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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 1338 of 2016

- 1) Narendra Plastic Private Limited, A]
 company incorporated under the]
 Companies Act, 1956, having its]
 registered office at 714-725 Corporate]
 Avenue, Sonawala Cross Road, Goregaon]
 (West), Mumbai 400 063.]
]
- 2) Neemit Punamiya,] PETITIONERS.
 an adult, Indian Inhabitant, having its]
 office at Block No.D, Himachal CHSL,]
 Opp. Sunder Nagar, S.V. Road,]
 Malad (West), Mumbai]
]

VERSUS.

DBS Bank Limited,] RESPONDENT.
 A body Corporate incorporated in]
 Singapore, 12, Marine Boulevard, Marina]
 Bay Financial Center Tower 3, Singapore]
 018982 and having its branch office inter]
 alia at Fort House, 3rd Floor, 221, Dr. D.N.]
 Road, Fort, Mumbai 400 001 through its]
 constituted attorney, Mr. Pankaj Jain.]

ALONG WITH

WRIT PETITION No. 2046 of 2016.

DBS Bank Limited,] PETITIONER.
 A body Corporate incorporated in]
 Singapore, 12, Marine Boulevard, Marina]
 Bay Financial Center Tower 3, Singapore]
 018982 and having its branch office inter]
 alia at Fort House, 3rd Floor, 221, Dr. D.N.]
 Road, Fort, Mumbai 400 001 through its]
 constituted attorney, Mr. Pankaj Jain.]

VERSUS.

- 1] M/s. Narendra Plastics Limited, A] RESPONDENTS.
 company incorporated under the]
 provisions of Companies Act, and having]
 its registered office at 714-725 Corporate]
 Avenue, Sonawala Cross Road, Goregaon]
 (West), Mumbai-400 063.]
]
- 2] Mr. Neemit Punamiya,] .
 an adult, Indian Inhabitant, having its]
 address at Block No.D, Himachal CHS Ltd.,]
 Opp. Sunder Nagar, S.V. Road,]
 Malad (West), Mumbai 400-064.]
]

Appearances:-

Mr. Gaurav Joshi, Senior Counsel a/with Mr. Piyus Jhaveri and Mr. Vinod Kothari i/by M/s. Apex Law Partners for the petitioner in Writ Petition No. 1338 of 2016 and for the respondent in Writ Petition No.2046/2016.

Mr. Zubin Behramkamdin, Counsel a/with Ms. Vidya Naik, Mr. Huzefa Nasikwala, Mr. Raman Misra, Ms. Nikita Mahadik, Mr. Ganesh Narkhede i/by Nasikwala Law Office for Respondent in Writ Petition No.1338/2016 and for petitioner in Writ Petition No.2046/2016.

**CORAM : R.M. BORDE &
 A.S.GADKARI, JJ.**

**RESERVED ON :- 14th February, 2017.
 PRONOUNCED ON: 28th February, 2017.**

JUDGMENT (PER: R.M. BORDE,J)

- 1) Heard.
- 2) Rule. Rule is made returnable forthwith. By consent of parties, both the petitions are taken up together for final hearing at the admission stage.
- 3) Both these petitions are presented objecting to the order passed by the Debt Recovery Appellate Tribunal, at Mumbai in Appeal No. 203 of 2015 Misc. Application (M.A.) No.520 of 2015. The Appeal No. 203 of 2015 has been presented by the petitioners in Writ Petition No.1338 of 2016 (i.e. original defendants in O.A.No.32 of 2014) for setting aside the order passed in Original Application as well as Misc. Application No.24 of 2014. M.A.No.520 of 2015 is presented in the appeal claiming exemption from making pre-deposit of the amount.
- 4) The original applicant-DBS Bank Ltd., before the Debt Recovery Tribunal-I, Mumbai (for short, DRT-I) presented proceedings i.e. Original Application No.32 of 2014 against the petitioners- original defendants) (the parties are referred to as per the status in Writ Petition No. 1338 of 2016). According to the respondent-bank, the petitioners-Company applied for sanction of multi line financial facilities comprising of working capital facility,

sales bill/invoice as well as discounting facility of Rs.100 Million for Working Capital requirement and by issuing sanction letter dated 31st August, 2009, the financial assistance of Rs.100 Million has been sanctioned to petitioner No.1 herein (original defendant no.1) for which the petitioner No.2 (original defendant no.2) executed all necessary documents in favour of the respondent-bank (original applicant). At the request of petitioner (defendant no.1 Company) the respondent-bank (original applicant) sanctioned additional multi line credit facilities of Rs.100 Million vide sanction letter dated 2nd November, 2011.

