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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 73 OF 2018
IN
SUIT NO. 400 OF 2004

Goldcrest Capital Market Pvt Ltd ...Plaintiff
Versus
Ashok Mittal & Anr ...Defendants

Ms Dhawani Bokaria, *i/b Purnanand & Company, for the Plaintiff in Suit No. 400 of 2004 and Applicant in Notice of Motion No. 73 of 2018.*

Mr DD Madon, Senior Advocate, *with Dimple Merchant, Digant Bhatt, & Gaurav Jangle, i/b IV Merchant & Co., for the Applicant in Notice of Motion No. 71 of 2018.*

Mr Harsh B, *i/b ALMT Legal, for the Respondents in Notice of Motion No. 73 of 2018.*

Mr A Lohia, *with Ms R Patil, i/b Negandhi Shah & Himayatullah, for the Respondent in Notice of Motion No. 71 of 2018.*

Ms Ruchi Mittal, *present.*

CORAM: G.S. PATEL, J
DATED: 18th/25th June 2018

PC:-

1. Heard. This is an application by the 1st Defendant to the Suit (“Mittal”) under Order 9 Rule 13 of the Code of Civil Procedure 1908 to set aside an *ex parte* decree dated 1st December 2015 and then to raise an attachment levied pursuant to that decree.

2. Very briefly, these are the facts. The 1st Defendant was served with a writ of summons. On 1st October 2015 when the suit was listed, the 1st Defendant was not represented in Court. The Affidavit in Support of the Notice of Motion gives reasons for not being present. It is important, however, to note what happened on 1st October 2015 before KR Shriram J. This is how that order reads:

"1. The Plaintiffs' first witness Mr Tushar Tulsidas Tanna (PW-1) is present in Court and is administered oath. On oath PW-1 confirms having affirmed an affidavit dated 1st November 2014 and further affidavit of evidence dated 25th November 2014 and identifies his signature. The same are taken on record and marked **Exhibit P-1 and P-2** respectively. With these affidavits the Plaintiffs affidavit of documents is also taken on record. The Plaintiffs have also filed a compilation of 7 documents.

2. The serial numbers given below relate to the index to the compilation of documents:-

Serial No. 1 – X-1 for identification.

Serial No. 2 – **P-3**

Serial No. 3 – X-2 for identification

Serial No. 4 – **P-4**

Serial No. 5 – **P-5**

Serial No. 6 – **P-6**

Serial No. 7 – **P-7**

3. The counsel for the Plaintiff seeks some time to prove the documents marked as X-1 and X-2 for identification.

4. Stand over to 29th October 2014 for marking of documents on which date the Plaintiff's 1st witness shall remain present in court."

3. On 29th October 2015, the Court proceeded to mark the remaining documents that had till then been marked for identification.

4. Mr Madon on behalf of the 1st Defendant points out that the filings that were before the Court and were taken up, i.e. the two Affidavits of Evidence, the compilation of documents and Affidavit of Documents, not a single one was served on the 1st Defendant before the date of KR Shriram J's order. Mr Shah in fairness agrees that there is nothing to prove service on the 1st Defendant.

5. Today, on 25th June 2018, it is pointed out that when M/s Purnanand & Co, Advocates for Goldcrest Capital, the Plaintiff, attempted to serve these filings (the evidence affidavits, the compilation and the Affidavit of Documents), they did so under a cover letter of 5th November 2015 to M/s ALMT Legal. On 6th November 2015, ALMT Legal refused to accept these documents with an endorsement saying that they were no longer concerned with the matter; that the papers had been returned to the clients; and that Goldcrest Capital's attorneys should please serve the Defendant personally. That was never done.

6. This letter of 5th November 2015 is after the date when Shriram J passed his orders of 1st October 2015 and 29th October 2015 marking the Plaintiffs' documents.

7. In other words, at the time when the documents were marked, Goldcrest Capital had made no attempt to serve these filings and documents on Mittal.

8. On 19th November 2015, SC Gupte J noted briefly the prior history and adjourned the matter to 1st December 2015 for an *ex parte* decree. Even up to this time, none had pointed out to the Court that the 1st Defendant had not been served with any of these filings and documents.

9. The *ex parte* decree was passed on 1st December 2015. The Court set out the case in brief. In paragraph 5, the Court said:

"5. The Plaintiff has led evidence of Mr Tushar Tulshidas Tanna, (P.W. 1), Director of the Plaintiff. PW1 has deposed about the transfer of the suit shares by the Plaintiff to Defendant No. 2 on the request and assurance of Defendant No. 1 and also his guarantee to repay the outstanding dues of Defendant No. 2. There is no cross-examination of PW1. No contrary evidence is led either. Having regard to the oral evidence of P.W.1 and the documentary evidence tendered by the Plaintiff, which is referred to above, the Plaintiff has made out a case for grant of a money decree. The Defendants have neither stepped into the box nor produced any documents in support of the case that the amount of Rs. 3 crores paid by Defendant No. 1 was towards any short term loan and not towards repayment of the dues of Defendant No. 2."

