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

**NOTICE OF MOTION NO. 1787 OF 2015
IN
SUMMARY SUIT NO. 4160 OF 2000**

Akbar Humayun Abdulali	...Applicant
in the matter between	
Qays Tayyibji	...Plaintiff
VS	
Akbar Humayun Abdulali	...Defendant

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Mr Sanjay Jain, Utkarsh Muzumdar a/w Ms Renuka Kavedia i/b Lalit S. Jain for the Plaintiff
Mr Arshad Shaikh a/w Aditya Shiralkar, Sanjay Udeshi, Mahesh Londhe & Netaji Gawade i/b M/s Sanjay Udeshi & Co. for the Applicant/Defendant.

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CORAM : S.C. GUPTA, J.

FEBRUARY 16, 2016

P.C. :

This Notice of Motion is taken out by the Defendant – applicant under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (“CPC”) for setting aside an ex-parte decree passed by this court on 18 February 2003.

2 The present Summary Suit is filed by the Plaintiff for a decree of Rs.17,09,470/- together with pendent-lite and post decree interest at the rate of 24 % per annum on the principal amount of Rs.10 Lacs. The suit is filed on a Promissory Note as well as a dishonoured cheque. The Plaintiff claims to have lent and advanced a sum of Rs.10 Lacs to the Defendant repayable on demand with interest @ 24 % p.a. In consideration, the Defendant has executed a Demand Promissory Note dated 26 September 1997, promising to pay to the Plaintiff or his order the principal amount of Rs.10 Lacs together with interest @ 24 % per annum. It is the Plaintiff's case that the Defendant issued a cheque of Rs.10 Lacs on 10 April 2000 drawn on Bombay Mercantile Co-operative Bank

Ltd. towards repayment of the principal sum. The cheque was dishonoured on presentation for payment and returned with the remark “**funds insufficient**”. The suit was filed on 15 September 2000. A writ of summons was duly served on the Defendant. After the Defendant filed his appearance, a Summons for Judgment was taken out by the Plaintiff on 26 September 2001. The Summons for Judgment appeared for hearing before a learned Single Judge of this Court on 18 February 2003. Learned counsel for the Plaintiff informed the Court at that time that the Defendant had been duly served with the summons and undertook to file an affidavit of service within a period of one week. Since there was no application for leave to defend filed by the Defendant and there was no affidavit disclosing grounds for grant of leave to defend, the Plaintiff's suit was decreed on 18 February 2003 under the provisions of Order XXXVII Rule 3 of CPC. On 29 September 2015, the present Notice of Motion was taken out by the Defendant for setting aside that decree. It is the case of the Defendant that the Defendant became aware of the impugned judgment and decree only when the Defendant received a notice dated 2 February 2015 issued under Order XXI Rule 22 of CPC in an execution application filed by the Plaintiff – decree holder. It is submitted that the decree was passed ex-parte after recording an undertaking of the Plaintiff's counsel to file an affidavit of service of the Summons for Judgment. It is submitted that from the search made by the Applicant – defendant in the registry, it is revealed that no affidavit in proof of such service appears to have been filed. Based on that, it is claimed by the Applicant – defendant that “it appears that no Summons for Judgment was served”. In the premises, the Defendant prays for setting aside the ex-parte judgment and decree dated 18 February 2003.

3 At the hearing of Notice of Motion, it is admitted by learned Counsel for the Plaintiff – decree holder that the record does not disclose any affidavit having been filed by the Plaintiff proving service of Summons for Judgment on the Defendant. It is submitted across the bar by learned Counsel for the Plaintiff that there is no record or proof of service available with the Plaintiff now, since the matter pertains to a decree passed about 12 years back. For the purpose of the present Notice of Motion, we shall accordingly proceed on the footing that the Summons for Judgment was not duly served on the Defendant – applicant.

4 Since, however, the present application is under Order XXXVII Rule 4 of CPC, the question that needs to be considered is whether the Defendant – applicant has made out a case for setting aside the decree under special circumstances. It is submitted by learned counsel for the Applicant – defendant that non-service of the Summons for Judgment is in itself a special circumstance which entitles the Defendant to have a decree passed under Rule 3 of Order XXXVII of CPC set aside. On the other hand, it is submitted by learned Counsel for the Respondent – plaintiff that it is not sufficient for the Defendant to merely show special circumstances which prevented him from appearing or applying for leave to defend, but that he has also to further show facts which would entitle him to defend the suit. Learned counsel for the Plaintiff relies upon a judgment of the Supreme Court in the case of **Rajni Kumar Vs Suresh Kumar Malhotra**¹ and a judgment of a learned Single Judge of this court in case of **Deutsche Bank Vs Bizworld International**² in support of his contention.

