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

**NOTICE OF MOTION NO. 1288 OF 2015
IN
SUIT NO. 824 OF 2004**

Mr Sailesh Hingorany & Ors.	...Applicants
In the matter between	
Arif Sultan Nathani & Ors.	...Plaintiffs
VS	
Kiran Kumar & Ors.	...Defendants

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Mr S.H.Doctor, Sr. Advocate i/b MBS & Co. for the Plaintiffs
Mr Ashwin Shete a/w Agasti Vibhute for Defendant Nos.1, 2(a) & 2(b).
Mr E.P.Bharucha, Sr. Advocate a/w Sarosh Bharucha for Defendant Nos.3(a),
3(b) and 3(c).

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CORAM : S.C. GUPTE, J.

NOVEMBER 23, 2015

P.C. :

This Motion is taken out by original Defendant Nos. 3(a) to 3(c) for dismissal of the suit against them for want of prosecution. The Motion is on the footing that the Defendants were not served with the writ of summons and were completely unaware of the filing as well as the pendency of the present suit, and in the premises, had not filed their Vakalatnama or their Written Statement. The Defendants now seek leave to withdraw the Notice of Motion with liberty to the Defendants to file their Written Statement and contest the suit, and also to participate in the cross-examination of the Plaintiffs' first witness, which is underway. (The Plaintiffs' witness is currently under cross-examination by Defendant Nos.1, 2(a) and 2(b).)

2 Learned Counsel for the Plaintiffs opposes the application. He submits that whereas he has no objection to the Motion being withdrawn, he objects to any such liberty being granted to the Defendants. Learned Counsel submits that the Motion was taken out on an incorrect statement, namely, that the

Applicants (original Defendant Nos. 3(a) to 3(c)) were completely unaware of filing and pendency of the present suit. It is submitted that in co-ordinate proceedings between the same parties, the Applicants have specifically referred to the present suit, disclosing thereby their knowledge of the present suit. He submits that having regard to this incorrect statement, the Motion deserves to be dismissed and that no liberty, in the premises, ought to be granted to the Defendants. Learned Counsel for the Plaintiffs also submits that writ of summons need not always be served on the Defendant, and if it can be shown that the Defendant knew of the proceedings and participated in it, service of writ of summons can very well be dispensed with. He relies on a judgment of Allahabad High Court in the case of **Sri Nath Agrawal Vs Santosh Kumar**¹ in this behalf.

3 Sri Nath Agrawal's case does suggest that there may be circumstances in which the defendant, having knowledge of the suit and participated in the suit through Counsel, cannot thereafter claim that the writ of summons was not duly served upon him and that the proceedings were, accordingly, vitiated. But that does not mean that a defendant who can be shown to have knowledge of the suit need not be served. It is absolutely necessary for the Plaintiff to show that the defendant was served with a writ of summons. Knowledge of the suit does not dispense with the service of the writ. It is another matter that in a given case, a defendant, though not formally served with a writ, may appear and contest the matter without insisting on a formal service. He may, thereafter, be precluded from setting up a case of the trial being vitiated on account of want of formal service. That is a different matter. It is effectively like waiver of a formal service of writ. In the present suit, the Defendants' case is that the Defendants were not duly served with the writ of summons and as a result have not engaged any Advocate on their behalf or filed any Written Statement or appeared at any time in the matter. It is the Defendants' case that the Advocates purportedly appearing for original Defendant No.3 were not engaged by the Defendants, they were the Advocates of original Defendant No.3 who had died.

4 Learned Counsel for Defendant Nos.1, 2(a) and 2(b) on instructions

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by Advocates who were appearing for Defendant No.3 clarifies that the Advocates of Defendant No.3 have never appeared on behalf of Defendant Nos. 3(a) to 3(c). Learned Counsel appearing for Defendant Nos. 1, 2(a) and 2(b) also submits that the cross-examination of the Plaintiffs' witness is not yet over.

5 In the premises, though the Defendants may now accept the position that the writ of summons need not be served on the Defendants and in that case can be said to have waived service of the writ, the Defendants are surely entitled to defend the suit by filing a Written Statement and cross-examining the Plaintiffs' witnesses. Nothing can prevent them from doing that.

6 In the premises, the Notice of Motion is dismissed as withdrawn with liberty to Defendant Nos. 3(a) to 3(c) to file their Written Statement within a period of four weeks from today. The Defendants shall also be permitted to cross-examine the Plaintiffs' witness after filing of their Written Statement. As a result of filing of the Written Statement by Defendant Nos. 3(a) to 3(c), if there is any additional issue that arises in the suit, an appropriate application in that behalf may be moved before this Court. The cross-examination of the Plaintiffs' witness, currently underway, is postponed till Defendant Nos. 3(a) to 3(c) file their Written Statement. The Motion is disposed of accordingly.

(S.C.GUPTA J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/ Order.