherein it is observed as under : "the period of limitation for filing an appeal under Section 18 of the SARFAESI Act is 30 days as against 45 days under Section 20 of the RDDB Act. To this extent, legislative intent may be deliberate. However, the absence of an express provision for

condonation, when Section 18(2) expressly adopts and incorporates the provisions of the RDDB Act which contains provision for condonation of delay in filing of an appeal, cannot be read as excluding the power of condonation. The proviso to Section 20(3) which provides for condonation of delay (45 days under the RDDB Act) stands extended to disposal of appeal under the SARFAESI Act (to the extent that condonation is of delay beyond 30 days). There is no reason to exclude the proviso to Section 20(3) in dealing with an appeal under the SARFAESI Act. Taking such a view will be nullifying Section 18(2) of the SARFAESI Act. (Paras 9,10,14 and 15)

Section 29(2) of the Limitation Act, 1963 has no absolute application, as the statute in question impliedly excludes applicability of provisions of the limitation Act to the extent a different scheme is adopted. If no provision of the Limitation Act was expressly adopted, it may have been possible to hold that by virtue of Section 29(2) power of condonation of delay was available. It is well settled that exclusion of power of condonation of delay can be implied. However, in the present case, the power of condonation of delay has been made expressly applicable by virtue of Section 18(2) of the SARFAESI Act read with the proviso to Section 20(3) of the RDDB Act

having been expressly incorporated under the special statutes in question. Section 29(2) stands impliedly excluded. Even though Section 5 of the Limitation Act may be implied inapplicable, principle of Section 14 of the Limitation Act can be held to be applicable even if Section 29(2) of the Limitation Act does not apply."

(vii) In the decision of the Hon'ble Supreme Court in Baleshwar Dayal Jaswal V Bank of India reported in (2016) 1 Supreme Court Cases 444 at Spl.Page 445 and 446, wherein it is observed as under:

"*The period of limitation for filing an appeal under Section 18 of the SARFAESI Act is 30 days as against 45 days under Section 20 of the RDDB Act. To this extent, legislative intent may be deliberate. However, the absence of an express provision for condonation, when Section 18(2) expressly adopts and incorporates the provisions of the RDDB Act, which contains provision for condonation of delay in filing of an appeal, cannot be read as excluding the power of condonation. The proviso to Section 20(3) which provides for condonation of delay (45 days under the RDDB Act) stands extended to disposal of appeal under the SARFAESI Act (to the extent that codonation is of delay beyond 30 days). There is no reason to exclude the proviso to Section 20(3) in dealing with an appeal*

under the SARFAESI Act. Taking such a view will be nullifying Section 18(2) of the SARFAESI Act. (Paras 9,20,24 and 15).

Section 29(2) of the Limitation Act, 1963 has no absolute application, as the statute in question impliedly excludes applicability of provisions of the Limitation Act to the extent a different scheme is adopted. If no provision of the Limitation Act was expressly adopted, it may have been possible to hold that by virtue of Section 29(2) power of condonation of delay was available. It is well settled that exclusion of power of condonation of delay can be implied. However, in the present case, the power of condonation of delay has been made expressly applicable by virtue of Section 19(2) of the SARFAESI Act read with the proviso to Section 20(3) of the RDDB Act and to that extent, the provisions of the Limitation Act having been expressly incorporated under the special statutes in question. Section 29(2) stands impliedly excluded. Even though Section 5 of the Limitation Act may be impliedly inapplicable, principle of Section 14 of the Limitation Act can be held to be applicable even if Section 29(2) of the Limitation Act does not apply."

(viii) In the decision of Shakti Tubes V State of Bihar (2009) 1 Supreme Court Cases at Page 786 at sp.pg.787 and 788 wherein it is observed and held as under:

"Section 14 of the Limitation Act speaks of prosecution of the proceedings in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. The true purport of the words "other cause of a like nature" is that the same must relate to the subject-matter of the issue. (Para 20)

It is not in dispute that the writ remedy was resorted to by the plaintiff. A part of the writ petition was admitted. It has not been held that the writ petition was not maintainable. It was not dismissed as the threshold. In view of the fact that a part of the writ petition was admitted for hearing, there cannot be ay doubt whatsoever that the same was maintainable. The appellant-plaintiff was, therefore, pursuing the said remedy bonafide and in good faith. (Para 19)

Further, it is not correct to contend that the writ petition filed by the appellant had nothing to do with the escalation clause. In the writ petition, the entire contention of the appellant revolved around the arbitrary refusal on the part of the respondents to pay the price of the steel in terms of the escalation clause. Even the amount claimed in the writ petition was the same for which the suit was filed. The price of the steel, as contended in the writ petition, is the same in the suit as would appear from the writ petition and the judgement passed in the suit concerned. (Paras 16 and 17).

