

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

**NOTICE OF MOTION NO.1683 OF 2015  
IN  
SUMMARY SUIT NO.454 OF 2012**

Ganpatraj K.Sanghvi

....Plaintiff

V/s.

Vishal Udyog & Ors.

....Defendants/applicants

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Mr.Nitin Thakkar a/w Mr.A.S.Pal i/by Prasad L.Gajbhiye for plaintiff.

Mr.Shyam Kapadia a/w Mr.Prashant Kamble i/by Kartikeya and Associates for defendants/applicants.

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**CORAM : K.R.SHRIRAM,J**

**DATE : 23.6.2016**

**P.C.:-**

1           This Notice of Motion is to set aside an ex-parte decree that was passed on 1.4.2013. Order 37 Rule 4 of the Code of Civil Procedure 1908 reads as under :-

“4. Power to set aside decree – After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.”

2           Therefore, we have to see whether the applicant has set out “special circumstances” to set aside the ex-parte decree.

3           The case of the applicant is that the writ of summons was not served upon him at all. In the cause title in the plaint the address of the defendants is shown as under :-

“B/4, Shri Krishna Vihar, Babulal Pannalal Jain Marg,  
Road No.22, Belapur Village, Jain Society, Navi  
Mumbai-400 706”

4           In the presentation form filed with the plaint also the address of the defendants is shown as “B/4 Shri Krishna Vihar, Babulal Pannalal Jain Marg, Road No.22, Belapur Village, Jain Society, Navi Mumbai-400 706”.

5           When the plaintiff served the writ of summons, the packet was returned by the postal authorities with the endorsement “intimation and unclaimed”. The plaintiff therefore, filed an affidavit of service of the Bailiff of the Sheriff of Bombay, based on which the Addl. Prothonotary & Senior Master passed an order granting leave to serve the defendants by substitute service. Based on that, the plaintiff published the writ of summons in Free Press Journal and Navshakti on 28.2.2013. The plaintiff also filed an affidavit of service of the clerk of the plaintiff's Advocate. Suit was listed on 1.4.2013 and this Court was pleased to pass an ex-parte decree in favour of the plaintiff on

the ground that the defendants have not entered appearance.

Paragraph nos.2 & 3 of the said judgment read as under :-

*"2. The plaintiff has filed affidavit proving service of the writ of summons dated 30<sup>th</sup> day of March 2013. However, the Defendants have not appeared before the Court.*

*3. The plaintiff has filed the suit as a Summary Suit under the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure 1908 against the Defendants, since the Defendants have failed/neglected to make payment to the plaintiff of the claim amount payable for goods sold and supplied to the Defendants. All the purchase orders, invoice, delivery challans constituting a written contract between the plaintiff and the Defendants are placed on record. In view of sub-Rule (3) of Rule 2 of Order XXXVII of the Code of Civil Procedure, 1908, the plaintiff is forthwith entitled to a decree against the Defendants."*

6 I do not find in the record & proceeding any affidavit of service dated 30.3.2013. Mr.Thakkar appearing for the plaintiff submitted that it could be a typographical error and it should be 4.3.2013. If that was so, it was for the plaintiff to move the Court for speaking to the minutes to have the date corrected. Not only that even in the affidavit in reply to the present Notice of Motion the plaintiff has relied upon affidavit of service dated 30.3.2013. I asked the counsel for the plaintiff to provide copy of the said affidavit, which he could not, particularly in view of the fact that the counsel for the applicant stated that despite repeatedly calling upon the plaintiff they have not given inspection of the affidavit of service dated 30.3.2013.

7           It is the case of the applicant that the residence of the defendant no.3 (defendant no.2 having expired sometime back) is B-3, Krishna Vihar, Babulal Pannalal Jain Marg, Road No.22, Belapur Village, Jain Society, Navi Mumbai-400 706 and not B-4 Shri Krishna Vihar. I asked the counsel for the plaintiff from where did the plaintiff get the address B/4, Shri Krishna Vihar. The counsel stated that the whole building is owned by the defendants and relied upon the documents annexed to the additional affidavit filed by the plaintiff affirmed on 9.12.2015. None of the documents indicate that the defendants owned the entire building. There is a copy of the sale agreement which shows that unit 1B had been purchased by the defendants. The building shown in the agreement is Krishna Vihar III. It is the case of the applicant that he resides in building III B and not B/4. It is not the case of the plaintiff that the defendant was avoiding service. The counsel for the plaintiff submitted that the defendant has been changing address very frequently which also I noticed. But would that permit the plaintiff to serve writ of summons at an address where the defendant never was ? Indisputably the defendant was never at the address shown in the cause title of the plaint.

