

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRP No.137/2012 & C.M.No.18815/2012 (Stay)**

% **19th AUGUST, 2014**

NUCON INDUSTRIES PVT. LTD. Petitioner

Through: Mr.Praveen Kumar Singh with
Ms.Swasiika Kumari and
Mr.Navlendu Kumar, Advocates.

VERSUS

SMT.ZAMAN ARA & ORS. Respondents

Through: Mr.Naveen Kumar Chaudhary,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition is filed under Section 115 of Code of Civil Procedure, 1908 (CPC) impugning the order of the trial court dated 04.9.2012 which has dismissed the application of the petitioner under Section 5 of the Limitation Act, 1963 by holding that there are no grounds made out for condonation of delay.

2. The impugned judgment and decree which was passed against the petitioner/defendant is dated 23.5.2006. The judgment and decree is a judgment and decree for recovery of possession, mesne profits, maintenance

charges etc with respect to the occupation of the petitioner company of the tenanted premises situated at flat no.207, second floor, Jyoti Shikhar, 8 Janakpuri District Centre, New Delhi.

3. A reading of the impugned order dated 04.9.2012 shows that though the petitioner company claimed a delay of 737 days in filing the application under Order 9 Rule 13 CPC, however really the delay was of 2129 days, inasmuch as the petitioner wrongly claimed commencement of limitation from the date of knowledge of the execution proceedings, whereas the limitation period commenced from the date of petitioner/defendant being proceeded *ex parte* as it did not appear service of the petitioner/defendant in the suit viz on 14.12.2005.

4. It is trite that limitation for filing of an application under Order 9 Rule 13 CPC once a person is served in the suit begins not from the date of knowledge but from the date of being proceeded *ex parte* in the suit. In the present case, it is noted by the trial court while passing the judgment and decree on 23.5.2006 that the petitioner was proceeded *ex-parte* on 14.12.2005 as it did not appear after service.

5. The impugned order shows that averments in the application under Order 9 Rule 13 CPC along with accompanying application under Section 5

of the Limitation Act, 1963 were vague as to when the petitioner derived knowledge of the *ex-parte* judgment and decree inasmuch as no dates and details have been given as to when and how the petitioner came to know of *ex-parte* judgment and decree. Not only that, even from this date of alleged knowledge, admittedly there is a delay of 737 days in filing of the application under Order 9 Rule 13 CPC.

6. I put a specific query to counsel for the petitioner as to whether the address of the petitioner/defendant in the memo of parties of the suit is or is not correct, and to which query it is not disputed that the address of the petitioner/defendant is as stated in the memo of parties in the suit. It is also conceded that there is no other entity functioning at the address of the petitioner/defendant as given in the memo of parties of the suit. Accordingly, the trial court was justified in proceeding *ex-parte* on account of service of the petitioner/defendant/company through courier company M/s Blue Dart.

7. As already stated above, there is in fact an unexplained delay as many as of 737 days even from the alleged date of knowledge of *ex-parte* judgment and decree, and which delay has not been sufficiently explained.

8. In my opinion, the trial court has passed a correct and exhaustive order and the relevant observations of the trial court are contained in paras 10 to 18 of the impugned order dated 04.9.2012, which read as under:-

“ 10. The above are the paramount considerations which have to be considered. Thus the fact that the explanation of delay which has to be explained on day to day basis does not mean that Court shall take pedantic approach in considering the same.

11. In fact it is not the length of delay but it is the justification of delay which is important.

12. The foundation of the facts and circumstances on which the condonation of delay has been claimed has been set up in the application. The facts on the basis of which condonation of delay is sought are within the personal or special knowledge of the applicant/defendant. Thus, it was incumbent upon the defendant to give specific, concrete and full disclosure of the facts and circumstances which had occasioned the delay. I note that this aspect is entirely missing and only vague and omnibus averments have been pressed into service. It is the settled law that the pleadings are the foundation of the case of the parties.

13. Applicant has claimed delay of 737 days whereas in fact it is a delay of 2129 days from the date of passing of decree. Ostensibly applicant made the starting point of delay from the date of his alleged M. No. 14/2012, Zaman Ara & Ors Vs. Nucon Industries Pvt Ltd. 6/97 knowledge. Para 3 of the application states that the applicant's Branch Office was approached by the Baliff on 03.10.2010 but the said Branch is only managed by clerical staff. That para 2 and 3 of the application are reproduced under:-

“Pare-2:- That after excluding the time spent in obtaining the certified copy of the order, a delay of 737 days has occurred in filing the present application against the impugned decree and judgment dated 23.05.2006 which is neither intentional nor deliberate but due to the circumstances beyond the control of the petitioner.

Para-3:- That the said delay has occurred because it came to the knowledge of the applicant company branch on 30.01.2010 when the bailiff approached the branch office of the applicant company regarding the ex-parte decree dated 23.05.2006 however the same was not communicated to the corporate office of the applicant in time, as the total management of the applicant company is being managed from Hyderabad and there is only an ad-hoc arrangement here in Delhi of the applicant company being managed by clerical staff who are not performing supervisory roles due to which the information regarding execution proceeding could not be shared in time to defend the execution and file the present application in time as per law. That the said fact was well within the knowledge of the plaintiffs and they have intentionally avoided providing the corporate office address (main corresponding address) in the execution petition”

14. The submissions as made in above paras as quoted above are M. No. 14/2012, Zaman Ara & Ors Vs. Nucon Industries Pvt Ltd. 7/98 totally bald as to on which date and how the Corporate Office of the defendant/applicant got the knowledge that an ex-parte decree has been passed against it. Such date is conspicuous by its absence in the application.

15. The applicant has not specified any date or the event when the Corporate Office got the information of ex-parte decree. The same has been left to imagination, surmises and speculation.

16. In para 4 to 8 there are general averments but no specific details on which particular date and in what mode and manner the applicant's Corporate Office came to know of the passing of the ex-parte decree.

17. In the interest of justice, I have also considered the contents of the application U/o 9 Rule 13 CPC deeming the same to be an integral part of the application U/s 5 of the Limitation Act but the specific details as mentioned above are also conspicuous by their absence in the said application also.

18. Courts have to consider the pleadings liberally. However, the Courts can not import the facts into leadings which are expressly or impliedly non existence. It is not the obligation of the Court to fill up the blanks and supply the missing or non pleaded facts. For this M. No. 14/2012, Zaman Ara & Ors Vs. Nucon Industries Pvt. Ltd. 8/99 reason, no case is made out for condonation of delay, even taking the pleadings in application of defendant at face value and construing the same liberally. Thus, in view of the above discussion, the delay is without any plausible explanation and has been occasioned ostensibly due to laid back approach of the defendant/applicant.”
(underlining added)

9. The aforesaid reasoning of the trial court is apposite because it is not the length of the delay but the justification of the delay is important and there is no justification given with respect to the delay in filing of the application under Order 9 Rule 13 CPC either from the date of service in the

suit or even from the date of the alleged knowledge of the decree in view of the execution proceedings.

10. In view of the above there is no merit in the petition, and the petition is therefore dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

AUGUST 19, 2014
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