Thus, it is held that the provisions of Section 14 of the Limitation Act, 1963 were applicable to the facts of the present case. Hence, the impugned judgement cannot be sustained which is set aside accordingly."

(ix) In the decision of State of Goa V Western Builders (2006) 6 Supreme Court Cases at Page 239 at sp.pg.240 and 241, wherein it is observed as under :

"Though it is true that wherever the legislature wanted to give power to the court under the Arbitration and Conciliation Act, 1996 that has been incorporated in the provisions of the 1996 Act, viz., in Sections 5, 8(1), 9, 11(4), (6) & (9), 14(3), 27, 34, 36,37,39(2) & (4), 41, 42(2) and 43, therefore no further power should lie in the hands of the court so as to enable the court to exclude the period spent in prosecuting the remedy before other forum. But at the same time there is no prohibition incorporated in the Act of 19916 for curtailing the power of the court under Section 14 of the Limitation Act. Nor is there any provision in the whole of the Act which prohibits discretion of the Court in such matters. (Para 19).

By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the

Act of 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act should not be read in the Act of 1996, which will advance the cause of justice. (Para 19)

The Arbitration and Conciliation Act, 1996 does not expressly exclude the applicability of Section 14 of the Limitation Act. The prohibitory provision has to be construed strictly. It is true that the Arbitration and Conciliation Act, 1996 intended to expedite commercial issues. It is also clear in the Statement of Objects and Reasons that in order to recognise economic reforms the settlement of both domestic and international commercial disputes should be disposed of quickly so that the country's economic progress be expedited. The Statement of Objects and Reasons also nowhere indicates that Section 14 of the limitation Act shall be excluded. (Para 25)

Therefore it is held that Section 14 of the Limitation Act, 1963 is applicable in the Arbitration and conciliation Act, 1996." (Para 26).

23. Respondent's Decisions:

(a) The Learned Counsel for the 'Respondent' relies on the decision of Hon'ble Supreme Court in Kalabharathi Advertising V Hemant Vimalnath Narichania (2010)9 SCC 437 at Sp.Pg.439, wherein it is observed as under :

Paras 15 to 19: *"no litigant can derive any benefit from the pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrong by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised., as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court action" (Para 15 to 19)*

(b) The Learned Counsel for the 'Respondent' refers to the Hon'ble Supreme Court in Patel Chunnibhai Dajibha Etc. V Narayanrao Khanderao Jambekar and Another, reported in AIR 1965 SC at P.1457, wherein at Para 4 and 5, it is observed as under :

…."*in other words, (other than a permanent tenant) cultivating the lands personally would become the purchaser of the lands on April*

1, 1957 if on the date neither an application under Section 29 read with Section 31 nor an application under section 29 read with Section 14 was pending. If an application either under section 29 read with Section 31 or under Section 29 read with Section 14 was pending April 1, 1957 the tenant would become the purchaser on 'the postponed date", that is to say, when the application would be finally rejected. But if the application be finally allowed, the tenant would not become the purchaser. The expression "an application" in the proviso means not only an application under Section 31 but also an application under Section 29 read with Section 14. If an application of either type was pending on April 1, 1957 the tenant could not become the purchaser on that date. Now, on April 1, 1957 the application filed by Respondent 1under Section 29 read with Section 31 was pending. Consequently, the appellant could not be deemed to have purchased the lands on April 1, 1957."

