

Atul

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 456 OF 2015
IN
SUIT NO. 1967 OF 2009**

MADHU SUSHIL GUPTA

of Bombay, Indian Inhabitant, carrying on
business in the firm name and style of M/s.
Photo Film Industries, as the sold
proprietress thereof at 42, Irish Park, JVPD
Scheme, Juhu, Mumbai 400 049

... **PLAINTIFF**

~ VERSUS ~

- 1. M/s VR PICTURES**, a firm carrying
on business at Jai Ambe Cooperative
Hsg. Soc., 101/102, 2nd Floor, Juhu
Versova Link Road, Near HDFC Bank,
Andheri (West), Mumbai 400 053
- 2. GAURANG DOSHI**, of Bombay
Indian Inhabitant, proprietor of
M/s VR Pictures having office at
Jai Ambe Cooperative Hsg. Soc.,
101/102, 2nd floor, Juhu Versova Link
Rd., Near HDFC Bank, Andheri
(West), Mumbai 400 053
- 3. MADHUKANT VINOD DOSHI**,

of Mumbai, Indian Inhabitant, having
address at 78/10, Mehta Building, 2nd
Floor, Jain Society, Sion (West),
Mumbai.

4. **SONAL SHAH**, of Mumbai, Indian
Inhabitant having address at 78/10,
Mehta Building, 2nd Floor, Jain
Society, Sion (West), Mumbai. ... **DEFENDANTS**

APPEARANCES

FOR THE PLAINTIFF	Mr Karl Tamboly, i/b Ranjit & Co.
FOR DEFENDANTS NOS 1 AND 2 TO 4 (DEFENDANTS NOS. 2 TO 4, APPLICANTS)	Mr Nagendra S Dube.

CORAM : G.S.Patel, J.

DATED : 14th December 2017

ORAL JUDGMENT:

1. The application is under Order IX Rule 13 of the Code of Civil Procedure, 1908 (“CPC”) to recall an *ex parte* decree that I passed on 7th March 2014. After I passed the decree, Defendants Nos. 2 to 4 filed this Notice of Motion, on which an order was passed on 8th May 2015 (Mrs RS Dalvi J) staying further execution; and then on 21st December 2016, the *ex parte* decree was recalled (KR Shriram J) on the basis that the Writ of Summons was not

properly served. The packet were said to be have been returned with the remark “unclaimed”.

2. The order of KR Shriram J was carried in appeal and the Division Bench (RM Sawant & SV Kotwal JJ) on 10th November 2017 observed that the question of delay had not been considered while recalling the order. The Notice of Motion under Order IX Rule 13 was, therefore, restored to file and remanded for hearing afresh.

3. Today I have before me, therefore, a Notice of Motion to recall the *ex parte* decree that I passed and there is a delay of 150 days, which Mr Tamboly for the Plaintiff says is wholly unexplained, in filing the Notice of Motion.

4. I believe I must allow this Notice of Motion and I must allow it immediately, condoning the delay in the process, not for reasons of service or on the question of whether the return of a packet with the remark ‘unclaimed’ is a good service or not. For, after the packets were returned unclaimed they were served afresh by the Bailiff by hand delivery on Defendant No. 2.

5. There is a more fundamental reason to recall the decree and this has to do with the Bombay High Court (Original Side) Rules and in particular Rule 90 which reads thus:

**“R.90. Judgment for want of written statement.—
Application for judgment for want of Written Statement
shall be made by Notice of Motion, but no such Notice of
Motion shall be issued before the date on which the Writ of**

Summons is returnable. On the filing of an affidavit of service of the Notice of Motion, the suit shall be set down on the daily board for the purpose of such application."

(Emphasis added)

6. This Rule evidently does not permit the passing of an *ex parte* decree without a Notice of Motion being filed for a judgment for want of a written statement. The provisions of the Code of Civil Procedure 1908 will not apply.

7. There is a jurisprudential history to this. This is apparent from the decision of a Division Bench of this court (RMS Khandeparkar and PB Majmudar JJ) in *Nikita Trading v Nirlon Synthetics Fibres & Chemicals Ltd & Ors.*¹ There, an *ex parte* decree was passed in a civil suit on the Original Side. The matter was carried in appeal. By the time the appeal came up for final hearing, the Supreme Court had delivered its decision in *Iridium India Telecom Ltd v Motorola Inc.*,² saying that the Rules of this Court framed under Clause 37 of the Letters Patent would prevail over the provisions of the CPC where there is a conflict. The Division Bench in *Nikita Trading*, therefore, set aside the *ex parte* decree.³ Therefore, on the Original Side of this court an *ex parte* decree cannot be passed following the provisions of the CPC. It can only be passed on a Motion under Rule 90.

1 Order dated 29th April 2008 in Appeal No. 1136 of 2002.

2 (2005) 2 SCC 145.

3 It is perhaps a delectable irony that both the *ex parte* decree in *Nikita Trading* and the Supreme Court decision in *Motorola* were both rendered by BN Srikrishna J.

