

dik

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

**NOTICE OF MOTION NO. 8 OF 2016
IN
SUMMARY SUIT NO. 2539 OF 2012**

Purnendu Shekarmal Jain	...Applicant
In the matter between	
M/s ACG Associated Capsules P. Ltd.	...Plaintiff
VS	
Purnendu Shekarmal Jain	...Defendant

.....

Mr Madhav Jamdar i/b Vrushali Kabare for the Plaintiff
Mr Simil Purohit a/w Gayatri Sharma, Khushboo Rupani i/b S.K.Srivastav & Co.
for the Defendant.

.....

CORAM : S.C. GUPTE, J.

FEBRUARY 29, 2016

P.C. :

This Notice of Motion is taken out by the Applicant, who was the original Defendant in the Summary Suit herein and against whom there is an ex-parte decree passed by this Court, for setting aside that decree under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 ("CPC"). The application is on the footing that the writ of summons was not duly served on the Defendant.

2 It is submitted that the writ of summons was admittedly sought to be served on the wife of the Defendant, who refused to accept the service. According to the Plaintiff, going by the Bailiff's report and affidavit of service, service on the wife, who is an adult member of the Defendant's family, is good service. Order V Rule 15 of CPC provides that service of the writ of summons may be made on any adult member of the family, whether male or female, who is residing with the Defendant. There is, however, a Bombay amendment, which requires that such service be made only on an adult male member of the family of the Defendant. Based on this amendment, it is the Defendant's contention that,

on the Plaintiff's own showing, the service is not properly effected on the Defendant.

3 On the other hand, it is submitted by the Plaintiff that the service sought to be effected at the residence of the Defendant, was refused by his wife after taking instructions from the Defendant himself and that this fact, which is established in the affidavit filed by the Bailiff, has not been disputed by the Defendant. Be that as it may, as held by the Supreme Court in case of **Rajni Kumar Vs Suresh Kumar Malhotra**¹, it is no good for the Defendant, who applies for setting aside an ex-parte decree passed against him, under Order XXXVII Rule 4 of CPC, simply to establish the circumstances which justify his non-appearance at the hearing of the Summons for Judgment. He must, in addition to such circumstances, also establish that the defence disclosed by him entitles him leave to defend. The only defence urged by learned counsel for the Defendant, at the hearing of the Notice of Motion was that as of this date, the company, which was a principal debtor and whose debt was guaranteed by the Defendant, is already under BIFR in a pending reference and that the suit against the guarantor is liable to be stayed under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). Section 22 of SICA provides for stay of a suit for recovery of money or for enforcement of any guarantee in respect of any loan or advance granted to the Industrial Company. The entitlement to seek a stay of the suit under Section 22 of SICA is not in the nature of a defence entitling the Defendant to secure leave to defend. Here, a decree has already been passed against the Defendant on 12 March 2013, on which date there was admittedly no pending reference in respect of the Industrial Company. Had there been such reference, the Defendant could have at the most pressed his claim for stay of suit and not unconditional leave to defend the suit. On an application of the Defendant under Order XXXVII Rule 3 of CPC, there is no question of this Court considering this defence and on that basis, granting him leave to defend under Order XXXVII Rule 4 of CPC.

4 In the premises, there is no special circumstance made out by the

1 (2003) 5 Supreme Court Cases 315

Defendant under Order XXXVII Rule 4 of CPC, as held by Supreme Court in the case of **Rajni Kumar** (supra). Accordingly, the Notice of Motion is dismissed. There shall be no order as to costs.

5 Learned counsel for the Defendant submits that this Court should stay execution of the decree considering Section 22 of SICA and the judgment of this Court in case of **Patheja Bros Forging & Stamping Vs ICICI Ltd. & Ors.**² He submits that considering the fact that the Industrial Company, whose debt was guaranteed by the Defendant, is already under BIFR in a pending reference, the execution even against the Defendant as a guarantor ought not to proceed. I do not propose to decide this question. It would be for the executing court to consider the application, if any, for stay of execution. All rights and contentions of the parties, in this behalf, are kept open.

(**S.C.GUPTE J.**)

2 (2000) 6 Supreme Court Cases 545