

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 97 of 2018

IN THE MATTER OF:

Mahendra Trading Company & Ors.Appellants

Vs.

Hindustan Controls and Equipment Pvt. Ltd.Respondent

Present:

For Appellants: Mr. Rudreshwar Singh, Mr. Anil Agarwalla, Mrs. Neha Sharma and Mr. Aditya Garodia, Advocates.

For Respondent: Mr. Abhijeet Sinha, Ms. Anusuya Sudha Sinha, Mr. Saikat Sarkar, Mr. Aditya Sukhla and Ms. Amrita Sharma, Advocates.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

The Appellants- 'Mahendra Trading Company & Anr.' filed application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) for initiation of the 'Corporate Insolvency Resolution Process' against 'Hindustan Controls & Equipment Private Limited'- ('Corporate Debtor'). The Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata by impugned order

dated 19th January, 2018 rejected the application on the ground of pre-existence of dispute and other grounds.

2. Learned counsel appearing on behalf of the Appellants submitted that there is no pre-existence of dispute and the so-called arbitration proceeding is not an arbitral proceeding in terms of the Arbitration & Conciliation Act, 1996.

3. The Respondent while opposed the prayer also questioned the maintainability of the appeal on the ground it is barred by limitation. Counsel for the Respondent also relied on the decision of the Hon'ble Supreme Court in "**Singh Enterprises v. Commissioner of Central Excise, Jamshedpur and Others- (2008) 3 SCC 70**", wherein the Hon'ble Supreme Court taking into consideration the provisions of Section 35 of the 'Central Excise Act, 1944' observed:

"6. At this juncture, it is relevant to take note of Section 35 of the Act which reads as follows:

*"35. Appeals to Commissioner (Appeals).—(1)
Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal*

to the Commissioner of Central Excise (Appeals) [hereafter in this Chapter referred to as the Commissioner (Appeals)] within sixty days from the date of the communication to him of such decision or order:

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(2) Every appeal under this section shall be in the prescribed form and shall be verified in the prescribed manner.”

7. *It is to be noted that the periods “sixty days” and “thirty days” have been substituted for “within three months” and “three months” by Act 14 of 2001, with effect from 11-5-2001.*

8. *The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not*

vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The

language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

4. Before deciding the issue on merit, it is desirable to find out whether the appeal is barred by limitation or not.

5. Sub-section (1) of Section 61 of the 'I&B Code' empowers an aggrieved person to prefer an appeal before the National Company Law Appellate Tribunal against an order passed by the Adjudicating Authority (National Company Law Tribunal). Sub-section (2) of Section 61 prescribes period of limitation and reads as follows:

"61. Appeals and Appellate Authority.— (1)

Notwithstanding anything to the contrary contained under the Companies Act 2013, any person

aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.”

6. The aforesaid provision of Section 61(2) makes it clear that the appeal has to be preferred within 30 days and the power of condonation is only for 15 days' delay and not more than that.

7. In the present case, the question arises as to how the period of 30 days is to be counted.

8. Section 420 of the Companies Act, 2013 prescribes the manner in which the National Company Law Tribunal (Adjudicating Authority) is to pass order. Sub-section (3) of Section 420 mandates the Tribunal to

send a copy of every order to all the parties concerned, which reads as follows:

“420. Orders of Tribunal.— (1) *The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.*

(2) *The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:*

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) *The Tribunal shall send a copy of every order passed under this section to all the parties concerned.”*

9. The National Company Law Tribunal Rules, 2016 also stipulates supply of free copy of the order to the parties.

10. The Appellant herein has been provided with free certified copy of the order by the National Company Law Tribunal, Kolkata Bench vide letter No. NCLT/CP(IB)-646/18/2468 dated 29th January, 2018, which has been received by the Appellant subsequently. Even if we calculate the date of 30 days from 29th January, 2018, 30 days will be completed as on 27th February, 2018.

11. In the 'Central Excise Act, 1944', there is no mandate under the Act to provide free certified copy to the aggrieved person nor such provision has been made in the Rules framed thereunder. Therefore, the decision in "***Singh Enterprises v. Commissioner of Central Excise***" (Supra), as referred to by the counsel for the Respondent, cannot be directly applicable in the present case for the purpose of counting the period of limitation.

12. The appeal thereafter preferred on 5th March, 2018 and as such it is to be held that the appeal has been filed after 6 days of completion of 30 days. Further, having noticed that the letter dated 29th January, 2018 was sent to the Appellant by speed-post, the envelop which has been produced before us and received on 30th January, 2018, we hold that there is a delay of only 4 days in preferring the appeal and as such being satisfied, we condone the delay.