5 In **Rajni Kumar's** case (supra), the Supreme Court was dealing with a decree passed under Order XXXVII Rule 3 of CPC upon failure of the defendant to appear at hearing of the Summons for Judgment and apply for leave to defend. The trial court proceeded with the hearing of the Summons for Judgment on the ground that the Summons for Judgment was sent by Registered Post AD to the defendant pursuant to an order of the Court and that such service amounted to a deemed service. Since the defendant failed to appear and apply for leave, the trial court decreed the suit ex-parte. As in this case, it was contended before the Supreme Court in **Rajni Kumar's** case (supra) that non service of summons was itself a special circumstance. The Supreme Court in fact accepted the submission that non-service of summons would undoubtedly be a special circumstance. The court, however, noted the difference between the provisions of Rule 4 of Order XXXVII of CPC and the provisions of Rule 13 of Order IX insofar as ex-parte decrees passed respectively under the summary procedure of Order XXXVII and in ordinary suits, are concerned. After

1 (2003) 5 Supreme Court Cases 315.

2 Chamber Summons 1768/2009 in Summary Suit No.3148 of 2004 pronounced on 12 April 2010

considering this distinction the Court came to a conclusion that when a defendant applied for setting aside an ex-parte decree under Order XXXVII Rule 4 of CPC, it was not enough for him to show special circumstances which prevented him from appearing or applying for leave to defend. He must further show facts which would entitle him to secure a leave to defend the suit. The rationale of this decision is that the very purpose of Order XXXVII is to ensure an expeditious hearing and disposal of suits filed thereunder. In the premises, Rule 4 empowers the Court not only to set aside an ex-parte decree but also to grant leave to the defendant to appear and defend the suit, if the court considers it reasonable to do so and on such terms as the Court may deem fit. Where on an application, more than one amongst specified reliefs may be granted by the Court, all such reliefs must be claimed in one application and it is not permissible to claim such reliefs in successive applications, as it would be contrary to the letter and spirit of the provision. Thus, even whilst accepting the existence of special circumstances justifying the defendant not seeking leave of the Court to defend the suit, the Court in **Rajni Kumar's** case considered it fit not to grant the relief of setting aside the ex-parte decree, since there were no circumstances emanating from the record justifying grant of leave to defend. The judgment of the Supreme Court in **Rajni Kumar**, thus, makes it clear that an ex-parte decree passed under Rule 3 of order XXXVII on account of the defendant's failure to appear and apply for leave to defend, can be set aside not just upon the defendant showing sufficient cause for his absence on the date of passing of the ex-parte decree but also after considering whether the defence tendered by the defendant discloses facts which would entitle the defendant to seek a leave to defend.

6 Learned counsel for the Applicant – defendant relies on a judgment of the Division Bench of our Court in the case of **M/s Fire Protection Systems Vs. Pankaj Gandhi**³. Based on this judgment, it is submitted that the fact that the Summons for Judgment was not served on the Defendant constitutes a special circumstance sufficient to set aside the ex-parte decree granted in the present case, under Order XXXVII Rule 4 of CPC and that the Court ought not to go into the merits of the case at this stage. The case of **Fire Protection Systems**

3 2009(1) ALL MR 889

(supra) was a case where whilst setting aside an ex-parte decree, the Court also came to the conclusion that the suit of the plaintiff was *prima facie* time barred and also that there was no territorial jurisdiction. The matter was carried in appeal by the plaintiffs. The Division Bench came to a conclusion that at the time of deciding the application for setting aside ex-parte decree, it was not necessary for the learned Single Judge to decide the aspects of limitation or territorial jurisdiction of the Court. The court, in the premises, held that *prima facie* findings of the learned Single Judge in connection with the questions of territorial jurisdiction, and limitation would have no bearing on the hearing of the Summons for Judgment and that these aspects would be considered afresh when the Plaintiff takes out a fresh Summons. It was clarified that as and when any fresh Summons for Judgment was taken out, the learned Single Judge would decide the same *denovo* and in accordance with law, after hearing both parties. This decision has no bearing on the facts of our case. In **Fire Protection Systems** case (supra), the learned Single Judge simply set aside the ex-parte decree. He did not further consider the question of leave, though the Court was expected to consider such question at that stage. However, without actually considering the question of leave, the learned Single Judge made observations about merits of the case insofar as the aspects of limitation and territorial jurisdiction were concerned. The Division Bench found fault with that and held that these observations of the Single Judge would not have any bearing when these aspects are considered at an appropriate stage by the Court, that is, when a fresh Summons for Judgment is taken out by the Plaintiff.

7 As held by the Supreme Court in the case of **Rajni Kumar** (supra), the Court has to decide not only the question as to whether or not to set aside the ex-parte decree but also whether or not to grant leave to defend. Upon cause being shown for the absence of the Defendant at the hearing of the Summons for Judgment, the Court is bound to take into account merits of the defence as disclosed by the pleadings of the parties and, accordingly, pass an order under Order XXXVII Rule 4 of CPC, considering whether or not to set aside the decree and whether or not to grant leave to defend simultaneously. In the premises, it is necessary for this Court to consider (i) whether or not the absence of the

Defendant was justified and (ii) whether or not the defence discloses facts which would entitle the Defendant to a leave to defend.

