



## **NCLAT: Re-filing of an Appeal after the limitation period would not amount to a fresh filing**

The 5 (five) judge bench of the National Company Law Appellate Tribunal (“**NCLAT**”)<sup>1</sup> has recently decided the long-standing issue of whether re-presentation of appeal constitutes a fresh filing before the NCLAT and its implication on the period of limitation. The NCLAT has held, *inter alia*, that ‘re-filing’ an appeal (after curing defects) beyond the prescribed 7 (seven) days period will not amount to a ‘fresh filing’ for the purposes of the limitation.

### **Facts**

A batch of appeals were (independently) filed before the NCLAT. After scrutiny, the NCLAT notified defects in these appeals. Rule 26 of the NCLAT Rules, 2016 (“**NCLAT Rules**”) prescribe a period of 7 (seven) days to cure the defect and re-present the appeal. However, the respective appellants re-filed the appeal after delays of 43 (forty three) days, 35 (thirty five) days, 40 (forty) days, and 105 (one hundred and five) days respectively.

These appeals were listed before the 3 (three) member bench of the NCLAT under the list of appeals ‘For Admission (Fresh Case) with defects’. The NCLAT took up the preliminary issue of re-filing delay, and expressed its doubt on the earlier decisions of the NCLAT in the case of Mr. Jitendra Virmani v. MRO-TEK Realty Ltd.<sup>2</sup> (“**Jitendra Virmani**”) and Arul Muthu Kumaara Samy v. Registrar of Companies<sup>3</sup> (“**Arul Mrunu**”), resulting in the reference to larger bench on the following 2 (two) questions:

1. Whether the NCLAT in the case of Jitendra Virmani and Arul Mrunu has laid down the correct law that when the defect in an appeal is cured and it is refiled, the date of re-presentation of the appeal shall be treated as a fresh appeal?
2. Whether the limitation prescribed for filing an appeal before NCLAT under Section 61 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) or Section 421 of the Companies Act, 2013 (“**Companies Act**”) also governs the period under which a defect in the appeal is to be cured? Further, would the NCLAT have no jurisdiction to condone the delay in re-filing if it is beyond the limitation prescribed in the above stated Sections?

<sup>1</sup> V.R. Ashok Rao v. TDT Copper Ltd., Company Appeal (AT) (Ins) No. 780 of 2022; Stressed Assets Stabilization Fund v. Delta International Ltd., Company Appeal (AT) (Ins) No. 823 of 2022; A'XY Kno Capital Services Pvt. Ltd. v. Rattan India Power Ltd., Company Appeal (AT) (Ins) No. 913 of 2022; and Bhagwati Singh v. Incab Industries Ltd., Company Appeal (AT) (Ins) No. 914 of 2022.

<sup>2</sup> (2017) SCC OnLine NCLAT 7.

<sup>3</sup> (2020) SCC OnLine NCLAT 671.

## Position of law

### Re-filing under NCLAT Rules

Rule 26 of the NCLAT Rules stipulates that if the appeal (or any documents attached to it) is defective, the appellant has to cure the defect and 're-present' the appeal within 7 (seven) days. Any delay in complying within 7 (seven) days, the same shall be placed before the Registrar who may pass appropriate authorities. Under Rule 26(3), the Registrar may either direct rectification or extend the time for compliance. Rule 26(2) and Rule 26(3) does not indicate any penal consequences for removal of defects after 7 (seven) days.

### NCLAT decisions

In 2017, the 2 (two) member bench of the NCLAT held in the case of Jitendra Virmani that if defects are removed after 7 (seven) days, the appeal is treated to be a fresh appeal. Subsequently, in 2020, the 3 (three) member bench followed the decision of Jitendra Virmani and dismissed an application for condonation of delay of 338 (three hundred thirty eight) days in the case of Arul Mrunu on the ground that the re-filing was a fresh filing and under the Code, the NCLAT cannot condone the delay beyond 45 (forty five) days.

### Limitation

An appeal before the NCLAT lies against an order of the National Company Law Tribunal ("NCLT"). The limitation period for the appeal is - (i) 45 (forty five) days for an NCLT order under the Code, and (ii) 90 (ninety) days for an NCLT order under the Companies Act.

## NCLAT: Findings and Rationale

After consideration of the aforementioned provisions of the Code, the NCLAT Rules and the Companies Act, as well as judicial rulings on the issue of re-filing delay, the NCLAT has held that (i) 're-filing an appeal' (after curing defects) beyond the prescribed 7(seven) day period will not amount to a 'fresh filing' for the purposes of the limitation; and (ii) the limitation periods under the Code and Companies Act do not apply to re-filing/representation of an appeal. The key considerations and findings in this regard are set out below:

### 1. The 7(seven) day re-filing period is directory, not mandatory

- (a) There is a specific power under Rule 26(3) of the NCLAT Rules to extend the time for compliance, and accordingly, the period of 7 (seven) days cannot be said to be mandatory period.
- (b) The filing of appeal (presentation) under Rule 22 of the NCLAT Rules is distinct from re-filing (re-presentation) under Rule 26 of the NCLAT Rules.
- (c) Rule 5(3) of the Delhi High Court (Original Side) Rules, 1967 ("**Delhi High Court Rules**") specifically provides that filing beyond the period allowed by the deputy registrar will be treated as a fresh filing. However, under Rule 26 of the NCLAT Rules, there is no concept of fresh filing in case defects are not cured in 7 (seven) days, as has been expressly provided in Delhi High Court Rules. Therefore, re-presentation of an appeal beyond 7 (seven) days, under NCLAT Rules, in no manner said to be fresh filing.
- (d) Hence, the judgement in the case of Jitendra Virmani cannot be held to be good law.

### 2. Limitation period of filing an appeal cannot be applied to re-filing/re-presentation of appeals

- (a) The limitation provided under Section 61 (2) of the Code and Section 421 of the Companies Act is the limitation period to file an appeal. These provisions do not lay down any limitation for re-presentation/refiling of the appeal.
- (b) Rule 26 of the NCLAT Rules which govern the position on re-filing/re-presentation of appeals does not provide for any limitation.
- (c) When Rule 26(3) of the NCLAT Rules empowers the Registrar to condone delay in re-filing, such power is not hedged by any period of limitation. Hence, no limitation is prescribed for re-presentation/refiling of an appeal.

- (d) The limitation prescribed for filing an appeal does not govern the limitation period for re-presentation/refiling of an appeal<sup>4</sup>.

## Conclusion

In a nutshell, the key takeaway from this judgement is that-

1. The requirement under Rule 26 of the NCLAT Rules for re-filing the appeal (after curing defects) within 7 (seven) days is directory, and not mandatory.
2. The limitation prescribed for filing an appeal before the NCLAT under Section 61 of the Code and Section 421 of Companies Act cannot be imported while considering condonation of delay in re-filing/ representation. Therefore-
  - (a) 're-filing an appeal' (after curing defects) beyond the prescribed 7 (seven) day period will not amount to a 'fresh filing' for the purposes of the limitation
  - (b) the criterion for considering an application for condonation of delay under Section 5 of the Limitation Act, 1963 may not be strictly applicable when question of condonation of delay in re-filing/re-presentation arises.

## JSA Comment

1. The limitation for filing an appeal was always only prescribed under Section 61 of the Code and Section 421 of the Companies Act. The earlier NCLAT decisions of Jitendra Virmani and Arul Mrunu added an additional layer of limitation, which was neither contemplated by the legislation, nor the executive while notifying the NCLAT Rules.
2. This decision simply upholds the settled principle of law that a party's substantive rights cannot be extinguished on procedural technicalities. Once an appellant has filed its appeal within the limitation period of the Code or the Companies Act, it has established its vigilance to comply with the law to prefer the appeal. A dismissal on the ground of delayed curing of defects interferes with a substantial right.
3. This decision is in line with the Supreme Court's decision in Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Ltd. & Ors.<sup>5</sup>, where the 7 (seven) day period for curing defects in applications prescribed under the proviso(s) to Section 7(5), 9(5) and 10(4) of the Code was held to be directory, and not mandatory.
4. Practically also, appeals are filed from different parts of the country and are subject to a very pedantic scrutiny. Therefore, there was a genuine need to import some leeway in the 7 (seven) day defect curing period before the NCLAT to safeguard a party's substantive rights.

<sup>4</sup> This position has been upheld by the Delhi High Court in the context of Section 34 of the Arbitration & Conciliation Act, 1996 [*Delhi Development Authority v. Durga Construction, 2013 (139) DRJ 133 (DB)*]

<sup>5</sup> (2017) 16 SCC 143.

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