

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

CR-1217-2019 (O&M)

Date of decision: 27.09.2022

M/s Adigear International and others

....Petitioners

Versus

M/s Tex Corp. Ltd.

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vaibhav Narang, Advocate for the petitioners
 Mr. V.B.Aggarwal, Advocate for the respondent

ANIL KSHETARPAL, J (Oral)

Both the courts below have dismissed the application for setting aside ex parte decree filed under Order IX Rule 13 of the Code of Civil Procedure, 1908. The respondent (the plaintiff) filed a suit for recovery of Rs.19,01,300/- alongwith pendente lite and future interest against the defendants. Pursuant to the summons issued, the defendants appeared and engaged a counsel. During the pendency of the suit, the matter was referred to the Mediation and Conciliation Centre of the Court. The parties amicably settled their disputes vide agreement dated 01.04.2014 and the defendants (petitioners) agreed to pay Rs.19,00,000/- including the amount of interest. A sum of Rs.7,00,000/-was paid. The defendants claim that with respect to the remaining amount, the goods purchased by them from the plaintiff were returned against proper challans. However, unfortunately, on account of fault of their counsel, they were proceeded against ex parte on 16.10.2014 and the court ex parte decreed the suit on 21.07.2015 for Rs.12,01,300/-

alongwith interest at the rate of 9% from the date of filing of the suit till its realization. The petitioners (defendants) filed an application for setting aside the ex parte decree on 26.10.2015 which was dismissed on the ground that it is filed beyond the prescribed time of 30 days. The courts have also observed that no application for condonation of delay has been filed.

Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook. Learned counsel representing the petitioners (defendants) submits that before the Executing court, the petitioners have already deposited the decretal amount alongwith interest. He submits that the petitioners while filing the application asserted that they came to know of the ex parte decree only on 11.10.2015. He submits that separate application under Section 5 of the Limitation Act, 1963, seeking condonation of delay is not necessary.

The learned counsel representing the respondent submits that in the absence of application under Section 5 of the Limitation Act, 1963, the delay in filing the application could not be condoned.

The requirement of filing separate and distinct application for seeking condonation of delay has already been debated by the Supreme Court in para 11 and 12 in **Bhagmal and others vs. Kunwar Lal and others (2010) 12 SCC 159:-**

11. In our opinion, the High Court was not justified in taking a hypertechnical view. We have seen all the orders. It is quite clear from the trial court's order that the trial court entertained the application on

merits. The trial court undoubtedly has referred to the reply of the respondents to the effect that the application for setting aside the ex parte decree was beyond the limitation. However, the view taken by the trial court was based more on the merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The trial court has more or less based its findings regarding delay on the basis of the order-sheets. That was not right as the order-sheets nowhere bore the signatures of the parties. They were mechanically written mentioning "parties as before". Therefore, the trial court did not throw the application under Order 9 Rule 13 merely on the basis of the fact that no application for condonation of delay was made. It went on to consider the delay aspect as well as the merits and even allowed the parties to lead evidence.

12. It is to be seen here that the question of delay was completely interlinked with the merits of the matter. The appellant-defendants had clearly pleaded that they did not earlier come to the court on account of the fact that they did not know about the order passed by the court proceeding ex parte and also the ex parte decree which was passed. It was further clearly pleaded that they came to know about the decree when they were served with the execution notice. This was nothing, but a justification made by the appellant-defendants for making Order 9 Rule 13 application at the time when it was actually made. This was also a valid explanation of the delay. The question of filing Order 9 Rule 13 application was, in our opinion, rightly considered by the appellate court on merits and the appellate court was absolutely right in coming to the conclusion that the appellant-defendants were fully justified in filing the application under Order 9 Rule 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex parte proceedings against them. If this was so, the Court had actually considered the reasons for the delay also. Under such circumstances, the High Court should not have taken the hypertechnical view that no separate application was filed under Section 5.

The revision petition stands allowed.

The parties through their counsel are directed to appear before the trial court on 27.10.2022.

All the pending miscellaneous applications, if any, are also disposed of.

27.09.2022

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE