

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 936 of 2021

[Arising out of Order dated 08.06.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench V, in Company Application No. 878/ND/2020]

IN THE MATTER OF:

**M/s. Essjay Ericsson Private Limited
Through its Authorised Representative
Sh. B.K. Garg,
S-18E, School Block Shakarpur
Delhi-110092**

...Appellant

Versus

**M/s. Frontline (NCR) Business Solutions Pvt. Ltd.
B-48, Ground Floor, Naraina Industrial Area,
Phase-II, New Delhi- 110028**

...Respondent

Present:

**For Appellant: Mr. Partho Bhattacharya and Mr. Anand Kumar
Singh, Advocates.**

For Respondent: Mr. Rajeev Narayan, Advocate.

**ORDER
(10th January, 2022)**

Ashok Bhushan, J.

1. This Appeal has been filed against the judgment and order dated 08.06.2021 in Company Application No. 878/ND/2020 passed by the by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench V, by which Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) by the Appellant has been rejected.

2. Learned Counsel for the Respondent at very outset contended that this Appeal is barred by time and should be rejected on the ground of delay. No Application for condonation of delay has been filed by the Appellant. Learned Counsel submitted that the impugned judgment was passed on 08.06.2021 and this Appeal has been filed on 02.09.2021 i.e. much after expiry of limitation for filing an Appeal.

3. Learned Counsel for the Appellant refuting the submission of the Learned Counsel for the Respondent submits that the present Appeal is not barred by time. He submits that in view of the judgment of the Hon'ble Supreme Court passed in *Suo Motu Writ Petition No. 3 of 2020* dated 23.09.2021, the Appellant is entitled to claim extension for the limitation till 02.10.2021. The Appeal having been filed before that the same is not barred by time.

4. Learned Counsel for the Respondent elaborating his submissions contends that judgment of the Hon'ble Supreme Court in *Suo Motu Writ Petition No. 3 of 2020* shall not be treated as automatic extension of limitation. An Applicant seeking benefit of limitation as provided in the judgment of the Hon'ble Supreme Court has to file an Application under Section 5 of the Limitation Act, 1963 and satisfy the Court that there was sufficient ground for condonation of delay.

5. Learned Counsel for the Appellant has placed reliance on judgment of the Delhi High Court in the matter of ***"Bharat Kalra vs. Raj Kishan Chabra-***

CM (M) 429/2021” decided on 12.08.2021. Learned Counsel has also placed reliance on the judgment of the Hon’ble Supreme Court in **“Sagufa Ahmed and Ors. vs. Upper Assam Polywood Products Pvt. Ltd. & Ors.- (2021) 2 SCC 317”**.

6. We have considered the submissions of the Learned Counsel for the parties and perused the record.

7. From the submissions of the Learned Counsel for the parties, following two issues arise for consideration: -

- (i) Whether judgment and order of the Hon’ble Supreme Court passed in Suo Motu Writ Petition No. 3 of 2020 shall operate as automatic extension of the limitation?
- (ii) Whether for taking benefit of judgment of the Hon’ble Supreme Court passed in Suo Motu Writ Petition No. 3 of 2020, an Applicant has to file an Application for condonation under Section 5 of the Limitation Act, 1963 and satisfy the Court/Tribunal that sufficient cause has been made out for condonation of delay?

ISSUE NOS.(1) and (2):-

8. We may first notice the judgment of the Hon’ble Supreme Court passed in Suo Motu Writ Petition No. 3 of 2020 to find out the purport and effect of the judgment. The first order passed by the Hon’ble Supreme Court was order dated 23.03.2020. By order dated 23.03.2020, following was directed:-

“This Court has taken Suo Motu cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.”

9. Subsequently, in the same proceeding, Suo Motu Writ Petition was disposed of by subsequent judgment dated 08.03.2021. Further directions were issued in paragraph 2:-

“2. We have considered the suggestions of the learned Attorney General for India regarding the

future course of action. We deem it appropriate to issue the following directions: -

1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.

3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”

10. Miscellaneous Application No. 665 of 2021 was filed in SMW (C)No. 3 of 2020 which was also disposed of by the Hon'ble Supreme Court vide its order dated 23.09.2021 by direction issued in paragraph 8, which is to the following effect:-

“8. Therefore, we dispose of the M.A. No.665 of 2021 with the following directions: -

- I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.*
- II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.*
- III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996,*

Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

- IV. *The Government of India shall amend the guidelines for containment zones, to state. "Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."*

11. When we peruse all the above orders, it is clear that what was directed by the Hon'ble Supreme Court was extension of period of limitation prescribed in general law and special law and the order was passed by the Hon'ble Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution of India. In the order dated 23.09.2021, the Hon'ble Supreme Court while referring to its earlier order dated 23.03.2020 has stated that ***"this Court directed extension of the period of limitation in all proceedings before the Courts/ Tribunals including this Court w.e.f. 15.03.2020 till further orders"***. Paragraph 1 of the order is as follows:-

“1. Due to the outbreak of COVID-19 pandemic in March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State). On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders.”

