

1. These are the Defendants' Notices of Motion. Notice of Motion No.2857 of 2012 seeks condonation of delay of 567 days in applying for setting aside of the ex-parte decree dated 6th April 1999 ("the ex-parte decree"). Notice of Motion No.2608 of 2012 seeks the setting aside of the ex-parte decree. Considering that the issues involved are common, both the Notices of Motion are heard and disposed off by this common order.
2. Defendant No.1 is a sole proprietary concern of Defendant No.2. The thrust of the Defendants' application seeking setting aside of

the ex-parte decree is non service of the writ of summons on the Defendants. In this context, the Defendants' case, as pleaded and urged, is as follows :

- 2.1 The Suit has been filed by the Plaintiffs against the Defendants on 28th May 1993. The Plaint sets out two addresses of the Defendants. The first being office at 304 Vishwanak, Near Dorr Oliver, Chakala Junction, Andheri (E), Mumbai 400 099 ("the Mumbai address"). The second being, D-22, Moti Dungari Road, Jaipur 302 004 ("the Jaipur address"). The Defendants contend that the Jaipur address was the erstwhile registered office of Defendant No.2. From January 1993, Defendant No.2 shifted its registered office to A-4, Vijay Path, Tilak Nagar, Jaipur 302 004 ("the new Jaipur address"). In support of this contention, the Defendants rely upon the Registrar of Companies ("ROC") certification dated 28th January 1993. As such, on the date of the Suit, the registered office of Defendant No.2, which is also the place of business of Defendant No.1 had already shifted. Defendant No.2 being a corporation, by virtue of Order XXIX, Rule 2 of the Code of Civil Procedure, 1908 ("CPC"), the service of the Writ of Summons on the Defendants was required to be done on Defendant No.2's registered office. The registered office of the Defendants having changed, no such service could ever have been effected upon the Defendants.
- 2.2 As regards the Mumbai office, the Defendants contend that the same was the marketing office of the Defendants and was closed in the year 1995. As such, there could have been no service of the Writ of Summons on the Defendants at the said

address. The Defendants also asserted that the Plaintiffs' case of having effected service on the Defendants on 2nd September 1993 by hand delivery through M/s. Haresh Mehta & Co., is not legally tenable. This is because, no vakalatnama was filed by M/s. Haresh Mehta & Co. for and on behalf of the Defendants. As such, even such alleged service is bad in law. The Defendants, thus, contend that there is no valid service of the Writ of Summons on them. As such, it is urged that the ex-parte decree is liable to be set aside.

2.3 In support of the application for condonation of delay, it has been urged that the Defendants did not know of passing of the ex-parte decree. The knowledge of the ex-parte decree came only when service of Notice No.342 of 2010 was made by hand delivery on 11th April 2011 at the Defendants' registered office at Jaipur. Even this notice stated the Jaipur address and not the new Jaipur address. After receipt of the notice, the Defendants who are based in Jaipur and had ceased operations in Mumbai caused enquiries to be made. These enquiries revealed the passing of the ex-parte decree and thereafter, the Defendants : on 25th April 2012 appointed advocates; on 4th May 2012 applied for certified copies; and on 1st November 2012, secured certified copies of the present proceedings. Pursuant thereto, on 29th November 2012, the present Notices of Motion have been filed. On this basis, the Defendants contend that there is sufficient cause for condonation of delay.

2.4 Even otherwise, in paragraphs 10 to 13 of the affidavit in support of Notice of Motion No.2608 of 2012, the Defendants have urged that they have a good defense on merits to the suit claim. The Defendants have urged that the suit supplies were

in good order; the Plaintiffs have failed to bring any evidence to show that the suit supplies were of inferior quality; and as such, the suit claim was one of damages which the Plaintiffs is required to prove. The Defendants therefore, urge that grave and irreparable prejudice will be caused to them if they are not heard; the suit claim is not tried on merits; and the ex-parte decree is allowed to stand. The Defendants submit that the ex-parte decree has incorrectly been applied for and secured by the Plaintiffs. The same therefore, deserves to be set aside.

3. The Plaintiffs have opposed the aforesaid Notices of Motion, inter alia, on the following grounds :

3.1 The Defendants have made a false statement on oath about the service of Notice No.342 of 2010 on 11th April 2011 by hand delivery at the registered office of the Defendants at Jaipur. The Plaintiffs have placed reliance on affidavit dated 3rd February 2011 of one Mr. R.J. Tiwari from the office of Sheriff of Mumbai. The Plaintiffs have also placed reliance on the order dated 4th February 2011, permitting the Plaintiffs to make substituted service by publication in Free Press Journal and Navsakti newspapers on 22nd March 2011.

3.2 The Plaintiffs have also stated that the Defendants had not shown any diligence in defending the Suit. They were aware of the proceedings and passing of the ex-parte decree. Further, the order dated 12th August 1998 of this Court (Coram : F.I. Rebello, J.) records service of the Writ of Summons. Hence there has been service on the Defendants. The Notices of Motion are, therefore, liable to be dismissed.