Para 5. But the application under Section 29 read with Section 14 was not maintainable as it was filed after April, 1957. On this point, we adopt the reasoning and conclusion of the Full Bench of the Bombay High Court in Ramachandra anant v. Janardhan, We agree with the following observations of Chainani, C.J. in the aforesaid case:

"It has been contended that as there is no provision in the Act that an application on the grounds mentioned in Section 14 cannot be made after April 1, 1957, such an application, it could not have intended that it should not be availed of in any case. There is undoubtedly force in this argument, but it seems to us that the intention of the legislature in enacting Section 32 clearly was to transfer the ownership of the lands to the tenants on April, 1,1957 except in case where applications for possession had been made by the landlords before April 1, 1957. Where such an application had been made, the right of purchase given to the tenant is postponed until that application is rejected. It is clear from this Section that the legislature did not intend that the right given to a tenant by this section should be destroyed or affected by any application made after April 1, 1957. If an application for possession made under Section 29 read with Section 14 after April 1, 1957, is decided in favour of the landlord before the application made by him prior to April 1, 1957 is disposed of, it will effect the right of the tenant to become the owner of the land on the postponed date. It seems to us that this was not intended by the legislature. The fact that the legislature has provided that only an application made prior to April 1, 1957 should affect the right of the tenant to become the purchaser of the land on April 1, 1957 should affect the right of the tenant to become the purchaser of

the land on April 1, 1957 clearly indicates that the legislative contemplated that no such application should be made after April 1, 1957.

(c) The Learned Counsel for the 'Respondent' cites the decision of the Hon'ble Supreme Court in Union of India V Popular Construction Company (2001) 8 SCC at P.470 at Sp.Pg.474 and 475, wherein at Para 12, it is observed as under:

"As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further.

a. *To hold that the court could entertain an application to set aside the award beyond the extended period under the proviso, would render the phrase 'but not thereafter" wholly otiose. No principle of inter*pretation would justify such a result."

One further thing remains …..and that is the learned counsel for the appellant pointed out the difference between the expression used in the Arbitration Act as construed by Popular Construction (Union of India v Popular Construction Co.(2001)8 SCC 470) and its absence in the proviso in Section 421(3). For the reasons given

above, we are of the view that this would also make no difference in view of the language of the proviso to Section 421(3) which contains mandatory or peremptory negative language and speaks of a second period not exceeding 45 days, which would have the same effect as the expression "but not thereafter' used in Section 34(3) of the Arbitration Act, 1995."

(d) In the decision of Hon'ble Supreme Court in Chatisgarh State Electricity board V Central Electricity Regulatory Commission and others (2010) 5 SCC P.23 at Sp.Pg.32 and 43, wherein it is observed as under :

"Section 125 lays down that any person aggrieved by any decision or order of the Tribunal can file an appeal to this court within 60 days from the date of communication of the decision or order of the Tribunal. Proviso to Section 125 empowers this court to entertain an appeal filed within a further period of 60 days if it is satisfied that there was sufficient cause for not filing appeal within the initial period of 60 days. This shows that the period of limitation prescribed for filing appeals under Section 111(2) and 125 is substantially different from the period prescribed under the Limitation Act for filing suits, etc. The use of the expression 'within a further period of not exceeding 60 days" in the proviso to Section 125 makes it clear that the outer limit for filing an appeal is 120 days. There is no provision in the Act under which this court can

entertain an appeal filed against the decision or order of the Tribunal after more than 120 days."

"It is not clear from the record whether the appellant had applied for a certified copy of obtained one through e-mail, but this much is evident that the appellant did obtain/receive a copy of order dated 17.5.2007 If that was not so, the appellant could not have filed an appeal under Section 125 of the Electricity Act. The preparation of appeal, which bears the date 7.9.2007 is a clinching evidence of the fact that the appellant had not only become aware of the order of the Tribunal, but had obtained a copy thereof. However, instead of filing of the appeal within 60 days from the date of receipt of the letter dated 7.6.2007 sent by the Registry of the Tribunal or the communication sent by Respondent 5, the appellant chose to file the appeal only on 24.12.2007 and that too despite the fact that the same was prepared on 7.9.2007. The appellant has not offered any tangible explanation as to why the appeal could not be filed for more than three and a half months after its preparation. Thus, there is no escape from the conclusion that the appeal has been filed after more than 120 days from the date of communication of the 'Tribunal's order and, as such, the same cannot be entertained."

