

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

**APPEAL NO. 300 OF 2016
IN
NOTICE OF MOTION NO. 1211 OF 2012
IN
SUMMARY SUIT NO. 2526 OF 2009**

Dinesh Chandra Maingi	..Appellant.
V/s.	
Shivkant V. Choudhary	.. Respondent.

Mr. Rohan Cama i/b M/s. Joby Mathew and Associates for the Appellant.

Mr. Saeed Akhtar a/w. Pinny Pathak , Khurshood Akhtar, Pradnay Meshram for the Respondent.

**CORAM: DR. MANJULA CHELLUR, C.J.
AND M.S.SONAK, J.**

DATE : 08 SEPTEMBER 2016.

P.C.

1] The challenge in this appeal is to the order dated 12 February 2015 made by learned Single Judge of this Court in Notice of Motion No. 1211 of 2012 in Summary Suit No. 2526 of 2009.

2] By the impugned order, learned Single Judge has set aside the *ex-parte* decree made in the suit on 12 January 2011 and restored the summary suit by imposing costs of Rs.50,000/- upon the respondent in this appeal.

3] Mr. Rohan Cama, learned counsel for the appellant, submits that there is material on record, which establishes that the respondent was served with the writ of summons at his residential address at Ghatkopar, Mumbai. Further, the service at 'K' Building, Ballard Estate, Mumbai, was in addition to service at residential address in Ghatkopar, since the respondent had his office at the said address. The circumstance that service at 'K' Building was acknowledged by some clerk purporting to represent M/s. Geeta marine Services Pvt. Ltd, of which the respondent was admittedly the Director, before the said company was wound up, is really not a circumstance to hold that there was no valid service of the writ of summons upon the respondent. Further, Mr. Rohan Cama submitted that the learned Single Judge has failed to advert to the merits of the disputes between the parties, which was relevant in deciding whether the *ex-parte* decree should be recalled or not. For these reasons, Mr. Cama submitted that the impugned order warrants interference.

4] On the other hand, Mr. Saeed Akhtar, learned counsel for the respondent, has submitted that there was no service of writ of summons upon the respondent, which is quite evident from the material on record. In such circumstances, learned Single Judge has rightly recalled the *ex-parte* orders and afforded the respondent an opportunity to contest the matter on merits. Mr. Saeed submitted that although costs of Rs.50,000/- was tendered time again to the appellants, the same was refused upon the plea of the pendency of the appeal. Mr. Saeed Akhtar submitted that

the respondent is ready to pay or deposit the costs as directed.

5] Upon due consideration of the rival submissions, we are satisfied that the impugned order warrants no interference. There is no material on record to establish that the writ of summons was served upon the respondent at his residential address at Ghatkopar. Before proceeding to make an *ex parte* decree dated 12 January 2011, the purported service at 'K' Building, appears to have been treated as valid service. Upon perusal of record and appreciation of submissions made by rival parties, learned Single Judge has rightly concluded that the service at 'K' Building was acknowledged by some persons purporting to represent M/s. Geeta Marine Services Pvt. Ltd., which had already been wound up on the date of service of writ of summons. The suit has been instituted against the respondent in his capacity as guarantor and not as director of M/s. Geeta Marine Services Pvt. Ltd.. In such circumstances, it cannot be said that the impugned order is vitiated by any error of jurisdiction or perversity.

6] The material on record also establishes that the respondent applied for recall of *ex parte* decree, no sooner, he was served with a warrant of attachment. From the date of knowledge of *ex parte* decree, there is really no substantial or unexplained delay on the part of respondent. In any case, the prejudice faced by the appellant has been compensated by imposition of costs of Rs.50,000/-. The non-advertence to merits cannot be regarded as

fatal in the peculiar facts and circumstances of the present case, particularly when it is established that there was no effective service upon the respondent before an *ex parte* decree came to be made.

7] For the aforesaid reasons, we dismiss this appeal. However, we leave it to the parties to apply to learned Single Judge for expeditious disposal of the suit, in accordance with law and on its own merits.

8] The respondent is at liberty to deposit the costs of Rs.50,000/- to the account of Summary Suit No. 2526 of 2009 in this Court, in case, the appellant refuses to accept the same. Upon deposit, the appellant shall be at liberty to withdraw the amount of costs unconditionally.

(CHIEF JUSTICE)

(M.S.SONAK, J.)