8. Consequently, so long as that Rule remains and is not either deleted or amended, no *ex parte* decree on the Original Side is possible except by filing a Notice of Motion for a judgment for want of written statement.

9. The Division Bench in *Nikita Trading* said:

3. The impugned order is sought to be challenged on various grounds, however, in our considered opinion, it is not necessary to address to all those grounds. Suffice to refer to only one ground which relates to failure on the part of the Court to take into consideration the provisions of law those are applicable in cases where the Defendant fails to file the written statement inspite of service of summons and when the matter High Court is placed before this Court on Original Side. The Law on the point is well settled by the decision of the Apex Court as well as of this Court and we can conveniently refer to only three decisions. One in the matter of *Iridium India Telecom Ltd. vs. Motorola Inc.* reported in (2005) 2 SCC 145 of the Apex Court, and two others of this Court to which one of us (R.M.S.Khandeparkar, J.) had been the party and they were in *Tardeo Properties Pvt. Ltd. vs. Bank of Baroda* reported in 2007 (5) BCR 557 and *All India Central Bank Employees Congress & Ors. vs. Central Bank of India* reported in 2007 (5) BCR 835

4. **This Court relying upon the *Motorola's* case in *Tardeo Properties* matter (*supra*), had clearly held that the provisions of Order VIII of the Code of Civil Procedure are not applicable to the matters which arise on the Original Side of this Court and the Court has to follow in that regard the Original Side Rules.** The same view was reiterated in Central Bank of India's case (*supra*).

In fact, the Delhi High Court in *M/s.Printpak Machinery Ltd., New Delhi vs. M/s.Jay Kay Paper Congeters, New Delhi* reported in AIR 1979 Delhi 217 had held that the Original Side Rules are not an amendment made or a provision inserted in the Code of Civil Procedure and they always existed as a separate body of Rules. Similarly Division Bench of this Court in *Shevaram Thadaram Jainsinghani vs. Indian Oil Corporation Ltd.* reported in 1968 Mh.L.J. 748, **had held that wherever rule has been made by the High Court for the benefit of the procedure to be followed on the Original Side, the provisions of the Code of Civil Procedure would not apply and it was held that the amended provision of Order VIII Rule 1 would not apply to the Suits on the Original Side and such Suits will continue to be governed by the Original Side Rules. The said decision of the Division Bench was duly approved by the Apex Court.**

5. **Considering the law as above being well settled, plain reading of the above quoted order passed by the learned Single Judge while disposing the Suit cannot be sustained and is liable to be set-aside and matter is required to be remanded** for disposal of the Suit in accordance with the provisions of law and considering the Ruling of the Apex Court in *Motorola's case (supra)*, the Division Bench of this Court in *Tardeo Properties' case (supra)* as well as *Central Bank of India's case (supra)*.

(Emphasis added)

10. In *Tardeo Properties Pvt Ltd v Bank of Baroda*,⁴ the question received a more elaborate analysis and discussion. There, a Division Bench (RMS Khandeparkar and DG Karnik, JJ, per RMS

4 2007 (5) Bom CR 557.

Khandeparkar J) held, albeit in the context of service of a writ of summons:

9. The Rule 88 under Chapter VII deals with the matter relating to the time for filing appearance or vakalatnama by the defendant. The Clause (a) thereof provides that in suits where the written statement is called for by the writ of summons, the defendant shall file an appearance in person or a vakalatnama, as the case may be, within twelve weeks from the service of writ of summons. **The Rule 90 provides for judgment for want of written statement and it states that an application for judgment for want of written statement shall be made by notice of motion, but no such notice of motion shall be issued before the date on which the writ of summons is returnable.** On the filing of an affidavit of service of the notice of motion, the suit shall be set down on the daily board for the purpose of such application. The Rule 91 deals with the situation arising out of default in filing the written statement and it provides that if in a suit where there are more defendants than one, any defendant shall have failed to file his written statement if such be called for, within the time fixed in the writ of summons, or any time extended by order, and the suit has not been set down as undefended as against him, such defendant shall not be allowed to appear and defend at the trial except with the leave of the Court or the Judge in chambers upon such terms as to the filing of his written statement, giving discovery, and the payment of costs of adjournment, as a condition precedent to leave to defend, or otherwise, as the Court or Judge may order or upon such other terms, if any, as the Judge may think proper.

10. Taking into consideration the decision of the Division Bench in *Motorola's* case and plain reading of the above referred Rules on the Original Side, it is apparent

that in order to enable the defendant to file the written statement, there has to be a writ of summons served upon the defendant, specifying the period within which he can file the written statement. Undoubtedly, such writ of summons can be served upon the Advocate for the defendant. Undoubtedly, the Advocate for the defendant can certainly file his vakalatnama in the Court but by that itself it would not lead to the conclusion that the defendant is served with the writ of summons. Though the Rule 79 empowers the Advocate to accept the writ of summons on behalf of the defendant, nevertheless, Rule 69 clearly requires the writ of summons to be issued in a particular Form and further Rule 88 specifically speaks of the occasion to file the written statement only when the defendant is called upon to do so by service of writ of summons specifying the period within which the written statement to be filed.

