



# INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

## IBC Case Law Capsule

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(March 13, 2023)

**M/s. SMS Foundation & Investment LLP. Vs. J. John Ohilvi**  
**Company Appeal (AT) (CH) (INS) No. 41 of 2023**  
**Date of NCLAT's Judgements March 07, 2023**

### Facts of the Case: -

The current Appeal is filed by the M/s SMS Foundation & Investment LLP (hereinafter referred as “Appellant”) after being aggrieved by the Impugned order dated 11.10.22 passed by AA.

The AA rejected the Appellant claim to consider him as ‘Financial Creditor’ because of the fact that the Appellant fall under the category of Shareholder. The Appellant contended that the order was never pronounced by the AA.

The Appellant stated that the order was available online on 21.11.2022 and he received the certified copy of the order on 24.11.2022. The Appellant filed the appeal through e-filing portal on 23.12.2022 but due to serious medical issues and the closure of the Tribunal on account of holidays the Appellant filed the Hard Copies of the appeal on 28.12.2022 and therefore, he had filed the instant ‘Condonation of Delay’ through IA in the current appeal to avoid any discrepancy.

The Appellant relying on the judgment in *“Balaji Baliram Mupade &anr v. The State of Maharashtra & Ors”* pleaded that the delay of five days in physical filing of the hard copies may be condoned and the appeal may be allowed.

The RP of M/s Harsha Exito Engineering Pvt. (hereinafter referred as “Respondent”) citing the judgement in *“V. Nagarajan v. SKS Ispat and Power Ltd”* sought the dismissal of the appeal on the ground that the Appellant had knowledge of the order dated 11.10.2022 and the limitation period started from that date.

### NCLAT Observations:

The Appellate Tribunal placing their reliance on the judgment given by Hon’ble Supreme Court in *Central Bank of India v. Vrajlal Kapurchand Gandhi & Anr.* held that the order in question is a matter of ‘Judicial Record’ of the AA and the contra stand taken on behalf of the Appellant is not accepted.



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The Appellate Tribunal further stated that the Appellant cannot have any grievance as the impugned order was pronounced in Open Court in the presence of authorized representative of the appellant. There is sufficient compliance of Rule 150(1) of the NCLT Rules, 2016 and hence the limitation will be counted from 11.10.22.

The Appellate Tribunal observed that the 45 days period lapsed on 25.11.22 and E-filing of the Appeal papers were made by appellant on 23.12.22, i.e. on 73<sup>rd</sup> day counted from impugned order dated 11.10.2022, after deducting 45days from Outer Limit period, there is a delay of '28 days' and there is no power enjoined upon the Appellate Tribunal to condone the delay beyond the prescribed period as per section 61 of IBC 2016.

**Order/Judgement:** The 'Condone Delay Application' filed by the appellant is not entertained and the same stand rejected.

**Case Review:** Appeal is dismissed.