IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: October 31, 2019

\+ CS(COMM) 1261/2018 & I.A. No. 10178/2019 and O.A. No. 81/2019

ODEON BUILDERS PVT. LTD.

..... Plaintiff

Through: Mr. Karunesh Tandon and Mr. Mayur Singhal, Advs.

versus

NBCC (INDIA) LIMITED FORMERLY KNOWN AS NATIONAL BUILDINGS CONSTRUCTION CORPORATION LTD.

..... Defendant

Through: Ms. Shilpi Chowdhary and Mr. Jasdeep Singh Dhillon, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

I.A. No. 10178/2019 (for delay)

This application has been filed by the appellant / plaintiff seeking condonation of 22 days in re-filing the appeal being OA 81/2019.

For the reasons stated in the application delay of 22 days in re-filing the appeal is condoned.

Application stands disposed of.

O.A. No. 81/2019

1. Vide this order I shall decide this appeal filed by the plaintiff challenging the order dated May 17, 2019 of the learned Joint Registrar in CS (COMM) 1261/2018, whereby the learned Joint Registrar has closed the right of the plaintiff to file replication as well as the affidavit of admission / denial of documents.

2. It must be stated here that the suit has been filed by the plaintiff for recovery of ₹11,55,58,917 along with 18% interest against the defendant. Upon service of the summons, the defendant has submitted its written statement on January 30, 2019 / February 18, 2019. Thereafter on March 13, 2019, the learned Joint Registrar recording the factum of filing of the written statement granted liberty to the appellant / plaintiff to file replication as well as the affidavit of admission / denial of documents and adjourned the matter for April 9, 2019.

3. It is the case the appellant / plaintiff that the mother of the counsel for the appellant / plaintiff was seriously ill and remained in hospital for more than a month on account of being diagnosed with Swine Flu and as the counsel was busy in the treatment of her mother, the replication as well as the affidavit of admission / denial of documents were not filed before April 9, 2019 when the counsel sought further time to file the replication as well as the affidavit of admission / denial of documents. The learned Joint Registrar by recording the reasons for not filing the replication

granted further time to the appellant / plaintiff to file replication and affidavit of admission / denial of documents and adjourned the matter to May 17, 2019 when the impugned order was passed.

4. Mr. Karunesh Tandon, learned counsel appearing for the appellant / plaintiff would submit that the replication and the affidavit of admission / denial of documents were drafted by the counsel for the appellant / plaintiff much before May 17, 2019, but he did not get the same attested prior to May 17, 2019. On May 17, 2019, there was election of the Delhi High Court Bar Association and every counsel was busy in the election. Consequently, the replication as well as the affidavit of admission / denial of documents could not be got attested on the same day prior to 11 am and it was under these circumstances, the counsel sought two more days to file replication as well as the affidavit of admission / denial of documents and had also agreed to hand over the replication as well as the affidavit of admission / denial of documents to the counsel for the respondent / defendant but the learned Joint Registrar ignoring the aforesaid fact in utter haste closed the right of the appellant / plaintiff to file replication and affidavit of admission / denial of documents.

5. It is the submission of Mr. Tandon that there is no reason for the learned Joint Registrar not to grant further time of two days to enable the appellant / plaintiff file the replication as well as the affidavit of admission / denial of documents as the time period under the Delhi High Court (Original Side Rules), 2018 is not mandatory to be followed. This according to him is because

of Rules 14 and 16 of Chapter I of Delhi High Court (Original Side Rules), 2018, which stipulates as under:

> ***14. Court's power to dispense with compliance with the Rules-***
> *The Court may, for sufficient cause shown, excuse parties from compliance with any requirement of these Rules, and may give such directions in matters of practice and procedure, as it may consider just and expedient.*
> *[provided where the Court / Judge is of the opinion that Practice Directions are required to be issued, he may make a suitable reference to the Hon'ble Chief Justice.*
>
> ***16. Inherent power of the Court not affected –***
> *Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.*

6. It is the submission of Mr. Tandon that the above two Rules give power to the court which are inherent in nature to make such order necessary for the ends of justice or for showing justifiable reasons for which the replication could not be filed to grant time to the party, i.e., the appellant / plaintiff in this case to enable it to file replication and affidavit by way of admission / denial of the documents. In this regard, he would rely upon two judgments of this court in the case of ***Jainsons Export India v. Binatone Electronics Ltd. 58 (1995) DLT 571*** and ***Sushil Jain v. Shri Meharban Singh and Ors CS(OS) 1735/1997*** decided on August 8, 2012 to contend that the court's power is not fettered or circumscribed by any Rules of prescribed procedure which are made for promoting the ends of justice and not to thwart justice.

