

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

+ **RSA No. 39/2016**

% **4th October, 2016**

M/S TEXMODE Appellant

Through: Mr. Venkat Subramium and Mr. Rahat
Bansal, Advocates.

versus

M/S SANA OVERSEAS INC & ANR Respondents

Through: Mr. M. Salim, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

**RSA No.39/2016 and C.M. Appl. No. 3971/2016 (for stay under Order XLI
Rule 5 read with Section 151 CPC)**

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by defendant no. 1 in the suit against the impugned Judgment of the First Appellate Court dated 19.12.2015 by which the first appellate court has dismissed the first appeal as being barred by time. Trial court by its Judgment dated 12.2.2015 had decreed the suit of the respondent no.1/plaintiff for recovery of a sum of Rs.2,51,500/- jointly and severally against the appellant/defendant no. 1 and respondent no. 2/defendant no. 2. The number of days of delay which have to be condoned is not mentioned in the

condonation of delay application, however, the delay for which condonation will be sought would be from 13.2.2015 till 16.12.2015 when the application for condonation of delay was filed. I may also at the outset state that the present case is not a simple case of condonation of delay in filing the first appeal, inasmuch as, the appellant as defendant no. 1 had appeared in the suit, filed his written statement-cum-counter claim, but thereafter had not appeared in the suit as a result of which he was proceeded *ex parte* vide Order dated 25.4.2005. Appellant/defendant no. 1 had moved an application for setting aside the *ex parte* proceedings against him but that application has been dismissed right till the Supreme Court. The Special Leave Petition before the Supreme Court was dismissed vide Order dated 7.10.2013 in default.

2. The respondent no.1/plaintiff filed the subject suit against two defendants. Appellant was defendant no. 1 and defendant no. 2 was a Canadian buyer with respect to the subject textile products. In the suit plaint, the respondent no. 1/plaintiff in addition to pleading that the appellant/defendant no. 1 placed order for the respondent no. 2/defendant no. 2, further pleaded in the plaint that appellant/defendant no. 1 gave an assurance that in case the Canadian buyer/respondent no. 2/defendant no. 2 failed to make the payment then the appellant/defendant no.1 will be liable to make the payment. After the appellant/defendant no. 1 was proceeded *ex parte*, respondent no.1/plaintiff has

led evidence. Respondent no.1/plaintiff has filed the affidavit by way of evidence of its partner Md. Sheikh Naqi and it has been reiterated in this affidavit by way of evidence that appellant/defendant no. 1 agreed to make the payment in case of default of respondent no. 2/defendant no. 2/Canadian buyer. Accordingly, the trial court decreed the suit by its Judgment dated 12.2.2015 jointly against both the defendants, i.e, appellant as defendant no. 1 and respondent no. 2 as defendant no. 2 for a sum of Rs.2,51,500/- along with *pendente lite* and future interest at the rate of 10% per annum. The issue in the present second appeal is that whether there is sufficient cause for condonation of delay from 13.3.2015 till 16.12.2015 because a period of thirty days is provided for filing of first appeal against the Judgment dated 12.2.2015 and consequently delay will have to be counted as commencing from 13.3.2015 as the Judgment of the Trial Court is dated 12.2.2015.

3. The reasons given in the application for condonation of delay filed by the appellant/defendant no. 1 before the first appellate court were that he was not aware of the proceedings in the civil suit and came to know of the same when he received notice of the execution proceedings in October, 2015 whereafter he told his counsel to take out the relevant documents/orders. However, paragraph 6 of the application destroys the case of the appellant/defendant no. 1 of coming to know of the decreeing of the suit only in

October, 2015, inasmuch as, in this paragraph 6 of the application for seeking condonation of delay the appellant/defendant no. 1 states that he had sent one official to keep on overseeing the suit/matter but which could not be prosecuted properly. Neither is the name given by the appellant/defendant no. 1 of this official nor can this be a reason for condonation of delay from 13.3.2015 to 16.12.2015 because such official if he was overseeing the suit proceedings on behalf of the appellant/defendant no. 1, he would actually know or would be deemed to know the Judgment and Decree dated 12.2.2015. In any case, the appellant/defendant no. 1 can be said to have deemed knowledge of the Judgment and Decree dated 12.2.2015, inasmuch as, he had appeared in the suit and was proceeded *ex parte* way back on 25.4.2005. Therefore, the application for condonation of delay was misconceived because knowledge was wrongly alleged from receiving of the notices in execution proceeding in October, 2015, inasmuch as, appellant/defendant no. 1 had appeared in the suit and was proceeded *ex parte*, and therefore, is deemed to have knowledge of the Judgment and Decree dated 12.2.2015 on 12.2.2015 itself. Also as already stated above even the application seeking condonation of delay makes averments against the appellant/defendant no. 1 itself because it is said that there was an official of the appellant/defendant no. 1 to oversee the suit proceedings. I note that appellant/defendant no.1 cannot always keep on laying blame at the door of his counsels either for being proceeded *ex parte* or the

Supreme Court Special Leave Petition being dismissed for non-prosecution or the Advocate not telling about the Judgment and Decree dated 12.2.2015. All in all there is no ground for condonation of the delay for non-filing of the first appeal from 13.3.2015 till 16.12.2015 in the facts and circumstances of the present case.

4. Counsel for the appellant/defendant no.1 sought to argue on merits that respondent no.1/plaintiff cannot be said to have proved his case against the appellant/defendant no. 1 as the appellant/defendant no. 1 was an agent however, I cannot agree to this argument because both in the plaint filed by the respondent no.1/plaintiff and in the affidavit by way of evidence filed by the plaintiff of its partner Md. Sheikh Naqi, there is pleading and deposition to the fact of the appellant/defendant no. 1 agreeing to pay the liability respondent no. 2/defendant no. 2/Canadian buyer in case of default by such Canadian buyer. As the appellant/defendant no. 1 was *ex parte*, there is no cross-examination of Md. Sheikh Naqi and therefore the respondent no.1/plaintiff can be said to have proved its case on joint liability of respondent no. 2/defendant no. 2/Canadian buyer with the appellant/defendant no. 1, because appellant/defendant no.1 had agreed to make the necessary payment for goods supplied in case of default committed by respondent no. 2/defendant no. 2/Canadian buyer.

5. In view of the peculiar facts and circumstances of this case, I do not see any reason to interfere with the judgment of the first appellate court dismissing the first appeal as barred by limitation, and therefore, this Regular Second Appeal does not raise any substantial question of law, and is accordingly dismissed leaving the parties to bear their own costs.

OCTOBER 04, 2016

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VALMIKI J. MEHTA, J

