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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.149 OF 2018
WITH
CIVIL APPLICATION NO.205 OF 2018
IN
APPEAL FROM ORDER NO.149 OF 2018.**

Rajendra A. Bagga Prop. M/s Shree Shankar Plastics V/s. Nocil Limited (National Organic Chemical Industries Ltd)	... Appellant
	... Respondent

Mr. Kirit Hakani a/w Ms. Niyati Hakani i/by Mr.
Yogesh P. Gandhi and Ms. Zehra Patel, for the
Appellant.

Mr. Ashutosh Kaushik a/w Mr. Ryan Sherif i/by
Manilal Kher Ambalal & Co., for respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 25th SEPTEMBER, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondent.
- 2] This Appeal takes an exception to the order dated 25th September, 2017, whereby the City Civil Court, Mumbai has dismissed the Notice of Motion No.829 of 2013, filed in Suit No.6572 of 2005.
- 3] The said Notice of Motion was taken out by the appellant plaintiff for setting aside the exparte judgment and decree dated 14.03.2008. It was contended by the appellant that the Summons of the Special Suit was not served upon him. He came to know about the

exparte decree only in the last week of April, 2012. Thereafter, he contacted his advocate for inspection of the record and proceeding, but it was informed to him that the record and proceeding is not available and therefore, only on the basis of the copy of plaint, he approached this Court. Then it was found that exparte decree was passed on 14.3.2008.

4] This Notice of Motion came to be resisted by respondent by contending inter alia that the Writ of Summons was duly served on the Appellant on 30th July, 2005. Subsequently same was also served through R.P.A.D. in August, 2005. Respondent has filed affidavit of Service of Writ of Summons in this Court, as the suit was pending in this Court at that time and thereafter the suit was transferred to the list of “undefended suit”. The decree was then passed on 14.3.2008. Thus, it is contended that the Notice of Motion taken out by the appellant is hopelessly barred by limitation. Moreover, affidavit in support of the Notice of Motion is dated 1.11.2012, but the Notice of Motion is filed in April, 2013 and hence on all these grounds the Notice of Motion was liable to be dismissed.

5] The trial Court accepted the contention raised by the respondent and finding that the Summons of Writ was duly served on the appellant, as it bears an endorsement of “not claimed” and despite that as the appellant had not appeared in the suit, there was no

sufficient cause to set aside the exparte judgment.

6] While challenging this order passed by the trial Court, the submission of learned counsel for the appellant is that though the endorsement on the Writ of Summons goes to show that it was, “not claimed”, that does not mean that it was duly served on the appellant. It is urged that in order to advance the substantive cause of justice, the trial Court should have allowed the Notice of Motion and set aside the exparte judgment and decree, especially when the appellant is having very good case on merits.

7] Per contra, learned counsel for respondent submitted that as the Writ of Summons bears the endorsement “not claimed”, the trial Court was justified in observing that it was duly served and as there was due service of Writ of Summons, hence no sufficient case is made out for setting aside the exparte judgment. There is also substantial delay in filing the said Notice of Motion and hence according to learned counsel for respondent, no interference is warranted in the impugned order passed by the trial Court.

8] I have given my thoughtful consideration to the submissions advanced at bar by learned counsel for both the parties. Admittedly the suit is of the year 2005. The record shows that the Writ of Summons was issued to the appellant and the endorsement thereon shows “not claimed” and hence it has to be held that the Writ

of Summons was duly served upon the appellant. Thereafter exparte decree came to be passed. As per the order passed by this Court, the suit was transferred to the list of “undefended suit” on 14.3.2006, the decree was passed in the year 2008 and then in the year 2013, this Notice of Motion is filed. In such situation, the trial Court was justified in dismissing the Notice of Motion.

9] In this appeal, the learned counsel for the respondent has fairly conceded that if the appellant is ready to deposit in the Court the amount of the suit claim, then learned counsel for respondent has no objection to set aside the exparte decree. In reply thereto, learned counsel for appellant submits that as per letter dated 09.02.2001, the business relations between the parties came to an end. There is also endorsement in the letter dated 6.10.2010 that in January an amount Rs.25 lacs was paid. In such situation, appellant is not liable to pay the suit claim amount.

10] However, in my considered opinion, at this stage while deciding this Appeal, against the rejection of the Notice of Motion, this Court cannot enter into the merits of the matter, but to protect the interest of respondent, who is litigating this suit since the year 2005; has already obtained the decree in the year 2008 and has filed execution proceeding of the said decree, at this stage when the appellant is seeking to set aside the said decree, it is necessary to

direct the appellant to deposit the amount of the suit claim in this Court, so that it will advance the substantive cause of justice and balance the interests of the both parties.

11] Accordingly the Appeal is allowed. The impugned order passed by the trial Court is set aside. The Notice of Motion filed before the trial Court is allowed, subject to appellant depositing in the Court the amount of suit claim, which is to the tune of Rs.31,84,960/-, within a period of 12 weeks from today.

12] If the amount is deposited, the trial Court to invest the said amount in any nationalized bank till decision of the suit and to decide the suit as expeditiously as possible, it being the suit of the year 2005.

13] On failure of the appellant to deposit the amount within the stipulated period, this order will stand automatically vacated.

14] In view of disposal of Appeal from Order, pending Civil Application therein becomes infructuous and the same is disposed off accordingly.

[DR.SHALINI PHANSALKAR-JOSHI, J.]