

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO. 1211 OF 2012
IN
SUMMARY SUIT NO. 2526 OF 2009**

Dinesh Chandra Maingi

...Plaintiff

vs.

Mr.S.V. Chaudhary

...Defendant

Mr.Vernekar for Plaintiff.

Mr.Saeed Akhtar with Mr.Khushnood Akhtar, Mr.Hitesh Thorat for Defendant.

CORAM : S.C. GUPTE, J.**12 FEBRUARY 2015****P.C. :**

This Notice of Motion is taken out by the original Defendant for setting aside an exparte decree dated 12 January 2011 passed in the present summary suit. There is a delay in taking out the present Notice of Motion. It is the case of the Defendant that the writ of summons was not duly served on the Defendant and that in the premises, no exparte decree could have been passed in the suit. From the affidavit of service filed by the Plaintiff, which is taken note of by this Court in the exparte decree, it appears that a writ of summons was served on the Defendant at the address of 11, 'K' Building, 1st Floor, Walchand Hirachand Marg, Opposite Rex Chambers, Ballard Estate, Mumbai – 400 001. The acknowledgement in connection with this service is claimed to have been signed on 30 October 2009. The acknowledgement, which is annexed to the affidavit in support of service, shows a rubber stamp of one Geeta Marine Services Pvt.Ltd. It is an admitted position that Geeta Marine Services Pvt.Ltd., of which the Defendant was a director, was wound up by an order passed by this Court on 19 March 2009. Thus, on 30 October 2009, the company, Geeta Marine Services Pvt.Ltd., was not in existence. The company had no authority to accept any service, much less service of writ of summons on behalf of its erstwhile director, who as on the date of the winding up had ceased to be the director. The

Defendant in his affidavit in support of the Notice of Motion (para 6) has categorically stated that the writ of summons was purportedly served on M/s.Geeta Marine Services Pvt.Ltd. and not on the Defendant. In his reply, the Plaintiff has not dealt with the averments made by the Defendant in this behalf in para 6 of his affidavit in support. The Defendant is arraigned in his personal capacity as a guarantor and not as a director of M/s.Geeta Marine Services Pvt.Ltd. The record of the case does not indicate that the writ of summons was duly served on the Plaintiff. Therefore, there was no case to pass an exparte decree against him.

2 Having regard to want of service of writ of summons, the limitation for setting aside the exparte decree begins to run from the date of knowledge of the decree. It is submitted by the Plaintiff that the Defendant was aware of the decree as far back as in May 2011 and yet chose to take out the present Notice of Motion only in April 2012. It is submitted that the Notice of Motion is, thus, barred by limitation.

3 On the other hand, it is claimed by the Defendant that the Defendant learnt of the exparte decree only in April 2012, when persons from the office of Sheriff of Bombay visited his premises with the warrant of attachment. In support of his case that the Defendant knew about the exparte decree in May 2011 itself, the Plaintiff relies upon two letters addressed by the Plaintiff to the Defendant communicating the exparte decree passed by this Court on 12 January 2011. These letters were addressed to two different addresses, one, the residential address of the Defendant at Ghatkopar, Mumbai and second, the address of Geeta Marine Services Pvt.Ltd. at Ballard Estate, Mumbai. The Plaintiff claims to have addressed a communication in this behalf to the Superintendent of Post Office, Mumbai South, Mumbai on 6 June 2011. In response to this communication, the Superintendent of Post Office has sent a communication to the Plaintiff that both letters have been duly delivered on 30 April 2011 and 3 May 2011, respectively. Admittedly, the acknowledgements in respect of the alleged service have not been received by the Plaintiff. On the basis of the postal certificate issued by the postal authorities, in the face of the

Defendant's express case that the Defendant has not received any such letter, the service effected cannot be taken to be proved for the purposes of ascertaining the starting point of limitation. It is next contended by the Plaintiff that the warrant of attachment is shown to be served on the Defendant on 29 March 2012 and not in April 2012 as claimed by the Defendant. Merely because there is a statement in the Defendant's application that he received warrant of attachment on 4 April 2012 in stead of 29 March 2012, it will not be possible to conclude that the Defendant is either indulging in falsehood or that his case of receiving intimation of the decree ought to be disbelieved. In any event, there is a case for condonation of delay of a few days in this behalf.

4 In that view of the matter, the Notice of Motion is made absolute in terms of prayer clauses (a) and (b).

5 The Defendant will pay the costs of the Notice of Motion to the Plaintiff quantified at Rs.50,000/-.

6 Learned Counsel for the Plaintiff states that a copy of the plaint would be served by the Plaintiff on the Advocates of the Defendant who represent the Defendant in the present Notice of Motion. Learned Counsel for the Defendant submits that if such copy is served, he waives the service of writ of summons. The Defendant to enter the appearance in the summary suit within a period of ten days from the service of the plaint.

(S.C. Gupte, J.)