(e) The Learned Counsel for the 'Respondent' points out the decision of Hon'ble Supreme Court in Bengal Chemists and Druggists

Association V Kalyan Chowdhury, reported in (2018) 3SCC at P.41 and 42, wherein it is observed and held as follows:

"Under 421(3) of the Companies Act, 2013, 45 days is the period of limitation, and a further period not exceeding 45 days is provided under Section 421(3) proviso only if sufficient cause is made out for filing the appeal within the extended period. This is a peremptory provision, which will otherwise be rendered completely ineffective. Accepting argument of appellant would mean that notwithstanding that the further period of 45 days had elapsed, the Appellate Tribunal may, if the facts so warrant, condone the delay. This would be to render otiose the second period, which is a special inbuilt kind of Section 5 of the Limitation Act in the special statute, which lays down that beyond the second period of 45 days, there can be no further condonation of delay."

(ii) Also in the aforesaid decision at P.46 in Para 12, it is observed as under :

One further thing remains……..and that is that the learned counsel for the appellant pointed out the difference between the expression used in the Arbitration Act as considered by Popular Construction (Union of India V Popular Construction Co.(2001) 8 SCC 470 and its absence in the proviso in Section 421(3). For the reasons given above, we are of the view that this would also make no difference in view of the language of the proviso to Section

421(3) which contains mandatory or peremptory negative language and speaks of a second period not exceeding 45 days, which would have the same effect as the expression "but not thereafter" used in Section 34(3) proviso of the Arbitration Act, 1996."

(f) In the judgement of Hon'ble Supreme Court in Municipal Corporation of Delhi V Yashwant Singh Neghi in (Special Leave Petition)(Civil)No.4616 of 2010 dated 12.7.2020, at Para 3, had observed as follows:

"We find ourselves unable to agree with the views expressed by this Court in Eastern Coalfields Limited (supra). In our view, once the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. In this connection reference may be made to the Judgement of this Court in Manohar S/o Shankar Nale and others v Jaipalsing S/o Shivlalsing Rajput and others (2008) 1 SCC 520 wherein this Court has taken the view that once the review petition is dismissed the doctrine of merger will have no application whatsoever. This Court in DSR Steel (Private Limited v.State of Rajasthan and others (2012) 6 SCC 782 also examined

the various situations which might arise in relation to the orders passed in review petitions. Reference to paragraphs 25, 25.1, 25.2 and 25.3 is made, which are extracted below for ready reference:

"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 reheard 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 is 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 the 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 or 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 pursing 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."

(g) The Learned Counsel for the Respondent refers to the judgement dated 30.11.2017 of this 'Tribunal' in Amod Amladi V.Sayali Rane & Ors in Company Appeal (AT)(Ins)No 295 of 2017, wherein at Para 5, it is observed as under :

"*Further, as the order dated 2nd May, 2017 is not under challenge in this appeal this Appellate Tribunal cannot express any opinion with regard to the order of admission dated 2nd May, 2017. If the said order dated 2nd May, 2017 is allowed to be challenged, the appeal will be barred by limitation under sub-section (2) of Section 61 of the "I & B Code".*

h. The Learned Counsel for the Respondent cites the decision of Ram Bhawan Singh and Others v. Jagdish and Others, (1990) 4 SCC @ 309, wherein at Page 309 and at Spl.Pg.311 and 312, at Para 4 and 7 , it is observed as under:

Para 4. " *The appellants did not challenge the order of the High Court dated October 3, 1972 by taking any further steps of filing any special leave petition before this Court. On the contrary, on some mistaken and totally wrong advice of some counsel the appellants again initiated fresh proceedings by moving an application on July 6, 1973 before the Settlement Officer consolidation. That application was rejected on October 30,1974. A revision was filed against that order before the Deputy Director of Consolidation which was also rejected by order dated July 21, 1975. Thereafter the appellants filed C.M.W.P.No9943 of 1975 before the High Court on August 7,1975 against the order of the Deputy Director Consolidation. This writ petition came to be dismissed by order dated September 18,1975.*

This judgement of the High Court is challenged in Civil appeal No.1003 of 1976. When the High Court in the earlier Writ Petition No.2726 of 1970 on the same subject matter had finally decided the matter in favour of the respondents by order dated October 3, 1972, there was no question of giving any advice by any counsel in good faith to start proceedings afresh by moving a fresh application before the consolidation authorities. No counsel could have given such advice in good faith to start proceedings afresh before the consolidation authorities and then to claim benefit of such period under Section 14 of the Limitation Act. It was elementary for any counsel of whatever standing to have known that none of the authorities of the Settlement or Consolidation Department could have any right or jurisdiction to set aside the order of the High Court dated October 3,1972. The Settlement Officer (Consolidation) as such was justified in dismissing the application by his order dated October 30,1974, and thereafter the revision by the Deputy Director (Consolidation) by order dated July 21, 1975. The appellants then under the same mistaken advice not in good faith file C.M.W.P.No.9943 of 1975 which came to be dismissed by the High Court on September 18, 1975. The second judgement of the High Court is now challenged in Civil Appeal No.1003 of 1976.

Para 7:The first question that we have to decide is that of limitation. The delay of 1198 days according to the appellants had occurred

unwillingly and the appellants had been prosecuting with due diligence the earlier proceedings before the appellate and the revisional authorities and on the basis of the advice given by their counsel. There is no proper affidavit of either the appellants or the counsel in support of the application for condonation of delay. There is also no other material to indicate that the appellants had exercised due diligence in working out their remedies and sought proper advice in the matter. When the party had no right of appeal, the proceedings instituted before the High Court challenging the judgement in the writ petition cannot be considered to be one in good faith. The subsequent proceedings are also not legal or valid. When the decision of the High Court in the writ petition was one quashing the orders of the appellate and the revisional authorities, the party could not proceed on the basis that the matter was resorted to the lower authorities for fresh decision. We are therefore not satisfied that there is any merit in the ground urged by the appellants for getting over the bar of limitation. The appeals are liable to be dismissed as time barred."

i. The Learned Counsel refers to the decision of Hon'ble High Court of Jammu & Kashmir in H.S.Bali v.Trilochan Dutt & Ors. Reported in (1988)KashL at Page 629, wherein at Para 3, it is observed as under: " *This appeal is liable to be dismissed for being barred by time as the same was admittedly filed after the period prescribed for filing such*

appeals. The petitioner has however vide CMP No.295/88 sought the condonation of delay mainly on the grounds that as the order impugned was challenged in a review petition before the learned Single Judge & the review petition remained pending till 551988, the period from 1631988, till 551988 having been spent allegedly bonafidely and diligently requires to be condoned. We are of the convinced opinion that there is no justification for condoning the delay because the remedy sought for by the appellant was not a legal remedy provided under law. It has not been pointed out as to whether there was any provision for review under the J&K Representation of Peoples Act. The remedy of review being a statutory remedy cannot be restored to by a party without reference to any provision of law & any period spent in conducting the review petition which according to the petitioner is still pending cannot be deemed to be a period bonafidely spent seeking justification for condoning the delay. The appeal being barred by time is liable to be dismissed. "

j. The Learned Counsel for the Respondent points out the decision of Hon'ble High Court of Rajasthan in Bal Chand V Devi Singh and Ors. wherein at Para 9, it is observed as under :

" In Asi Bai's case (supra) the delay in filing the appeal was condoned on the ground that the appellant was prosecuting with due diligence a proper application for review of judgement. The emphasis is on the

words, "proper application for review". In this case, as already stated above, the application for review cannot be said to be a proper one so also in the case in M.T.Cherian's case (supra) because the appellant was acting diligently, bonafide in filing review application. So also again in Inder singh's case (supra). Thus, all these authorities are clearly distinguishable and I am clearly of the opinion that the delay is not fit to be condoned."

k. The Learned Counsel relies on the decision of the Hon'ble Travancore High Court in Govinda Menon Raman Menon and others v. Krishna Pillai Kesava Pilai and others reported in (1954) SCC Online Ker 85, wherein at Para 21, it is observed as under :

" Mr.Velayudhan Nair further contended, that in case the date of the District Munsiff's order was the date for the commencement of limitation, the time spent in prosecuting the appeal to the District Court and that spent in the District Court and the High court to get the appeal restored to the file, should be excluded under the provisions of Section 14 of the Limitation Act. The decision in AIR 1929 Rang 297(B) and – 'Narayan Ambaji v Hari Ganesh', (C), earlier show that a proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding "in good faith' within the meaning of S.14. Further, "defect of jurisdiction" in S.14 means a defect in the particular Court where the former proceedings were instituted and not an inability shared by that