12. When the Hon’ble Supreme Court in exercise of jurisdiction of Article 142 of the Constitution of India has directed for extension of period of limitation, a litigant is entitled for the benefit of extended period of limitation and if the petition, application, suit, appeal etc. are filed within extended period of limitation, the application, appeal, suit etc. shall be treated within period of limitation. When the Hon’ble Supreme Court has granted extension of period of limitation, it cannot be said that appeal, suit or application which is filed during the relevant period is barred by time so as requiring an Application under Section 5 of the Limitation Act, 1963 for condonation of delay. When the appeal, suit, application etc. is filed within period of limitation as extended by the Hon’ble Supreme Court, there does not arise any occasion to pray for condonation of delay for filing suit, application or appeal. However, if a litigant being over cautious files an Application under Section 5 of the Limitation Act, 1963, no exception can be taken to that

proceeding but there is no requirement in law to file an application under Section 5 of the Limitation Act, 1963.

13. Further, when an application, appeal or suit etc. is filed within extended period of limitation as directed by the Hon'ble Supreme Court, as noted above, there is no discretion left with the Court or Tribunal to hold that application, appeal or suit is delayed when there is no requirement of filing application under Limitation Act. In above circumstances, discretion of Court to consider sufficient cause does not arise.

14. We may now notice two judgments relied by the Learned Counsel for the Respondent in support of his submissions.

15. Learned Counsel for the Respondent has firstly relied on the judgment of the Hon'ble Supreme Court in **“Sagufa Ahmed and Ors.”**. Learned Counsel has relied on paragraphs 19 and 23 of the judgment which is to the following effect:-

“19. But we do not think that the appellants can take refuge under the above order. What was extended by the above order of this Court was only “the period of limitation” and not the period upto which delay can be condoned in exercise of discretion conferred by the statute. The above order passed by this Court was intended to benefit vigilant litigants who were prevented due to the pandemic and the lockdown, from initiating proceedings within the period of limitation prescribed by general or special law. It is

needless to point out that the law of limitation finds its root in two latin maxims, one of which is Vigilantibus Non Dormientibus Jura Subveniunt which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

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23. Therefore, the expression “prescribed period” appearing in Section 4 cannot be construed to mean anything other than the period of limitation. Any period beyond the prescribed period, during which the Court or Tribunal has the discretion to allow a person to institute the proceedings, cannot be taken to be “prescribed period”.

16. The observations of the Hon’ble Supreme Court in paragraph 19 is that what was extended by the order of Hon’ble Supreme Court was the period of limitation and not the period for which the delay can be condoned in exercise of discretion conferred by the statute. The said observation fully supports the view which we are expressing regarding the effect of order of the Hon’ble Supreme Court passed in Suo Motu Writ Petition No. 3 of 2020. In a case where excluding the period of extension of limitation, there is still some delay in filing an application or appeal, it is always open for the Applicant/Appellant to file an Application seeking condonation of delay which has to be decided in discretion of the Court or Tribunal. Further in paragraph 23, the Hon’ble Supreme Court held that *“Any period beyond the **prescribed period**, during which the Court or Tribunal has the discretion to allow a person to institute the proceedings, cannot be taken to be “prescribed period”.* Thus,

prescribed period of limitation is only the period of limitation as provided under special and general law and extended by the Hon'ble Supreme Court by order passed in *Suo Motu Writ Petition No. 3 of 2020*. Any period beyond the said period rightly cannot be held to be prescribed period and for the period which is beyond the above extended period of limitation a sufficient cause has to be made out for a litigant to avail the benefit of Section 5 of the Limitation Act. Judgment of the Hon'ble Supreme Court in ***"Sagufa Ahmed and Ors."*** (supra) in no manner support the submissions of the Learned Counsel for the Respondent.