On a specific query to Mr. Tandon about the applicability of the judgment of the Coordinate Bench of this court in the case of ***Unilin Beheer B.V. v. Balaji Action Buildwell CS (COMM) 1683/2016 and CC (COMM) 38/2019*** decided on May 15, 2019 wherein the Coordinate Bench of this court has decided the consequence of non-filing of the affidavit of admission / denial of documents along with the written statement, by holding that the same shall have the effect of written statement filed, not taken on record, Mr. Tandon would submit that the judgment is *per-incuriam* inasmuch as the judgment has not taken into consideration the effect of Rule 14 and 16 of Chapter I of the Delhi High Court (Original Side Rules), 2018.

7. On the other hand, learned counsel appearing for the respondent would submit that in view of the specific provision of Rule 5 in Chapter VII of the Delhi High Court (Original Side Rules), 2018, wherein a time period has been prescribed for filing the replication, i.e., within 30 days of the receipt of the written statement and further extended time not exceeding 15 days, but not thereafter and *"not thereafter"* would mean that the said period is mandatory and no time beyond that period can be granted to the plaintiff to file replication.

8. She stated, in the case in hand, the written statement along with affidavit of admission / denial of documents was filed on January 30, 2019 when the counsel for the appellant / plaintiff had acknowledged the said aspect. The thirty days expired on March 02, 2019. Fifteen days thereafter would mean the

replication and affidavit of admission / denial of documents shall be filed within 15 days, i.e on or before March 17, 2019. No doubt that, on April 9, 2019, the learned Joint Registrar had granted time to the plaintiff to file replication and affidavit of admission / denial of documents within a period of one week but the same could not have been granted by him. Be that as it may, it is only thereafter on May 17, 2019, that the right of the appellant / plaintiff to file the same was closed. According to her, appellant / plaintiff had more than 45 days to file the replication and affidavit of admission / denial of documents, but still the appellant / plaintiff could not take the benefit of the period granted to it. She stated, learned Joint Registrar could not have further extended the time to enable the appellant / plaintiff to file the replication and affidavit of admission / denial of documents in view of the stipulation of the Delhi High Court (Original Side Rules), 2018. This according to her is clear from the words *"not thereafter"* which shows the rule making authority has made it clear that no time beyond a period of 45 days can be given to the plaintiff to file replication along with the affidavit of admission / denial of documents. She states, similar words "*not thereafter"* have been interpreted by the Supreme Court in catena of judgments. She relied on the judgment of the Coordinate Bench of this court in the case of ***Unilin Beheer B.V. (supra)*** and seeks dismissal of the appeal.

9. Having heard and considered the rival submissions made by the learned counsel for the parties, the issue which falls for consideration in this case is, whether the learned Joint Registrar

was right in closing the right of the appellant / plaintiff to file replication and affidavit of admission / denial of documents. To answer the issue, it is necessary to reproduce here the relevant Rule 5 of Chapter VII of Delhi High Court (Original Side Rules), 2018, which reads as under:

> ***5. Replication.*** *– The replication, if any, shall be filed within 30 days of receipt of the written statement. If the Court is satisfied that the plaintiff was prevented by sufficient cause for exceptional and unavoidable reasons in filing the replication within 30 days, it may extend the time for filing the same by a further period not exceeding 15 days but not thereafter. For such extension, the plaintiff shall be burdened with costs, as deemed appropriate. The replication shall not be taken on record, unless such costs have been paid / deposited. In case no replication is filed within the extended time also, the Registrar shall forthwith place the matter for appropriate orders before the court. An advance copy of the replication together with legible copies of all documents in possession and power of plaintiff, that it seeks to file along with the replication, shall be served on the defendant and the replication together with the said documents shall not be accepted unless it contains an endorsement of service signed by the defendant / his Advocate.*