Moreover, the packet that was dispatched by the plaintiff of the Sheriff of Bombay has been returned with the endorsement "intimation and unclaimed" If intimation is posted at the wrong address, can the defendant be stated to be avoiding service ? I

would go a step further that even if the intimation was posted at the right address and the defendant has not claimed the packet from the postal authorities, would it still be a reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or for any other reason summons cannot be served, for the Prothonotary and Senior Master to permit to serve the writ of summons by substituted service. In my view, by dropping the intimation once we cannot conclude that the defendant is keeping out of way for the purpose of avoiding service or writ of summons cannot be served. The plaintiff should make further attempts before the Prothonotary & Senior Master permits him to serve writ of summons by substituted service particularly when it is a Summary suit and within 10 days defendants have to enter appearance. I have been observing that the Prothonotary & Senior Master and Addl.Prothonotary & Senior master has been granting leave to serve by substituted service as a matter of course. They must while granting such a leave, record reason why they feel the defendant was keeping out of the way for avoiding service or why the summons cannot be served in the normal way. There could be various reasons why when intimation is posted, a party may not have collected the packet from postal authorities or the courier for e.g. the party may not be residing at the address where the intimation was dropped like in this case ; (b) The party may be out of town and before they returned,

the time provided to claim would have lapsed ; (c) the party may be too old or unwell to receive the parcel or go and claim. There could be many reasons. Plaintiff cannot just make one attempt and come and ask for leave to serve by substituted service. The onus is on the plaintiff to prove that the defendant was keeping out of the way for the purpose of avoiding service. Leave to serve by substituted service cannot be granted as a matter of course and the Prothonotary & Senior Master should satisfy himself and give reasons why he is permitting service by substituted service.

8            In <sup>1</sup>Rajnikumar Vs. Suresh Kumar Malhotra, paragraph-8 reads as under :-

*“The expression ‘special circumstances’ is not defined in the C.P.C nor is it capable of any precise definition by the Court because problems of human beings are so varied and complex. In its ordinary diction any meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the Court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree ; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit.”*

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1 AIR 2003 SUPREME COURT 1322

9           The Apex court has held that non-service of summons will undoubtedly be a special circumstance. I am satisfied that the summons has not been served upon the defendants and therefore, it will be a special circumstance under Order 37 Rule 4 to recall the ex-parte decree passed. Substituted service may be good service in law but the fact that leave to serve by substituted service was granted without valid reason will go to the root of the matter. In my view leave was granted without valid reasons. Substituted service can be permitted only when there are reasons to believe that the defendant is keeping out of the way to avoid service or if summons cannot be served. There was nothing in the present case to believe the defendants were keeping out of the way to avoid service.

10          Shri Thakkar submitted that the defendant also has to show by affidavit, facts which would entitle him for leave to defend the suit. He submitted here is a defendant who has been shifting place of business from time to time only to cheat various creditors like the plaintiff. In the affidavit in support of the Notice of Motion it is stated that the defendants have also informed the plaintiff about defects in material before the suit was filed. It is also stated that the defendant had filed a FIR before the suit was lodged and the whole plaint is a counter blast. Therefore, the defendant has shown some material for the Court to consider at the hearing of the summons for Judgment as

to whether the defendant should be granted leave to defend the suit or not. It is not that the defendant has been totally silent.

11 I must also clarify that I have not made any observations on merits of the counter allegations made and that would be considered at the time of hearing of summons for judgment.

12 In the circumstances, the ex-parte decree passed on 1.4.2013 is recalled.

13 In view of the above, the question of executing ex-parte decree will not arise and therefore, Thane court is directed to return the process.

14 The counsel for the applicant states that his Advocate's Vakalatnama be continued in the main suit.

15 Since the defendant no.2, I am told has expired, the advocates for the applicant to provide details of the legal heirs of defendant no.2 to the plaintiff's Advocate within one week from today along with a copy of the death certificate. The plaintiff to amend the cause title within one week thereafter and serve a copy of the amended plaint upon the Advocate for the defendants.

16           At the request of the counsel for the plaintiff this order  
setting aside the ex-parte decree is stayed for a period of four weeks.

**(K.R.SHRIRAM,J)**