14. As regards Rule 5(2), plain reading thereof and the reading of Rules 89 and 90 would reveal that the same is totally inconsistent with the latter rules. **While under Order 8, Rule 5(2) failure to present the written statement or pleadings would empower the Court either to pronounce the judgment or require the plaintiff to prove the case, in case of failure to file the written statement on the Original Side, the Judge in the chambers will have to issue direction to fix the suit on board for disposal as an undefended suit, either on the same day or any other day as he may deem fit. That itself will not amount to saying that failure on the part of the defendant to file the written statement would empower the Court to dispose of the matter by pronouncing judgment on the basis of the facts contained in the plaint. On the contrary, in terms of Rule 89 the Court will have to fix the matter for disposal as an undefended suit. In other words, only option**

which would be available to the Court would be to ask the plaintiff to prove the case before the pronouncement of the judgment. In case the plaintiff desires to get the suit disposed of based on the averments made in the plaint, on account of failure on the part of the defendant to file the written statement, he is required to take out notice of motion in terms of Rule 90 and the same will have to be dealt with accordingly. In other words, the procedure which is prescribed under Rule 5(2) of Order 8 is not similar to the one as provided under Rules 89 and 90 of the Original Side Rules. In fact, they are not consistent with each other. As far as Rule 10, Order 8 of the CPC is concerned, since the law on the point of non-applicability of Order 8, Rule 1/Rule 2 to the proceedings on the Original Side **is well-settled by the decision in Motorola's case, for the same reason Rule 10 cannot be made applicable to such proceedings before the Original Side.**

(Emphasis added)

11. I believe this puts it beyond the pale. Mr Tamboly submits that such a decree, even if passed, is not a nullity, because there is no inherent lack of jurisdiction. This is at the very least debatable, for *Motorola*, *Tardeo Properties* and *Nikita Trading* all make it clear that without a Notice of Motion the Court cannot pass such a decree at all. Read together, these three decisions tell us in the most unequivocal terms that on the Original Side of this court, given the extant Rules, a Court cannot exercise jurisdiction under Order VIII of the Code to pass an *ex parte* decree. That can only be done on a Notice of Motion filed under Rule 90 of the OS Rules, and not otherwise.

12. Does Mr Tamboly's submission mean or imply that that such a decree passed under the CPC by the High Court on its Original Side, that is to say without a Notice of Motion under Rule 90 is a mere 'irregularity'? If it is, then an irregularity is, by definition, curable. Does this in turn mean that a Notice of Motion can be filed now in 2017 to which the order of 7th March 2014 could be made to apply? I do not think that is even remotely possible. If the only way in which to pass an *ex parte* decree is on a Notice of Motion filed under Rule 90, then it is self-evident that there must be first a Notice of Motion seeking such an order and not one that can be filed later. What the three judgments referred to earlier tell us is that Rule 90 is exclusionary: it eliminates the applicability of the CPC altogether in the matter of passing *ex parte* decrees. An *ex parte* decree passed on the Original Side of the Bombay High Court without a Motion under Rule 90, i.e., passed under the provisions of the CPC, is entirely a nullity. It cannot be sustained. It lacks the underlying the remit; that remit demands the filing of a Motion. Without that Motion under Rule 90, no *ex parte* decree is possible. I do not myself believe Rule 90 is at all any longer a salutary provision or that it should be continued for a minute longer, but that is wholly irrelevant. So long as that provision remains, this result must follow.

13. The *ex parte* decree of 7th March 2014 is recalled and set aside.

14. It appears that by an order dated 21st December 2016 the Defendants have been allowed to enter their written statement. Even if that order has been set aside, the fact of the matter today is that there is a written statement now on file. There is, therefore, no

question any longer of the Plaintiff obtaining an *ex parte* decree or putting such decree into execution. I agree with Mr Tamboly that in a suit of 2009 there should not be further delay. I am however unable to accept his submission that the Defendants should now be asked to deposit some amount to secure the Plaintiffs' claim. The reasons are two: first, that KR Shriram J in his order of 21st December 2016 took a view that my *ex parte* decree was liable to be recalled. On a remand in an appeal from that order I have not only agreed that the decree requires to be recalled, but I have done so for, with respect, reasons that I believe to be more fundamental than were raised before KR Shriram J. I have, in the foregoing order, said that such an *ex parte* decree could never have been passed at all in view of the legal position on the subject.

15. The best that can be done, therefore, at this stage is to place the suit for directions peremptorily but that will have to await the framing of issues. That need not be delayed and I will therefore take up the matter on 22nd December 2017 at 11.00 a.m. for framing issues. I will issue necessary directions for trial and cross-examination of the Plaintiffs' witnesses thereafter.

16. A copy of the Affidavit of Evidence and Affidavit of documents will be given to the Advocates for the Defendants. I am making it clear now that I will not accept a single adjournment application on behalf of the Defendants hereafter.

17. The Notice of Motion is made absolute and disposed of in these terms.

18. There will be no order as to costs.

(G. S. PATEL, J)