5) Since the petitioners-Company herein failed to deposit the amount, the proceedings came to be presented for issuance of Recovery Certificate for an amount of Rs. 22,91,83,737/- together with interest at contractual rate from the date of presentation of original application till the payment and realization of the entire amount. On presentation of the Original Application, the Respondent-bank herein tried to serve the notices on the petitioners, however, those were returned back with postal endorsement as "Unclaimed". The service was deemed to be a good service. According to law, the Original Application No. 32 of 2014 was proceeded *ex parte* and the Debt Recovery Tribunal-I, Mumbai (DRT-I) allowed the original application directing the petitioners

(original defendant Nos. 1 and 2) herein, jointly and severally, to pay to the respondent-bank a sum of Rs.22,91,83,737/- (Twenty Two Crores, Ninety One Lakhs, Eighty Three Thousand, Seven Hundred and Thirty Seven Rupees) with subsequent simple interest at the rate of Rs.10% per annum from the date of application till realization. It is also declared that the repayment under Recovery Certificate amount is duly secured by valid and subsisting First pari passu hypothecation and charge on the present and future current assets, as, more particularly, described in Exhibit-J in Schedule-I of the Original Application No.32 of 2014. The petitioners herein aggrieved by the decision in the Original Application presented an application to the Tribunal itself requesting for recall of the *ex parte* order dated 27th June, 2014. The application was registered as Miscellaneous Application No. 24 of 2014.

6) It is contended in the application by the petitioners that there was no proper service of summons, the door number of the registered office address of petitioner No.1-Company (defendant No.1) is mentioned as 712-725 instead of 714-725 and that the bank has purposefully mentioned the wrong door number so as to obtain *ex parte* recovery certificate / order. It is claimed that there was no service of notice on the petitioners and as such the *ex-parte*

recovery certificate deserves to be set aside. The application tendered by the petitioners herein being Miscellaneous Application No.24 of 2014 came to be dismissed by the Presiding Officer of DRT by an order dated 17th March, 2015.

7) Being aggrieved by the decision rendered by the DRT-I, Mumbai in Misc. Application No.24 of 2014, dated 17th March, 2015 the petitioners preferred Appeal bearing No.203 of 2015 to the Debt Recovery Appellate Tribunal, at Mumbai (for short, the Appellate Forum/Tribunal). Along with the appeal, the petitioners also tendered Misc. Application No.520 of 2015 seeking exemption from pre-deposit of the amount as mandated by Section 30A of the Recovery of Debts Act, 1993 (for short, "R.D.B. Act"). The appeal came to be disposed of by the Appellate Forum by an order dated 5th January, 2016.

8) The Appellate Forum observed in the judgment that even though it is a technical objection raised in respect of service of summons but the Tribunal is of the opinion that proper opportunity has not been given to the party concerned. It is further observed that if the summons has not been served, the duty of the Court is to invoke the powers under Order V Rule 20 of the Code of Civil Procedure of issuing paper publication. The Appellate Tribunal held that the summons has not been served on the defendants. The

Appellate Tribunal observed that the dues as on June, 2014 is to the extent of 22 Crores (Rupees Twenty Two Crores). However, in order to demonstrate the bona fides the petitioners were directed to deposit Rs.1.00 Crore (Rupees One Crore) before the Trial Court within one month from the date of receipt of copy of the order. The petitioners were further directed to file written statement within two months before the DRT-I, Mumbai and the DRT-I,Mumbai was directed to decide the matter on consideration of merits.

9) The order passed by the Appellate Tribunal is challenged by the debtor as well as creditor. The petitioners herein objects to the condition in respect of deposit of Rupees One Crore contending that since the summons were not served it was not justifiable to direct the petitioners to make pre-deposit of amount before the DRT. On the contrary, the respondent herein (original applicant) objected to entertainment of the appeal itself by the Appellate Forum for want of compliance of the provision in respect of pre-deposit of the amount as required under Section 30A of the R.D.B. Act. It is contended that as per the provisions prevailing on the date of presentation of the appeal, it was mandatory to direct the petitioners to deposit 75% of the amount, before the Appellate Court proceeds to decide the appeal. It is contended that the appeal ought not to have been entertained at all before making pre-deposit

amount. It is further contended that the conclusion reached by the Appellate Forum that the summonses were not duly served, is erroneous and against the facts brought on record. The petitioner No.1/borrower who has admittedly borrowed sum of Rupees Two Hundred Million from the respondent-DBS bank and has not repaid the amount cannot be permitted to go scot-free and defeat the claim of the bank.