Consequently, the Suit was decreed in the amount of Rs. 2.90 crores with interest at the rate of 18% per annum.

10. It is to be noted that paragraph 5 again referenced the documentary evidence, but that, as I have noted, is not shown to ever have been served on Mittal at any time; to the contrary: there is now incontrovertible material to show that Mittal was never served with copies of Goldcrest Capital's filings and documents.

11. Mr Shah opposes the application on the limited ground that the 1st Defendant may at best carry the matter in appeal but he is unable to satisfy the Court with any cogent explanation for his non-appearance and this is, therefore, not a case that falls within Order 9 Rule 13 at all. What this, therefore, means, in my understanding of it, is that a decree that was passed in these circumstances where the plaintiff wholly failed to point out to the Court either that it had not served its evidence affidavit, compilation and affidavit of documents on the 1st Defendant at all, and obtained an executable money decree without such service against the 1st Defendant, such a decree must remain outstanding and can validly — in law, and in equity — be ruthlessly enforced.

12. I disagree.

13. In my view, the wrong in this has been done not just to Mittal, but also to the Court. I believe Mr Madon is completely correct in saying that on 1st October 2015, had the Court been informed that Mittal had not even been served with these Affidavits of Evidence, compilation and Affidavits of Document, the Court would never have passed the order that it did on that day. It would not have marked a single document. It would have insisted on service. That

has a domino effect: but for the order of 1st October 2015, there could not have been the order of 29th October 2015; but for those two orders there would not have been the order of 19th November 2015; and but for that order there could not have been the *ex parte* decree dated 1st December 2015.

14. I do not believe that a Court is so rigidly bound by the provisions of Order 9 Rule 13 even if they are to be read as Mr Shah suggests that it should allow such a manifest injustice to continue.

15. In any case, I am not entirely certain that I can agree with Mr Shah's formulation. Order IX Rule 13 reads thus:

"Rule 13. Setting aside decree *ex parte* against Defendant. — In any case in which a decree is passed *ex parte* against a Defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such Defendant only it may be set aside as against all or any of the other Defendants also:

Provided further 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.

Explanation. — Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the Appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that *ex parte* decree."

16. Now the second proviso to the Rule is interesting because it tells us that no Court is to set aside an *ex parte* decree only on the ground of irregularity of summons; but this is provided that the Court is satisfied that the Defendant had notice of the date of hearing and had sufficient time to appear and answer the Plaintiff's claim. I see no reason why the same principle must not apply to every stage of the hearing, and to the requirement of a party being served with the other side's documents. As a general rule, a copy of whatever is placed by one party before a court must be given to the opponent.

17. This is, therefore, not a case of a defendant not appearing after being served with the Plaintiff's filings and documents, and being put to notice of the documents on which the Plaintiff relies. This is a question of the Plaintiff not serving those documents on the 1st Defendant at all. This is no mere irregularity. This is complete non-service. I cannot envision a situation in which suits will randomly be taken to trial or to an *ex parte* decree in this fashion without serving defendants who have entered appearance and filed written statements.

18. As to the cause set out in the Affidavit in Support, the 1st Defendant says in brief that he had moved to Delhi in 2005 and, in January 2014 to Dubai. In paragraph 6, accompanied by some exhibits, he says that from 2008 to 2014 the matter was not listed at all and it was only at the time of attachment that he came to learn of the *ex parte* decree. The question in this matter of whether the 1st Defendant was represented by his legal consultant (not a lawyer), and whether his Advocates were duty-bound to inform him and so on does not really matter because it is not shown that even the advocates engaged by the 1st Defendant were served at any time with the documents on which the entire decree was founded.

19. This is perhaps one of those matters in which I believe I have no choice at all. Not to exercise the discretion Mr Madon seeks would result — and result only — in continuing with what I perceive to be a very great procedural injustice.

20. I am not making any assessment on the merits of the Plaintiff's suit or the 1st Defendant's opposition to it, or the cross-suit filed by the 1st Defendant against this Plaintiff. The manner in which the Plaintiff obtained the *ex parte* decree is entirely indefensible.

21. Notice of Motion No. 73 of 2018 is made absolute in terms of prayer clause (a), (b) and (c) which read as follows:

(a) That this Hon'ble Court be pleased to condone the delay if any in taking out this Notice of Motion;

(b) That this Hon'ble Court be pleased to set aside the Ex-parte Decree dated 1st December 2015 passed by this Hon'ble Court;

(c) This Hon'ble Court be pleased to raise the attachment pursuant to the Warrant of Attachment dated 29th November 2017 in the Commercial Execution Application No. 89 of 2017 of the immovable properties and bank accounts described in the Schedule to the Commercial Execution Application No. 89 of 2017 (more specifically described in Exhibit A hereto);

22. The Suit itself will be listed for directions including if necessary framing or re-framing issues on 17th July 2017.

(G. S. PATEL, J)