13. We may observe that we have not taken into consideration the decision of the Hon'ble Supreme Court in "***Singh Enterprises v. Commissioner of Central Excise***" (Supra) as in the 'Central Excise Act, 1944' there is no provision of communicating certified copy and there is no mandate to provide free certified copy to the concerned person and, therefore, we have noticed that the aforesaid decision is not applicable in the present case.


14. So far as maintainability of Section 9 is concerned, we find that the application under Section 9 was not maintainable for the reasons mentioned hereunder.

15. A 'Memorandum of Understanding' was reached between 'M/s. Hindustan Controls and Equipment Pvt. Ltd.'- ('Corporate Debtor') and 'M/s. Mahendra Trading Company'- (partnership firm- 1st Appellant). 'M/s. Hindustan Controls and Equipment Pvt. Ltd.' is engaged in business of development, marketing, sales and manufacturing of electrical control panel and execution of turnkey electrical projects.

16. With regard to payment of dues amounting to Rs.1,51,17,694/- as claimed by 1st Appellant- 'M/s. Mahendra Trading Company' was not cleared by 'M/s. Hindustan Controls and Equipment Pvt. Ltd.', the 1st Appellant ('Operational Creditor') moved before the 'Calcutta Electric Traders Association' of which 1st Appellant is a member alleging non-

clearance of the amount by the 'Corporate Debtor'. On the request of the 1st Appellant ('Operational Creditor'), the 'Calcutta Electric Traders Association' by letter dated 31st August, 2017 intimated the Managing Director of 'M/s. Hindustan Controls and Equipment Pvt. Ltd.'- ('Corporate Debtor') that the 1st Appellant has informed that the 'Corporate Debtor' is not clearing the amount and, therefore, requested the 'Corporate Debtor' to assign reasons for non-payment of the amount and to file reply so as to take further course of action. The letter dated 31st August, 2017 is extracted below:

THE CALCUTTA ELECTRIC TRADERS ASSOCIATION
 Registered Under Act XXI of 1939 (Amended Act XXVI of 1951) No. 9855 dL 18th September 1939
 55, EZRA STREET, 2ND FLOOR, KOLKATA - 700 001, TEL : 2235-5899/2234-1157/3993-1550
 Visit Us : www.ceta.co.in • e-mail : secy.cetacal@gmail.com • Smart : 1550
 Oldest Representative Association of Electrical Trade & Commerce of West Bengal
 GLORIOUS 78 YEARS OF SERVICES DEDICATED TO NATION FOR TRADE & COMMERCE

ESTD. 1939

To
 The Managing Director,
 M/s Hindustan Control & Equipment Pvt. Ltd.
 P-16, Kasba Industrial Estate, P-I
 Kolkata - 700 107

31st August 2017

Sub: Payment of dues amounting to Rs. 1,51,17,694/- of M/s Mahendra Trading Co., 51, Ezra Street, Kolkata - 700 001

Dear Sir,


We have been informed by M/s Mahendra Trading Co., 51, Ezra Street, Kolkata - 700 001, who is our life member since long, that you are not clearing their dues of Rs. 1,51,17,694/- since long.

We would now request you to inform us as why you are not making the payment and when you are going to clear their dues.

We would appreciate to have your reply within a fortnight falling which we would be open to take further course of action at our end.

Thanking You.

Yours faithfully,
 For The Calcutta Electric Traders Association


 Shankar Lal Aggarwal
 Chairman
 Arbitration Committee
 (M) 98305 03735

Cc. to : M/s Mahendra Trading Co.
 51, Ezra Street, Kolkata - 700 001

President
 BIJAY KUMAR SURANA
 ☎ 3995-1403, 98312 78403

Vice President
 ASHOK KR. BANKA
 ☎ 2235 7111, 93397 79911

Hony. Secretary
 ARVIND TIWARY
 ☎ 3985 1895, 98302 20925

Treasurer
 SANDEEP RATHI
 ☎ 2235 0647, 98306 93231

17. In the eye of law, there is no arbitration proceeding pending or initiated under the Arbitration and Conciliation Act, 1996. However, the aforesaid fact discloses that there was a dispute relating to payment of the dues and the letter issued by the 'Calcutta Electric Traders Association' suggests that there is pre-existence dispute. Therefore, we are of the view that the Adjudicating Authority has rightly held that there being pre-existence of dispute, the application was not maintainable.

The appeal is dismissed with aforesaid observations. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI
25th November, 2019

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