- 3.3 Additionally, the Plaintiffs have also contended and urged that there is no documentary evidence of shutting down of the Mumbai office in the year 1995. The Notices of Motion barred by the provisions of the Limitation Act, 1963.
- 3.4 Lastly, it is contended that no sufficient cause has been made out by the Defendants in support of the condonation of delay. The Defendants had knowledge of passing of the ex-parte decree in April 2011 and have taken out the Notices of Motion only in November 2012. As such, there is unexplained delay. The same is not liable to be condoned.
4. I have considered the submissions advanced by Mr. Kamat, learned counsel for the Defendants in support of the Notices of Motion and the submissions advanced by Mr. Barot, learned advocate for the Plaintiffs in opposition thereto. With the assistance of both the counsel, I have perused the records.
5. As regards the lack of service of the Writ of Summons prior to the passing of the ex-parte decree, I am inclined to accept the submissions made on behalf of the Defendants. This is for more than one reason. Firstly, Defendant No.1 is only a sole proprietary concern of which, Defendant No.2 (which is a body corporate) is the proprietor. As such, and in view of the provisions of Order XXIX Rule 2 of the CPC, the service of Writ of Summons was required to be made at the registered office of Defendant No.2 viz. the new Jaipur address. There is no material on record and the Plaintiffs' counsel is unable to satisfy me that any such service of the Writ of Summons at the new Jaipur address was made. Secondly, as on the date of the filing of the

Suit, the registered office of Defendant No.2 was the new Jaipur address. From the ROC certificate dated 28th January 1993, it is evident that the registered office of Defendant No.2 had shifted from the Jaipur address to the new Jaipur address with effect from 1st January 1993. Despite this, the Plaintiffs instituted the Suit on 28th May 1993 citing the Jaipur address only. As such, there could not have been any service of the Writ of Summons at the new Jaipur address as was required in law. Nothing, evidencing such service has been brought to my notice by the Plaintiffs' counsel. Thirdly, as regards the Mumbai address, the Defendants have contended that at Mumbai the Defendants only had a marketing office and the same was closed in year 1995. The Plaintiffs have denied this position. In my view, nothing turns on this subject since, it is not the Plaintiffs' case that the Writ of Summons was served on the Defendants at the Mumbai address. Fourthly, even the reliance on Mr. Tiwari's affidavit is misconceived. The same does not prove any service. On the contrary, the same states that the Defendants' office was not found. The same cannot also be the basis of any inference against the Defendants of having made false statements on oath. Lastly, the Plaintiffs have placed reliance on the order dated 12th August 1998 and have also contended that service of Writ of Summons was effected on M/s. Haresh Mehta & Co. who had represented the Defendants. Even on this count, I am unable to accept the Plaintiffs' contention. This is because, M/s. Haresh Mehta & Co. had not filed vakalatnama for and on behalf of the Defendants. No such vakalatnama is to be found on record. As such, the Plaintiffs could not have effected service of the Writ of Summons, on a firm of advocates who had not filed

vakalatnama. They would have no authority to accept the service of Writ of Summons for and on behalf of the Defendants. As regards the order dated 12th August 1998, the same merely takes on record the affidavit proving service of Writ of Summons. Considering that the service of Writ of Summons could not have been effected on the said advocates, in my view, the same does not advance the Plaintiffs' case.

6. In view of the reasons aforesaid, I hold that there is no valid service of the Writ of Summons.
7. As regards the application for condonation of delay, the Defendants are based in Jaipur, and post 1995, do not seem to have operations in Mumbai. In April 2011, they were made aware of Notice No.342 of 2010 which was issued in execution. Further, the Defendants were required to engage lawyers in Mumbai, which they did in April 2012 and applied for certified copies of the proceedings in May 2012. The certified copies of the proceedings were made only in November 2012. Considering the distance and location of the Defendants; the time taken for obtaining certified copies; and the fact that a liberal view ought to be taken whilst considering the application for condonation of delay, I am of the view that the delay in taking out the application for setting aside of the ex-parte decree needs to be condoned. Another aspect in this regard which is in the Defendants' favour is the fact that the Plaintiffs' claim is essentially in damages; therefore, triable; and the Defendants ought to be given an opportunity to defend the Plaintiffs' claim on merits. This approach, in my view, would sub-serve the ends

of justice and fair play.

8. In view of the aforesaid, I am of view that the Defendants have established that the three factors viz. prima facie case, balance of convenience and irreparable injury are in favour of the Defendants and require grant of reliefs in terms of the Notices of Motion. Both the Notices of Motion are therefore, made absolute in terms of their respective prayers (a). The ex-parte decree is hereby, set aside. The Defendants are directed to file their Written Statement within a period of six weeks.
9. There shall be no order as to costs.

(S.J. KATHAWALLA, J.)