10. Mr. Tandon, learned counsel for the plaintiff had relied upon Rules 14 and 16 of Chapter-I of Delhi High Court (Original Side Rules), 2018 which I have already re-produced above. Perusal of Rule 5 clearly reveals that the period within which replication could be filed is 30 days and 15 days as extended time. The words *"not thereafter"* under Rule 5 are of some

significance. A similar provision of this nature in the context of Arbitration and Conciliation Act, 1996 had come up for consideration before the Supreme Court in the case of ***Union of India v. Popular Construction Company (2001) 8 SCC 470*** wherein the court was considering the issue whether the provisions of Section 5 of the Limitation Act shall apply to a petition under Section 34 of the Arbitration and Conciliation Act, 1996, more specifically in view of Section 34, sub-section (3) has held as under:-

> *"12. As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result." (emphasis supplied)*

11. On similar lines, by relying upon its opinion in ***Popular Construction Co. (supra)***, the Supreme Court has in the case of ***P. Radha Bai and Ors. v. P. Ashok Kumar and Ors. 2018 (5) ARBLR 204 (SC)***, wherein the issue which fell for consideration was whether Section 17 of the Limitation Act, is applicable while determining the limitation period under Section 34 (3) of the Arbitration and Conciliation Act, the Court has in Para 37 held as under:

> *"**37.** This Court in **Popular Construction Case** (supra) at page 474 followed the same approach when it relied on the*

phrase "but not thereafter" to hold that Section 5 of the Limitation Act was expressly excluded.

> *"As far as the language of Section 34 of the 1996 Act is concerned, the crucial words are 'but not thereafter' used in the proviso to sub-section (3). In our opinion, this phrase would amount to an express exclusion within the meaning of Section 29(2) of the Limitation Act, and would therefore bar the application of Section 5 of that Act. Parliament did not need to go further. To hold that the Court could entertain an application to set aside the Award beyond the extended period under the proviso, would render the phrase 'but not thereafter' wholly otiose. No principle of interpretation would justify such a result."*

12. So it must be held by including the words *"not thereafter"* in Rule 5 of Chapter II of Rules, the rule making authority intended to exclude grant of further time for filing the replication and affidavit of admission / denial of documents after the expiry of period of 45 days. The plea of Mr. Tandon was that in view of Rule 14 and 16 of Chapter I, the court has discretion to grant further time over and above what has been prescribed in Rule 5 of Chapter VII of the Rules, I am afraid such a plea is not acceptable. Firstly, Rule 14 and 16 cannot be read in any manner to make the words "not thereafter" in Rule 5 of Chapter VII otiose. In any case, it is a settled position of law in terms of the Judgment of the Supreme Court in ***Padam Sen and Ors. v. State of Uttar Pradesh 1961 ALT 84 (SC)*** that the inherent power of the court is in addition to the power specifically conferred on the court by the Code (Rules in this case). It was held by the Supreme Court that the inherent powers are complementary to those powers and the court held that it must be held that the Court

is free to exercise them for the purpose mentioned in section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the code or against the intentions of the Legislature. In other words, it is well-recognized that inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the code.

13. This dicta in ***Padam Sen (supra)*** was approved by a Constitution Bench of the Supreme Court in ***Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal AIR 1962 SC 57.*** In a more recent judgment, a Co-ordinate Bench of this court by referring to Section 151 and Section 94 of the Code and also the judgment of the Supreme Court in ***Manohar Lal Chopra (supra)*** has held as under:-

> *"36. The Code confer powers to the Court to prevent abuse of power and secure the ends of justice. Section 151 and 94 of the Code of Civil Procedure, 1908 provide the bandwidth and flexibility so that the Court does not find itself handicapped in granting a relief if it is necessary and expedient. The logic of these provisions is that if the Court notices any shortcomings in the relevant provisions of code, it can resort to its inherent powers. I am cognizant that this power is not all pervading and ought to be used with reference to the outlines and confines given by the specific provisions relating to grant of injunctions. The inherent powers of the Code can be utilized and resorted to for issuing temporary injunctions to meet the ends of justice. However, the Court should be cautious that in the exercise of such power the statutory provisions that are specifically provided are not side-stepped or invalidated. It is pertinent to refer to the Judgment of the Supreme Court in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 57,*

wherein the Court observed that:

"19. There is nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

20. Further, the provisions of Section 151 of the Code make it clear that the inherent powers are not controlled by the provisions of the Code. Section 151 reads:
"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

21. A similar question about the powers of the Court to issue a commission in the exercise of its powers under Section 151 of the Code in circumstances not covered by Section 75 and Order 26, arose in Padam Sen v. State of Uttar Pradesh [(1961) 1 SCR 884] and this Court held that the Court can issue a commission in such circumstances. It observed at p. 887 thus:

> *"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature."*

These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in Section 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the

legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice.