17. Learned Counsel for the Respondent has heavily relied on the Delhi High Court judgment in CM(M) 429/2021 in ***"Bharat Kalra"*** (supra). Delhi High Court was considering a case where delay in filing written statement was not condoned by the Trial Court against which the Defendant had filed the petition. Before the High Court, reliance on the order of the Hon'ble Supreme Court in *Suo Motu Writ Petition* was claimed by the Petitioner. Delhi High Court has noted the orders passed by the Hon'ble Supreme Court on 23.03.2020 and 08.03.2021 in paragraphs 10 and 11. It may also be relevant to notice that summons was served on the Defendant on 11.01.2020 and he did not file the written statement until 20.08.2020. An Application was filed seeking condonation of delay in filing the written statement. Defendant had prayed for condonation of delay in filing the written statement which was rejected and petition was filed in the High Court. In the above reference, observation has been made by the Delhi High Court in paragraphs 13 and 15 which are to the following effect:-

“13. While it is true that the power to condone delay is intended to advance substantive justice, nevertheless, procedure cannot be given a complete go by. The powers of the court to condone delay is to be used in appropriate cases. No litigant can assume that, as a matter of right, the delay in taking steps would be condoned, because procedure is the handmaiden of substantive justice. Rights accruing to the opposite party on account of the delayed action need to be also kept in mind. The reasons given for explaining the delay are of paramount importance and not the length of the delay. The shortness of delay alone ought not to suffice for exercise of discretion to condone it. Cogent and clear explanations have led the courts to condone the delay, even of five years in filing the pleadings.

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15. It was thus made clear that the benefit of the order dated 23rd March, 2020 would be available only to those who were vigilant of their rights and not lethargic. There is also nothing in the orders of the Supreme Court that suggests that when an action has not been taken within the prescribed period of limitation, the merits of the application for condonation of delay need not be looked into and the same is to be allowed automatically. Only where the limitation has expired during the lockdown and even the extended period, which can be allowed in the discretion of the court, also expired in the lockdown period, a party can claim that no delay has occurred

as the Supreme Court had enlarged limitation periods prescribed.”

18. The observations made by the Delhi High Court have to be confined to the delay which was caused by a litigant before order in Suo Motu Writ Petition No. 3 of 2020 was passed i.e. before 15.03.2020 from which date period of limitation was extended. Admittedly, there was delay in filing written statement in the above case which period had expired before 15.03.2021 hence, observations in paragraph 13 and 15 has to be confined to that period. In event, it is accepted that even for the period after 15.03.2020, a litigant has to file an Application for condonation of delay showing sufficient cause for period which was covered within extended limitation granted by the Hon’ble Supreme Court, the same order will be contrary to plain reading of the Hon’ble Supreme Court judgment in Suo Motu Writ Petition No. 3 of 2020 passed on 23.03.2020, 08.03.2021 and 23.09.2021.

19. We, thus, are of the view that observations of the Delhi High Court in paragraphs 13 and 15 which are relied by the Counsel for the Respondent for contending that the Appellant before us has to file an Application under Section 5 of the Limitation Act and it is the discretion of the Court/ Tribunal to condone the delay or not, cannot be accepted. When the limitation has extended by the Hon’ble Supreme Court in the orders noted above, for a period covering extension of limitation neither application is required nor there is any discretion of Court or Tribunal to consider sufficiency of delay. We are of the view that unless the observations of the Delhi High Court in paragraphs 13 and 15 are not read to be with regard to period not covered by Hon’ble

Supreme Court Judgment, the said observations shall be clearly in conflict with direction of the Hon'ble Supreme Court and cannot be held to be correct law.

20. We may also refer to judgment of the Kerala High Court where Suo Motu judgment passed by the Hon'ble Supreme Court in Writ Petition No. 3 of 2020 came for consideration. Kerala High Court also took the view that in case appeal or application is filed within the period of limitation as extended by the Hon'ble Supreme Court, there is no occasion to file application for condonation of delay under Section 5 of the Limitation Act. In R.C. Rev. No. 144 of 2021- ***"K. Sulaiman vs. K.P. Nafeesa and Ors."*** decided on 18.11.2021, following was held in paragraphs 7 and 8:-

"7. In Re: Cognizance for Extension of Limitation [2021 (5) KHC 508] a Three-Judge Bench of the Apex Court held that in computing the period of limitation for any suit, appeal, application or proceedings, the period from 15.03.2020 till 12.10.2021 shall stand excluded.

8. In view of the aforesaid decision of the Apex Court, there is no necessity for the tenant to file an application for condonation of delay along with R.C.A. No. 99 of 2020, since the said appeal can be treated as one filed before the Rent Control Appellate Authority, Kozhikode, within the period of limitation."

21. In the present case, the impugned judgment passed on 08.06.2021 and Appeal having been filed on 02.09.2021, both dates being fully covered within

the order dated 08.03.2021 and last order dated 23.09.2021, there was no requirement of filing an Application for condonation of delay by the Appellant and the Appeal cannot be held to be barred by time. We, thus, overrule the objection raised by the Counsel for the Respondent and hold the Appeal to be within time.

22. Let the Appeal be listed 'For Admission' on **17.01.2022**.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

New Delhi
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