10) It is pointed out that the petitioner No.1 herein/borrower has not at all disputed the claim of recovery of amount nor has stated that it has not borrowed the amount at all and that the bank is not entitled to recover the amount. It is contended that in order to demonstrate the *bona fides* the petitioners herein ought to have been directed to deposit the amount at least as provided under the Amended Act. It is further contended on behalf of the bank that the principles governing setting aside the *ex parte* decree in the Code of Civil Procedure and more specifically Order IX Rule 13 proviso mandates that no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim, ought to have been considered by the Appellate Tribunal.

11) The petitioners contend that the envelope containing the notice is issued to the petitioner no.1 Private Limited Co. on the address at 712-725, Corporate Avenue Sonawala Cross Road. Whereas the registered office of the petitioner no.1 is situate at 714-725 Corporate Avenue, Sonawala Cross Road, Goregaon (West), Mumbai. It is contended that flat number has been intentionally and wrongly recorded with intent to obtain the ex parte decree. It is further contended that petitioner No.2 who is the Director of the Company has also not been served since the envelope sent to him by post has been returned "unclaimed". The address of the Director is not the one which is address of the Company. The contention raised by the petitioners does not appear to be acceptable for the reason that the registered office of the Company is admittedly situate at Block No.714-725 Corporate Avenue, Sonawala Cross Road, Goregaon (West), Mumbai. Whereas the postal address recorded on the envelope is 712 to 725 which includes Block No. 714 to 725. The objection raised is hyper-technical one and the petitioner cannot succeed on the basis of such hyper-technical objection. So far as the service on petitioner no.2 is concerned, admittedly, he has also not claimed the postal envelope. In the memo of writ petition, it is categorically recorded in ground "LL" that petitioner No.2 was a party to the proceedings in his own name and had been served with the summons. In ground "MM" also it

has been recorded that petitioner No.2 had been served with the summons in his name and had not been served with the summons issued in the name of petitioner no.1 Company. Admittedly, petitioner No.2 is a Director of the Company and the service on the Director of the Company is a good service. Petitioner No.2 who represents the Company is, admittedly, served and as such he cannot make any grievance in respect of service of notice even on the Company.

12) So far as the endorsement appearing on an envelope containing the summons transmitted back by post as “Not claimed” is concerned, it is the contention of the petitioners that not claiming the postal envelope cannot be considered to be a good service. Reliance is placed on the judgment in the matter of the **New India Assurance Co. Ltd. Vs. Smt. Nasibunnisa Mohd.Israr Khan & Ors** in C.A. No.1979/2011 in First Appeal Stamp No.13185/2011 delivered by a Single Judge of this Court on 14th October, 2011. The learned Single Judge of this Court has taken a view that though the subsisting Rule 9 of Order V of the Code of Civil Procedure expressly provides that if a postal article containing the summons is received back with an endorsement of refusal, the same shall be treated as good service, there is no such provision made in a case where summons or notice issued by

Registered Post A.D. is returned with a remark “intimation posted” and “not claimed” or “unclaimed”. Therefore, in such a case the service of summons or Court notice cannot be treated as a good service.

13) Reliance is also placed on the judgment in the matter of **Sushil Kumar Sabharwal Vs. Gurpreet Singh & Ors**, reported in **(2002) 5 SCC 377** to contend that the Court before exercising its discretion of passing *ex parte* decree must be satisfied that due service of summons was “proved”. A reliance is also placed on a judgment of the Division Bench in the matter of **Lucy Ayline Jacinto vs. Union Bank of India & Ors** reported in **2011 (3) Mh.L.J.480**. In the reported matter, as is evident from the judgment, it is observed in paragraph 14 that the Court cannot be unmindful of the circumstance that a fraud is alleged to have been perpetrated upon the first respondent by its then DGM Tawadia, who was at the material time, the Manager at the M.S.Marg Branch. The fraud pertains to the discounting of bills in favour of a proprietary concern. It was also observed by the Court that the address of the petitioner was totally different as such court proceeded to direct setting aside the *ex parte* decree. In the instant matter, it is observed that there was a proper service on defendant No.2 and that defendant No.2 has admitted the

correctness of the address and has not disputed the service of summons on him. Defendant No.2 is the Director of the Company though he has not claimed the postal envelope since the address on the postal envelope is correct it has to be presumed that he has received the notice. The Counsel appearing for the respondent vehemently contends, placing reliance on the judgment in the matter of **C.C. Alavi Haji vs. Palapetty Muhammed & Anr** reported in **(2007) 6 SCC 555** that Section 27 of the General Clauses Act, 1897 gives rise to a presumption that service of notice has been effected when it is sent to correct address by registered post. The respondent has placed reliance on the judgment in the matter of **Sunil Poddar v. Union Bank of India** reported in **AIR 2008 SC 1006**. In paragraph 18 of the judgment the Apex Court observed thus :-

18. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim, of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the

defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22 (2) (g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside."