Court in common with all other Courts to entertain the proceedings. In other words, the section applies if the proceedings are capable of being sustained in the sense of being granted in conformity with law by some Court and does not make an allowance for time spent in prosecuting a proceeding which the law does not permit any Court whatever to grant. "Defect f jurisdiction" does not cover such mistake as the prosecution of an appeal which does not lie at all in any Court. Proceedings to fall under S.14 must be such as one recognised by law as legal in their initiation though the party earned the proceeding to a wrong Court. See – 'Shaodhari Ram v Gupteswar Pathak' AIR 1924 Pat 716 (H): and 'Rustomji Volume 1 Page 245', commentaries on S.14 under the heading "Defect of Jurisdiction."

Discussions :

24. The Applicant/Appellant in IA No.774 of 2020 in CP(AT)(Ins)294 of 2020 had averred that on 4.7.2019, the Applicant/Appellant being dissatisfied with the 'Impugned Order' dated 25.6.2019 (first impugned order) passed by the "Adjudicating Authority'(National Company Law Tribunal) and moved the Hon'ble Supreme Court through the 'Interlocutory Applictaion' in Civil Appeal No.3169 of 2019 in February 2019 relating to connected proceedings. It is the specific case of the Applicant/Appellant with the said 'Interlocutory Application' was projected within 10 days of the 'Impugned Order'.

25. There is no two opinion of the vital fact that on 20.8.2019, pursuant to the liberty being granted by the Hon'ble Supreme Court (to withdraw the Civil Appeal) on 29.7.2019, an Application for 'Review' of the 'Impugned Order' dated 25.6.2019 (First Impugned Order) bearing CA No.87/CTB/2019) filed before the 'Adjudicating Authority' and that the 'Review Application' was filed within 30 days from the date of the order of the Hon'ble Supreme Court.

26. It is to be pointed out that the 'Review Application' filed by the Applicant filed by the Applicant/Appellant before the 'Adjudicating Authority' was pending between August 2019 till January 2020 for approximately 140 days and the 'Adjudicating Authority' ultimately dismissed the 'Review Application' based on 'lack of jurisdiction'. The plea of the Petitioner/Appellant is that the 'Review' is the continuation of 'original proceeding' of Section 7 of the 'Insolvency & Bankruptcy Code'. Therefore, as a matter of abundant caution and to prevent technical objections, being raised in filing of the present 'Appeal', the delay of 193 days in filing the IA No.774 of 2020 has to be excused by this 'Tribunal'.

27. On behalf of the 'Respondent', it is submitted that the IA No.774 of 2020 filed by the Petitioner/Appellant is not maintainable because of the fact that the 'delay' in question is beyond not only the initial period of 30 days, but also the 'further period' as provided under the 'Statute' and in fact there is a delay of 193 days.

28. Section 61 of the 'Insolvency & Bankruptcy Code' enjoins that an 'Appeal' shall be filed within 30 days before the National Company Law Appellate Tribunal and a further period of 15 days is provided only if 'sufficient cause' is made out for preferring the 'Appeal' within the extended period. Furthermore, the aspect of 'Consolidated Appeal' does not arise in any event, the 'application for condonation of delay', is liable to be dismissed, of course with costs.

29. One cannot ignore a prime fact that the 'term' 'sufficient cause' implies no negligence, nor inaction nor want of bonafides on the part of the litigant. In fact, in excluding the time, the period starting from the institution of former proceeding till the end of the said proceeding, would be calculated. If a litigant was bonafide prosecuting his rights in a 'Court'/'Tribunal' due to wrong advise, the limitation shall remain in 'limbo', which is the underlying Principle of Section 14 of the Limitation Act, 1963.

30. The essence of 'sufficient cause' is whether it was an act of prudence or reasonable man on the part of person filing an 'Appeal'. It is to be taken note of that whether the 'Appellant' had acted with reasonable diligence in prosecuting his 'Appeal'.

31. It is to be remembered that if an individual permits 'limitation' to expire and plead 'sufficient cause' for not filing an 'Appeal' earlier, he ought to establish that because of some event or circumstances arising before the limitation expired, it was not possible for him to

prefer an 'Appeal' within time. It cannot be gainsaid that if 'sufficient cause' is shown, the 'Court of Law'/'Tribunal' is to exercise its discretion.

