

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO.402 OF 2015
IN
SUIT NO.1723 OF 2011

M/s. Hindustan Zinc Ltd. Applicants

IN THE MATTER BETWEEN

M/s. Damani Shipping Pvt. Ltd. Plaintiff

V/s

M/s. Hindustan Zinc Ltd. Defendants

Mr. K.J. Presswalla a/w Mr. Sandeep Goyal i/b M/s. Mulla & Mulla & Craigie Blunt & Caroe for Defendants/Applicants.

Mr. Anant B. Shinde a/w Ms. Neeta Jadhav for Plaintiff.

CORAM : A.A. SAYED, J.

DATED : 7 APRIL 2015

P.C.

1 This Notice of Motion is taken out by the Applicant/Defendant to recall/modify the order dated 1 December 2014 passed by the learned Single Judge of this Court directing the suit be listed under the caption 'undefended suit'. The Applicant/Defendant has also sought other reliefs in the Motion.

2 The case of the Defendant is that they have not been served with the suit proceedings and writ of summons at any time and it is only when the order dated 1 December 2014 of learned Single Judge of this Court

was served upon the Defendant by the Plaintiff's Advocate's letter dated 10 December 2014, that the Defendant for the first time came to know that the present suit has been filed against them. The Defendant has averred in the Affidavit-in-support of the Motion that upon perusal of the court proceedings, they came to know that the suit was listed on board under the caption 'undefended suit' on 19 January 2015 and that the Plaintiff had filed Affidavit of Service of one Mr. Kishen Naik in the office of the Sheriff of Bombay stating that since the acknowledgement card was not received by the Sheriff's Office, the Sheriff's office had written a letter dated 4 May 2012 to the post office and received the Reply dated 25 May 2012 from the post office with the remark "Article under Reference delivered on 19 December 2011". The Defendant has alleged that such a ipsi dixit statement from the post office is not sufficient to prove service of the writ of summons. It is further stated that the post office maintains a record apart from the Acknowledgement Due card when a Registered Article is served on the addressee and the signature of the addressee is also taken on the post office's registered letter list. It is submitted that the original record has not been produced nor is the Affidavit of the postman who allegedly delivered the registered article is filed.

3 Learned Counsel for the Defendant has relied upon the Rule 63 of the General Statutory Rules and Orders, Volume XVI of the Government

of India, Ministry of Law, which states that no registered article shall be delivered to the addressee unless and until he or his agent signs receipt for it in such form as the Director-General shall prescribe. It is submitted that since the Defendant has not received the writ of summons or the suit proceedings they be granted an opportunity to defend the suit by filing their Written Statement.

4 An Affidavit-in-Reply has been filed on behalf of the Plaintiff stating that despite service of writ of summons on 19 December 2011 upon the Defendant as confirmed by the Senior Superintendent, Mumbai City (South), Department of Posts vide their letter dated 25 May 2012, the Defendant had not chosen to cause its appearance in the said suit and file the Written Statement. The Plaintiff has also relied upon the Affidavit of service of summons dated 2 July 2012 of Mr.Kishan Naik, Bailiff and Clerk in the office of the Sheriff of Bombay. It is urged that since the Defendant has been served with the writ of summons, the Notice of Motion deserves to be dismissed.

5 I have considered the rival contentions of the parties. It is not in dispute that there is no acknowledgement on record showing that the Defendant has been served with the suit proceedings or the writ of summons. The letter dated 25 May 2012 received from the Post Office

with the remark 'Article under Reference delivered on 19th December 2011' is not sufficient to prove that the writ of summons was in fact served upon the Defendant, particularly when the Defendant has specifically stated on oath that they have not received the suit proceedings and have not been served with the writ of summons. The Plaintiff has not placed on record any material in the form of acknowledgement to establish that the Defendant was served. Considering the facts and circumstances of the case, in my view, interest of justice requires that the Defendant be granted an opportunity to defend the suit.

6 In the circumstances, the Notice of Motion is allowed by permitting the Defendant to file their Written Statement. Let such Written Statement be filed within a period of six weeks from today.

7 It is clarified that in so far as the other prayers in the Notice of Motion are concerned, it will be open for the Defendants to file separate Application seeking those reliefs.

8 The Notice of Motion to stand disposed of accordingly.

(A.A. SAYED, J.)