

Delay in filing an appeal from an order of the NCLT beyond the period of 90 days cannot be condoned – Supreme Court.

In ***Bengal Chemists and Druggist Association Vs Kalyan Chowdhury (Civil Appeal No. 684 of 2018)*** the Supreme Court discussed the provisions of Sections 421 and 433 of the Companies Act, 2013 (**the Act**) which provide for filing of appeals from the orders of the National Company Law Tribunal (**NCLT**) within a period of 45 days with a further grace period of 45 days, (i.e. 90 days) subject to the Appellate Tribunal (**NCLAT**) being satisfied that the Appellant was prevented by a sufficient cause from filing an appeal within the first 45 days. It was held that the provisions are pre-emptive in nature. Once the period of 90 days expires, the appeal becomes time-barred and the delay cannot be condoned by invoking the provisions of the Limitation Act, 1963.

Facts: In the *Bengal Chemists* case, the appeal was preferred by the Appellant from an order of the NCLT before the NCLAT. However, since the appeal was filed after a delay of 9 days from the expiry of the period of limitation provided under Section 421(3) of the Act, the appeal was dismissed by the NCLAT. Assailing this order of the NCLAT, the Appellant preferred an appeal before the Hon'ble Supreme Court.

Submissions: Relying upon Section 433 of the Act, it was submitted by the Appellant that the provisions of the Limitation Act, 1963 apply to the proceedings or appeals before the NCLT and the NCLAT, and therefore Section 5 of the Limitation Act, 1963 (which provides for condonation of delay for sufficient cause in case of appeals), would be applicable to condone the delay beyond the period of 90 days provided under Section 421(3) of the Act.

It was also pointed out that the provisions of Section 421(3) of the Act do not contain the language as that of Section 34(3) of the Arbitration and Conciliation Act, 1996 which has a similar provision and provides for a 3-month period for filing an application to set aside an award with an extended period of 30 days. But the proviso to Section 34(3) explicitly states that if the application is not preferred within the

prescribed time i.e. 3 months and 30 days, then the application would become time-barred.

Judgment: The Supreme Court has discussed in detail the language of the provisions of Section 421(3) and Section 433 of the Act which are as follows:

"421. Appeal from orders of Tribunal. -

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*(3) Every appeal under sub-section. (1) shall be filed **within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved** and shall be in such form, and accompanied by such fees, as may be prescribed:*

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

*Section. 433. Limitation. - The provisions of the Limitation Act, 1963 shall, **as far as may be**, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be."*

It was observed by the Hon'ble Supreme Court that a cursory reading of Section 421(3) makes it clear that the proviso provides a limitation different from that provided in the Limitation Act, 1963. Further, the proviso provides a further period **not exceeding 45 days** subject to NCLAT, being satisfied that the

Appellant was prevented by a sufficient cause from filing an appeal within 45 days. Therefore, reliance cannot be placed upon the Section 433 of the Act, to invoke the provisions of the Limitation Act, 1963 as it applies to a limited extent possible in view of the words "**as far as maybe**" contained in Section 433 of the Act. It was also observed that since the proviso to Section 421(3) of the Act is a special provision, therefore general provisions like Section 5 of the Limitation Act, 1963 cannot apply. As the grace period of 45 days provided under Section 421(3) of the Act, is a special inbuilt Section 5 of the Limitation Act, 1963 which lays down that beyond the second period of 45 days, there can be no further condonation of delay.

Analysis: In *Bengal Chemists* case, reliance was placed by the Hon'ble Supreme Court on the judgment of ***Chhattisgarh SEB Vs Central Electricity Regulatory Commission, (2010 (5) SCC 23)***, where the language similar to Section 421(3) of the Act was interpreted by the Supreme Court. In this judgment, it was held by the Supreme Court that Section 5 of the Limitation Act, 1963 cannot apply to Section 125 of the Electricity Act, as the Section specifically provides for a limitation period of 60 days with an extension of 60 days on sufficient cause being shown. Further in view of the language of the proviso to Section 125 of the Electricity Act which uses the expression "**within a further period not exceeding 60 days**", the Supreme Court had no hesitation to hold that the outer limit for filing an appeal is 120 days and an appeal filed after the expiry of 120 days cannot be entertained. This ratio was also reiterated and followed by the Hon'ble Supreme Court in ***ONGC v. Gujarat Energy Transmission Corporation Limited, (2017 (5) SCC 42)***.

It is worth noting the that aforesaid decision of the Supreme Court duly supports the principle that the

right to appeal is not a natural or inherent right and is only a right provided by the statute. Therefore, it will be governed by the specific provisions provided in the statute limiting the same. (***Anant Mills Co. Ltd Vs State of Gujarat, (AIR 1975 SC 1234)***)

It was also noted by the Hon'ble Supreme Court in the *Bengal Chemists* case that although there is a difference between the expressions used in Section 34 of the Arbitration and Conciliation Act, 1996 and in the proviso to Section 431(3) of the Act, it would make no difference as the proviso to Section 431(3) of the Act contains a mandatory or peremptory negative language viz. "**not exceeding 45 days**". It was noted that these words have the same effect as the expression "**but not thereafter**" used in the proviso to Section 34 of the Arbitration and Conciliation Act, 1996.

Conclusion: After discussing the provisions of the Companies Act, 2013 at length, the Hon'ble Supreme Court held that the limitation period to file an appeal from an order of NCLT is 45 days alongwith a further period not exceeding 45 days only if a 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, if the Section 5 of the Limitation Act, 1963 is held to be applicable, which in effect would mean that notwithstanding that the further period of 45 days had elapsed, the NCLAT may, if the facts so warrant, condone the delay. Therefore, if Section 5 of the Limitation Act, 1963 is made applicable, it would render otiose the second-time limit of 45 days under Section 421(3) of the Act. Therefore, once the period of 90 days expires, the appeal becomes time-barred and the delay cannot be condoned by the NCLAT.

The content of this article is intended to provide a general guide to the subject matter and should not be construed as legal advice.