14) So far as the proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, the "R.D.D.B.F.I. Act") and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "SARFAESI Act"), are concerned, in exercise of the powers conferred under sub-section (1) of Section 22 of the R.D.D.B.F.I. Act, Regulations have been framed, called as Regulation of Practice, 2010 of the Debts Recovery Tribunals for the States of Maharashtra, Gujarat, Goa and the Union Territories of Dadra and Nagar Haveli, Daman and Diu. Regulation 19 relates to service of summons or notice. Sub-regulation (3) of Regulation 19 reads thus :

19.(3) Summons or Notice shall ordinarily be served by R.P.A.D. Or Speed Post. It may also be served by e-mail, Fax or courier with the leave of the Registrar who shall ensure due service of the Paper Book on or before the date of first appearance. The Registrar may allow the Summons or Notice to be served by the party filing the Application or the Appeal. Service Affidavit along with proof of service shall be filed by the person effecting such service.”

In view of sub-regulation (4) of Regulation 19 where the summons or notice is in respect of a claim against the Corporation or Partnership Firm, if it is served on the Secretary or the Director or other principal officer of the Corporation or the Partner of the Partnership Firm at its registered office or on the address of the Partnership Firm, it shall be good service.

15) In the instant matter, petitioner no.2 has not disputed his address and has in fact admitted the service of notice on him, in the memo of writ petition. A finding has been also recorded by the DRT while rejecting the application tendered by the petitioners for setting aside *ex parte* decree that the petitioner no.2 has not disputed service of notice to him. What has been disputed by respondent no.2 is that there is no service of notice sent to him on the registered address of the Company. The objection raised is

required to be rejected, since, admittedly, petitioner No.2 has not disputed receipt of the notice. Admittedly, petitioner No.2 is the Director of the Company. Apart from this, notice transmitted on the address of the company if not claimed shall also be termed as a good service. Sub-regulation (6) of Regulation 19 provides specifically that where the Summons or Notice is returned with postal remarks such as 'refused', 'unclaimed', 'not claimed', 'intimated' or 'intimation given' it may be declared that the Summons or Notice is served.

16) In the instant matter, the Summons or the Notice has not been claimed by both the petitioners though sent on the address of the Company and includes Director. Therefore, it must be presumed that there is proper service of notice and the finding recorded by the Appellate Forum as regards the deficiency in service of notice is not correct and deserves to be set aside. As has been correctly argued by the Counsel appearing for the respondent-bank that applying the principle of Rule 13 of Order IX of the C.P.C., the decree passed *ex parte* shall not be set aside merely on account of defect in service when the parties have posted with the knowledge of the proceedings.

17) The another argument that needs to be considered is the failure of the Debt Recovery Appellate Tribunal to observe the

mandate of Section 30A of the R.D.B. Act of ensuring pre-deposit of the amount before entertaining an appeal. The amendment enforced by Act No. 44 of 2016 mandates depositing of 50% of the amount. As per the provisions existing prior to the Amendment, it was incumbent upon the appellant to make deposit of 75% of the amount. In the instant matter, in order to test the *bona fides* of the petitioners it was ascertained as to whether the petitioner is willing to deposit at least 25% of the amount. However, the petitioners have specifically expressed their inability to deposit the amount. The dues payable to the bank by the petitioners on the date of presentation of the proceedings before the DRT were more than Rs.22 Crores. The petitioners have not denied the factum of advancement of loan by the bank to them. The petitioners did not have any intention to make payment of loan amount advanced by the bank. The petitioners are admittedly defaulters and do not have intention to repay the amount. In such situation, this Court need not exercise extraordinary jurisdiction under Article 226 of the Constitution of India in favour of such petitioner who is a unwilling to deposit any amount and to show his *bona fides*.

18) For the reasons recorded above, the decision rendered by the Appellate Forum allowing the appeal presented by the petitioners is unsustainable and deserves to be quashed and set

aside and same is accordingly quashed and set aside. The Writ Petition No.1338 of 2016 is dismissed. Rule is discharged. Ad-interim relief, if any, stands vacated.

19) Whereas, Writ Petition No. 2046 of 2016 presented by the bank is allowed. Rule is made absolute to the extent as specified above in the aforesaid writ petition. In the facts and circumstances of the case, there shall be no order as to costs.

(A.S. GADKARI,J)

(R.M. BORDE, J.)