

**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**MA No. 61 of 2016**

1. M/s. Fact India Engineering Company through its Partner S.M. Sagir, S/o S.M. Akhtar, aged about 65 years, R/o New Adarsh Nagar, Borsi Road, Durg, District- Durg, (Chhattisgarh),.....(Applicant)

**---- Appellant**

**Versus**

1. National Thermal Power Corporation Ltd. through its General Manager, Pragati Nagar, Korba, District- Korba, (Chhattisgarh),.....(Non-applicant)

**---- Respondent**

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| For Appellant –  | Ms. Sunita Jain, Advocate.                                              |
| For Respondent – | Mr. S.S.Baghel, Advocate under the authority of Mr. B.D.Guru, Advocate. |

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**Hon'ble Shri Justice Chandra Bhushan Bajpai**

**Order on Board**

**18/10/2016**

1. With the consent of the parties, the matter heard finally at the motion stage.
2. Facts, in brief, required for disposal of the instant M.A. are that Civil MJC No.9/2004 (M/s. Fact India Vs. NTPC) filed by the appellant was dismissed for want of prosecution as there was no any representation on behalf of the appellant before the trial Court on 06-12-2005. Thereafter, the appellant/applicant had filed Civil MJC No.25/2008 (M/s. Fact India Engineering Company Vs. National Thermal Power Corporation Ltd.) before the District Judge, Korba, C.G. on 05-08-2008 under Order 9 Rule 9 of the Code of Civil Procedure, 1908 (in short 'the Code') for restoration of Civil MJC No.9/2004. The Court below vide detailed order dated 04-02-2016 dismissed said Civil MJC No.25/08 as the appellant failed to demonstrate sufficient reason for his absence

on 06-12-2005, the present MJC has been filed at a very belated stage and also the appellant have not filed any application under Section 5 of the Limitation Act required for demonstrating reasons for condonation of delay under Article 122 of the Limitation Act, 1963. Against the said order the appellant has preferred the instant M.A. under Order 43 Rule 1 of the Code.

3. The instant miscellaneous appeal is barred by limitation by 82 days for which the appellant has filed I.A.No.1/2016 for condonation of delay.

4. On behalf of the respondent I.A.No.1/2016 is opposed.

5. On due consideration of the reasons mentioned in I.A.No.1/2016, this Court is of the considered view that the appellant has satisfactorily explained the reason for filing the instant M.A. after 82 days of its limitation.

6. Consequently, I.A.No.1/2016 is hereby allowed and the delay in filing the instant M.A. is hereby condoned.

7. During submission of the argument on the instant M.A., it is submitted on behalf of the appellant that in a bonafide mistake they have not filed any application under Section 5 of the Limitation Act, 1963 in support of their application under Order 9 Rule 9 of the Code, they want to file an application for condonation of delay and the matter may be remitted back for formal appreciation on the application under Section 5 of the Limitation Act along with the application under Order 9 Rule 9 of the Code.

8. Per contra, learned counsel for the respondent opposed the submission and submitted that the Court below considered the element of delay and after considering the entire material the Court below found that the delay was not explained satisfactorily. Hence, the M.A. may be dismissed.

9. On perusal of the impugned order, it appears that application under Section 5 of the Limitation Act is required to explain the delay for condonation of limitation under Article 122 of the Limitation Act, 1963. Though the Court below

appreciated the element of delay and its cause, but in the considered view of this Court, the delay part ought to have been considered by the Court below with the support of an application filed under Section 5 of the Limitation Act along with the main application filed under Order 9 Rule 9 of the Code. With this, the impugned order requires interference.

10. Consequently, the impugned order dated 04-02-2016 passed by the Court below in Civil MJC No.25/08 is hereby quashed. The appellant is granted liberty to file an application under Section 5 of the Limitation Act, 1963 taking all the grounds for delay in filing the main petition. Said MJC No.25/08 is directed to be restored on its original number. Both the parties are directed to remain present before the Court below either in person or through their respective counsel on **5<sup>th</sup> of December, 2016**. The appellant is required to file said application under Section 5 of the Limitation Act before the Court below on that day itself. If such application is filed, then Civil MJC No.25/08 be restored to its original number. After affording opportunity for reply of the said application to the respondent, the trial Court is directed to disposed of said application for condonation of delay and also the main application filed under Order 9 Rule 9 of the Code after hearing arguments of the parties afresh. Needless to mention that the appreciation in the order dated 04-02-2016 shall not come in the way, the Court below has to appreciate both the applications as directed on the basis of strength of the facts, evidence and other material afresh. The M.A. is hereby disposed of.

11. No order as to cost.

12. Certified copy as per rules.

Sd/-  
(Chandra Bhushan Bajpai)  
Judge