8 Coming now to the merits of our case, there is, in the first place, an admission of the loan of Rs.10 Lacs. Further, there is a Promissory Note executed by the Defendant in favour of the Plaintiff promising to pay the principal amount of Rs.10 lacs together with interest at the rate of 24 % per annum. The execution of this Promissory Note is not disputed by the Defendant, though the Defendant submits that the purpose of execution of this Promissory Note was not as alleged by the Plaintiff (without indicating what that purpose was). Then, there is also a clear case of dishonour of a cheque. This cheque covered the principal amount and was returned by the drawee bank on 13 April 2000 with the remark "funds insufficient". Insofar as, this dishonoured cheque is concerned, it is submitted by the Defendant in his affidavit in support of the Notice of Motion that the cheque produced with the plaint was not issued for the purpose of repayment of the principal amount as alleged. Once again, the affidavit is silent on the purpose for which this cheque was issued. It is disclosed in a further affidavit filed by the Defendant – applicant that sometime in September 1994, the Defendant had agreed to purchase from the Plaintiff and his wife, a property situated at Kihim in Maharashtra known as "**Almanzil**" on the terms and conditions agreed between the Plaintiff and the Defendant and recorded in two letters addressed by the Plaintiff's wife to the Defendant. These letters are addressed on 13 September 1994 and 20 January 1995. It is further submitted that subsequently as the Defendant's business was bad, he took loans of Rs.36.50 Lacs, Rs.10 Lacs and Rs.10 Lacs from the Plaintiff. It is submitted that since the Defendant could not repay these loans, the Plaintiff had filed a suit and taken out insolvency proceedings, which ultimately accumulated in a settlement arrived at between the Plaintiff and Defendant through the former's family owned company, Tayyabji Holdings and Investments Pvt. Ltd. It is submitted that according to this settlement, the two loans of Rs.36.50 Lacs and Rs.10 Lacs were to be repaid along with interest and the third loan of Rs.10 Lacs was to be written off by adjusting the same towards the consideration of Rs.20 Lacs paid by the Defendant for purchase of Almanzil in Kihim, Maharashtra. The Defendant has

relied on copies of letter dated 6 October 2004 addressed by the Defendant to the Plaintiff, Minutes of Order dated 4 November 2004 and further letter dated 20 June 2006 addressed by the Defendant to Tayyabji Holdings and Investments Pvt. Ltd. in support of his defence.

9 In the first place, two loans of Rs.36.50 Lacs and Rs.10 Lacs were advanced to the Defendant herein by Tayyabji Holdings & Investments Pvt. Ltd. A suit was filed by Tayyabji Holdings against him for recovery of the first of these loans, namely, Rs.36.50 Lacs with interest. There was a decree for payment of Rs.68,54,186/- with further interest at the rate of 24 % p.a. on Rs.36.50 Lacs. In pursuance of this judgment and decree, there was an insolvency notice taken out by Tayyabji Holdings followed by an Insolvency Petition. In an appeal filed by the judgment debtor (Defendant herein), Minutes of Order were tendered for payment of a sum of Rs.55 Lacs to the Petitioning Creditor in full and final settlement of his claim. It is clear that these Minutes of Order merely pertain to the judgment and decree dated 3 April 2002 arising out of the loan for the sum of Rs.36,50,000/-. As far as the other loan for Rs.10 Lacs is concerned, there is a full and final settlement of this loan as evidenced by the letter dated 20 June 2006 addressed by the Defendant herein to Tayyabji Holdings. Admittedly, the Defendant was advanced one more loan of Rs.10 Lacs individually by the Plaintiff. There is no reference to this loan, much less any discharge of this loan in the documents relied upon by the Defendant. Neither the without prejudice letter addressed by the Defendant to the Plaintiff on 6 October 2004 nor the Minutes of Order dated 4 November 2004 refer to this third loan of Rs.10 Lacs individually advanced by the Plaintiff to the Defendant. So also, the last letter of 20 June 2006 does not refer to the third loan of Rs.10 Lacs. The first two loans Rs.36,50,000/- and Rs.10 Lacs are the only subject matter of this correspondence and Minutes of Order produced by the Defendant.

10 In the premises, there is not even a statable defence as far as the third loan of Rs.10 Lacs is concerned. The facts brought out by the Defendant in his affidavits do not disclose any arguable defence to the Plaintiff's claim in the present suit. The defence can only be described as nominal and illusory or

moonshine.

11 In the premises, whilst there is cause shown by the Defendant for his failure to appear before the Court and apply for leave to defend when the decree of 18 February 2003 was passed against him, the defence does not disclose any ground to enable the Defendant to get a leave to defend. There is no reason in that case to set aside the decree.

12 In the premises, the Notice of Motion is dismissed. There shall be no order as to costs.

13 Learned counsel for the Plaintiff makes a statement, without prejudice to his client's rights and contentions, that the ad-interim statement made by the Plaintiff earlier in this Motion and continued till date, shall continue to operate for a further period of four weeks from today.

14 It is clarified that the observations made in this order will not in any way prejudice the Defendant's case vis-a-vis the property 'Almenzil' at Kihim, Maharashtra.

(S.C.GUPTA J.)