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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) 920/2011, IA No.11198/2017 (for stay) & IA No.11200/2017
(for condonation of 763 days delay in filing the appeal)
PARESH CONSTRUCTIONS AND
FOUNDATIONS PVT LTD Plaintiff

Through: Mr. Ashish Verma & Mr. Manish
Srivastava, Advs.

Versus

NATIONAL THERMAL POWER
CORPORATION & ANR Defendants

Through: Mr. Mohinder J.S. Rupal with Mr.
Praag and Ms. Shomita Rai, Advs. for
D-1.

Mr. Mukul Talwar, Sr. Adv. with Mr.
Samrat Sengupta, Mr. Soumya Dutta
& Mr. Soumyajit Nath, Advs. for D-
2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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12.04.2018

IA No.11197/2017 & IA No. 11199/2017 (both for exemption)

1. Allowed, subject to just exceptions.
2. The applications are disposed of.

OA No.129/2017

3. This Chamber Appeal has been preferred by the defendant no.2 Subhash Projects and Marketing Ltd. against the order dated 9th April, 2015 of the Joint Registrar striking off the defence of the appellant / defendant no.2.

4. The senior counsel for the appellant / defendant no.2 states that this suit for recovery of money, jointly and severally from the two defendants, has since, upon enhancement in minimum pecuniary jurisdiction of this Court, been transferred to the District Court, Saket and the file has been sent back to this Court only for the purpose of decision of this Chamber Appeal.

5. The senior counsel for the appellant / defendant no.2 further states that the defence of the defendant no.2 to the suit has been struck off owing to non production of the documents qua which notice had been got issued by the plaintiff under Order XII Rule 8 of the CPC and for such non-compliance, CPC does not provide for striking off of the defence.

6. The counsel for the plaintiff has fairly not disputed the aforesaid legal position but has contended that the Chamber Appeal is accompanied with an application for condonation of delay of 16 months in preferring the same and there is no cause for condonation of the said delay.

7. I have perused the order sheet and find that when the suit was listed for evidence of the plaintiff before the Joint Registrar of this Court on 10th December, 2014, the counsel for the plaintiff stated that the plaintiff had issued notice under Order XII Rule 8 of the CPC to the defendant no.2. The counsel for the defendant no.2 sought time to produce the documents of which production was sought in the notice. The Joint Registrar, directing the defendant no.2 to produce the documents, adjourned the recording of evidence. Thereafter, on 23rd February, 2015 none appeared for the appellant / defendant no.2 nor the documents had been produced and subject to costs of Rs.25,000/-, another opportunity was given to the appellant / defendant no.2 to produce documents.

8. On the next date i.e. 9th April, 2015 also, none appeared for the appellant / defendant no.2 and neither documents had been produced nor cost had been paid and which resulted in striking off the defence. However, the plaintiff did not lead evidence on that date also, as ought to have done but took adjournment.

9. Before any evidence could be led by the plaintiff, the minimum pecuniary jurisdiction of this Court was enhanced and the suit transferred as aforesaid.

10. Before the District Judge also, none appeared for the defendant no.2 till 5th October, 2016 and talks for settlement commenced with the parties being referred for mediation.

11. I am informed that mediation was a non starter.

12. It is at this stage that this Chamber Appeal was filed.

13. The counsel for the plaintiff informs that PW1 has already been examined and cross-examined by defendant no.1 and the cross-examination if any by defendant no.2 is held up owing to the pendency of this Chamber Appeal.

14. The only consequence provided in CPC and Indian Evidence Act, 1872 for non production of documents for production of which notice under Order XII Rule 8 of the CPC is issued is, that the party giving notice can lead secondary evidence after proving the service of the notice. It is thus indeed inexplicable as to why the plaintiff did not choose to do so and sought a direction for production of documents.

15. I may record that the senior counsel for the appellant / defendant no.2 states that the costs of Rs.25,000/- has since been paid and I also find the defendant no.2 to have before the District Judge on 27th July, 2017 made a statement qua the documents. In view of the said statement, the need now for production of the documents does not survive.

16. The senior counsel for the appellant / defendant no.2 states that an affidavit qua the documents has also been filed.

17. Though there is indeed negligence on the part of the appellant / defendant no.2 in pursuing this suit but it is found that the same has not delayed the proceedings in the suit.

18. In this view of the matter, the illegality in the order dated 9th April, 2015 in striking off the defence cannot be sustained and be a ground for depriving the defendant no.2 from contesting the suit on merits.

19. As far as the negligence and delay on the part of the appellant / defendant no.2 is concerned, the same is compensated by making today's order setting aside the order dated 9th April, 2015 striking off the defence of defendant no.2 conditional on the appellant / defendant no.2 paying costs of Rs.60,000/- to the counsel for the plaintiff before the next date of hearing before the District Court.

20. The Chamber Appeal is accordingly allowed and IA No.11198/2017 and IA No.11200/2017 are disposed of.

21. The order striking off the defence of the appellant / defendant no.2 is set aside.

22. The Chamber Appeal is disposed of.

CS(OS) 920/2011

23. The suit file be sent back forthwith to the Court in District Saket, New Delhi from which it was received.

APRIL 12, 2018

‘gsr’..

RAJIV SAHAI ENDLAW, J