23. ... ... The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."
(emphasis supplied)

14. So, it follows, the interpretation of the Rule 5 of Chapter VII in the aforesaid manner is justified, more so, when in the matter of filing a written statement under Order VIII Rule 1 CPC wherein a new proviso was added by Commercial Courts, Commercial Division and Commercial Appellate Tribunal of High Courts Act, 2015 which came into force on October 23, 2015, to mean that no further time shall be granted beyond a period of 120 days. ***(Ref:- M/s SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. and Ors. 2019 (4) Scale 574).*** No doubt, the proviso to order VIII Rule 1 CPC is different from the words used in Rule 5 of Chapter VII of the Delhi High Court (Original Side) Rules, but to have an uniformity with regard to the pleading of the parties, it must be held that 30 + 15 days for filing the replication and affidavit of admission / denial of documents is mandatory. Otherwise the

position that emerges is, for the purpose of filing written statement / affidavit of admission and denial of documents by the defendant, 120 days are mandatory and not 45 days for the plaintiff to file replication. The rule must be given a purposive interpretation. Even the Coordinate Bench of this court in ***Unilin Beheer B.V. (supra)*** has also in the context of, when affidavit of admission / denial of documents is not filed along with the written statement, on an issue whether the written statement can be taken on record, has in para 28 referred to the spirit behind overhauling of the Delhi High Court Original Side Rules, 1967 and enactment of 2018 Rules by stating as under:

> *"28. Such interpretation is also found to be in consonance with the spirit behind overhauling of the Delhi High Court (Original Side) Rules, 1967 and enactment of the 2018 Rules. With the experience of over fifty years of working of the 1967 Rules, attempt was made in the 2018 Rules to do away with the bottlenecks in the proceedings in the suits on the Original Side of this Court. One of such bottlenecks was the stage of admission / denial of documents, at which the suits remained pending, in large number of cases, for years and thereafter also not serving any purpose of expediting trial, with vague denials being made, putting the opposite party to proof of documents at the cost of consequent delays. Order XII Rule 2A of the CPC, as existed since amendment thereof of 1976, though provided that a document, which a party is called upon to admit, if not denied specifically or by necessary implication or stated to be not not admitted in the pleading of that party or in reply to notice to admit, shall be deemed to be admitted but also provided that where a party unreasonably neglected or refuses to admit a document after service of notice to admit documents, the Court may direct him to pay costs to the other party by way of compensation. The same in working, led to, as aforesaid, a practice of generally denying everything in*

pleadings, implicitly also documents and taking advantage of resultant delays in proof of documents. This resulted in suits, most of evidence wherein was documentary, also being not decided expeditiously owing to delays in proof of documents. To eliminate such malady, in the new Rules provisions aforesaid were incorporated, making affidavit of admission / denial of documents mandatory and providing stringent consequences of non-filing of affidavit of admission / denial of documents to prevent a party from abusing the process of Courts, to its own advantage and to the prejudice of opposite parties. The Scheme in entirety, as set out hereinabove, shows that the same consequences as for defendant, also follow for plaintiff for non-filing of affidavit of admission/denial of defendant's documents"

15. So, from the above discussion, it necessarily follows that the period of 30 plus extended period of 15 days are mandatory for the plaintiff to file replication along with admission / denial of documents. If the same are not filed within the time prescribed, learned Joint Registrar or the court has no power to extend time beyond that period.

16. For the reasons stated above, the appeal filed by the appellant / plaintiff is devoid of merit and the same is dismissed.

<u>CS(COMM) 1261/2018</u>

17. List before Joint Registrar for further proceedings on 12th December, 2019.

V. KAMESWAR RAO, J

OCTOBER 31, 2019/*jg*