

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.4386 of 2018 (O&M)
Date of Decision:28.08.2018**

M/s S.S. Enterprises

.....Petitioner

Vs

M/s Aicon Castalloy Limited

....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Rahul Gautam, Advocate
for the petitioner.

Mr. Amit Kumar Jain, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 04.05.2018 passed by the Civil Judge (Jr. Divn.) Gurugram, whereby the application filed by the defendant/petitioner under Order 9 Rule 13 CPC for setting aside the *ex parte* order dated 01.04.2016 was dismissed.

[2]. Defendant/petitioner was proceeded against *ex parte* vide order dated 01.04.2016. An application was filed on 30.09.2016 under Order 9 Rule 7 read with Section 151 CPC for setting aside the *ex parte* order dated 01.04.2016. The delay

was claimed to be attributable to the counsel, who kept on misinforming the defendant.

[3]. Reply to the application was filed by the plaintiff/respondent on 17.03.2017. Petitioner/defendant was again proceeded against *ex parte* on 04.08.2017, when the defendant or his counsel did not appear at the time of consideration of application under Order 9 Rule 7 CPC. The application under Order 9 Rule 13 CPC came to be filed on 17.11.2017 for setting aside *ex parte* order dated 01.04.2016. Evidently, the order dated 04.08.2017 was not assailed.

[4]. Learned counsel for the petitioner contended that the resultant effect of order dated 04.08.2017 was to the effect that the application under Order 9 Rule 7 CPC filed for setting aside the *ex parte* order dated 01.04.2016 was dismissed. Thereafter Civil Misc. Application No.13895-CII of 2018 was filed in the present revision petition with a prayer to amend the prayer clause to the extent that in addition to the relief already prayed, the Court may be pleaded to set aside the order dated 04.08.2017 as well.

[5]. During consideration of the case since procedural law is handmaid of justice, therefore, a proposal was given to learned counsel for the respondent to accept adequate costs for

the inaction on the part of petitioner/defendant. Learned counsel for the petitioner/defendant was ready to pay the adequate costs to the respondent/plaintiff. The said proposal for acceptance of the costs was refused by learned counsel for the respondent on the ground that the conduct of the defendant/petitioner is not such which warrants any indulgence for condonation of persistent default even by costs. Thereafter this Court proceeded to scrutinize the material on record.

[6]. The perusal of order dated 04.08.2017 would show that when the application for setting aside the *ex parte* order dated 01.04.2016 was under consideration before the Court, none appeared on behalf of the defendant/petitioner and the same was dismissed for non-prosecution. Reference to the provision in terms of Order 9 Rule 13 CPC for setting aside the *ex parte* order dated 01.04.2016 has to be read in the context of *ex parte* proceedings only as no decree was drawn.

[7]. It is true that the application for setting aside the *ex parte* order dated 01.04.2016 came to be filed belatedly when the counsel of the defendant appeared on 15.07.2016 and sought adjournment to file the application for setting aside the *ex parte* proceedings. The application came to be filed only on 30.09.2016 despite appearance of learned counsel for the defendant on 15.07.2016. Plaintiff evidence was closed on

27.05.2016, when PW-1 Sanjay Singh appeared and tendered his affidavit in examination-in-chief and also produced documentary evidence. The case was adjourned for *ex parte* arguments for 15.07.2016.

[8]. It was on 15.07.2016 that Sh. Ranjeet K. Rajan, Advocate appeared on behalf of the defendant and sought time to file an application for setting aside the *ex parte* proceedings. The case was adjourned for 09.09.2016 . No application was filed on 09.09.2016 and further time was sought to file the application for setting aside the *ex parte* proceedings. The case was adjourned for 30.09.2016 i.e. the date on which the application under Order 9 Rule 7 read with Section 151 CPC came to be filed. After filing of the said application, none appeared in the proceedings at the time of consideration of that application on 04.08.2017 and the same was dismissed as not pressed upon. The case was adjourned for 25.08.2017 for *ex parte* evidence.

[9]. It is relevant to note that the evidence of the plaintiff had already been closed on 27.05.2016 and the case was adjourned for *ex parte* arguments. Adjourning the case for *ex parte* evidence was not required at all. As per interlocutory order dated 25.08.2017, the case was also again shown for *ex parte* evidence. On 22.09.2017, the Court observed that no *ex parte*

evidence was present and the learned counsel for the plaintiff closed the evidence on behalf of the plaintiff.

[10]. The perusal of order dated 27.05.2016 and 22.09.2017 passed by the trial Court, would show that the evidence of the plaintiff was closed on two occasions. After passing of order dated 04.08.2017 dismissing the application for setting aside the *ex parte* order dated 01.04.2016, the case was adjourned for 25.07.2016, 22.09.2017, 29.09.2017, 16.10.2017 and 17.11.2017, when power of attorney was filed by Sh. Sandeep Mehta, Advocate on behalf of the defendant and application under Order 9 Rule 13 CPC was moved for setting aside the *ex parte* order dated 04.01.2016. Thereafter the case was adjourned for 05.01.2018 and 02.02.2018 for filing reply to the said application.

[11]. The proceedings on record are suggestive of the fact that the defendant despite engaging the counsel and despite appearance of the counsel did not file any application for setting aside the *ex parte* proceedings dated 01.04.2016 upto 30.09.2016. Firstly after dismissal of the application in default on 04.08.2017, petitioner did not venture to challenge the said order anywhere. It was only in this Court, the Civil Misc. Application No.13895-CII of 2018 was filed seeking to challenge the said order dated 04.08.2017.

[12]. Perusal of order dated 04.08.2017 would show that the presence of Mr. Ranjeet K. Rajan, Advocate was marked on behalf of the defendant. Still the order was passed dismissing the application as not pressed upon. It appears from the record that the case was fixed for *ex parte* arguments on 22.09.2017, 29.09.2017 and 16.10.2017. On 17.11.2017, the application under Order 9 Rule 13 CPC came to be filed for setting aside the order dated 01.04.2016 without challenging the order dated 04.08.2017. Thereafter the case was adjourned on the said application for 08.12.2017, 05.01.2018 and till date i.e. 04.05.2018 when the impugned order came to be passed. The fact remains that the order dated 04.08.2017 was never assailed before the trial Court in the form of application for setting aside the same as was not done in the order dated 01.04.2016. It shows the pathetic state of affairs on behalf of the defendant from the very inception. The conduct of the defendant is not such, which may be treated for granting indulgence by this Court. Even if for setting aside the proceedings only a good cause is to be shown. Defendant/petitioner has not been able to show any diligence while pursuing the remedy before the trial Court.

[13]. On 16.07.2018, learned counsel for the petitioner stated before this Court that the resultant effect of order dated

04.08.2017 was the dismissal of application under Order 9 Rule 7 CPC which was filed for setting aside the order dated 01.04.2016. Once the application for setting aside the order dated 01.04.2016 was dismissed on 04.08.2017, there was no occasion for the defendant to file the same application under Order 9 Rule 13 CPC on 17.11.2017 before the trial Court. The cumulative reading of the interlocutory orders on record would show that no indulgence can be granted in favour of the defendant/petitioner for condoning the belated inaction.

[14]. In view of aforesaid, this revision petition is found to be totally devoid of merits and the same is accordingly dismissed.

August 28, 2018

Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No