32. According to the 'Respondent' in the judgement of this 'Tribunal' in Radhika Meharv v. Vaayu Infra Structure LLP in .Company Appeal(AT)(Ins) 121 of 2019, after considering the provisions of the Limitation Act, at Para 9 has observed as under :

"In the aforesaid circumstances, as the Appeal is filed after 30 days and beyond 15 days thereafter, i.e. after 45 days of the date of the receipt/knowledge of the order, we hold that we have no jurisdiction to entertain the appeal."

33. It comes to be known that the Petitioner/Appellant has summarised the 'time lines' in a tabular form for ease of convenience, which runs as follows:

Period	Event	Time Spent
28 June 2019 to 4 July 2019	The time taken from the date of filing for a certified copy of the First Impugned Order to the filing of the interlocutory application in with the Civil Appeal before the Hon'ble Supreme Court	6 days
4 July 2019 To 29 July 2019	The time taken from filing the Application along with the civil Appeal filed before the Hon'ble Supreme Court	25 days

	to disposal of the same by the Hon'ble Supreme Court with the express liberty to file review application before the Ld. Adjudicating Authority.	
29 July 2019 To 20 August 2019	Time taken by the Appellant to file the Review Application before the Ld.Adjudicating Authority pursuant to the express liberty granted by the Hon'ble Supreme Court.	22 days
20 August 2019 To 10 January 2020	Application and pass the Second Impugned Order	143 days
10 January 2020 To 4 February 2020	Time taken by the Appellant to file the present consolidated Appeal before the Hon'ble NCLAT	25 days
	Total	224 days

34. This 'Tribunal' has heard the Learned Counsel for the Petitioner/Appellant as well as the Learned Counsel for the 'Respondent' and noticed their contentions. On a careful consideration of respective contentions, although an 'Appeal' is filed after the expiry of 30 days, if the 'Tribunal' is satisfied that there was 'sufficient cause' in not filing an 'Appeal', but such period had not exceeded 15 days, this 'Tribunal' bearing in mind that an axiomatic principle in law that if a party/litigant was

involved in a 'Bonafide Litigious Activity', then, the said time spent in such litigation can be excluded, because of the fact that the said party had acted with reasonable diligence in prosecuting his 'Appeal'. Furthermore, this 'Tribunal' opines that the term 'sufficient cause' in Law does not mean only those circumstances which the Law expressly recognised for extending the period for filing an 'Appeal, but also such situation/circumstances which are not expressly approved/recognised but which may appear to the 'Tribunal' to be reasonable, considering the totality of the circumstances of a given case.

35. As far as the present case is concerned, the action of the Petitioner/Appellant in moving the Hon'ble Supreme Court of India in Civil Appeal No.3169 of 2019 after the 'Impugned Order' dated 25.6.2019 passed by the 'Adjudicating Authority', instead of preferring an 'Appeal' before this 'Tribunal' and later filing of the 'Review Proceeding' before the 'Adjudicating Authority', pursuant to the liberty granted by the Hon'ble Supreme Court as per order dated 29.7.2019 are bonafide, of course based on act of prudence or reasonable person in prosecuting the concerned proceeding with reasonable due diligence. Suffice it for this 'Tribunal' to point out that the 'time spent' in prosecuting the legal remedy by the Petitioner/Appellant/Bank is required to be excluded while computing the period of limitation as envisaged under section 61(2) of the 'Insolvency & Bankruptcy Code, 2016, in the considered opinion of this 'Tribunal'. In any event, the Petitioner/Appellant/Bank cannot be attributed with 'Lack of

Bonafides' in resorting to the legal proceedings and time spent in this regard. Therefore, this 'Tribunal' by adopting a practical, purposeful, meaningful, a rational approach and by taking a pragmatic view of the matter in a lenient and liberal manner condones the delay of 193 days in furtherance of substantial cause of justice.

CONCLUSION : In fine, IA No.774 of 2020 in Company Appeal No.(AT)(Ins)294 of 2020 is allowed, without costs.

[Justice Venugopal M]
Member(Judicial)

[Kanthi Narahari]
Member (Technical)

15 March, 2021
HR