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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1554 OF 2017
IN
SUIT NO. 241 OF 2010

Placido Thomas Aguiar	...Plaintiff
<i>Versus</i>	
Elizzabeth Lucy D'Souza & Ors	...Defendants

Ms Saumya Brajmohan, *with Shruti Maniar, i/b M/s. Solomon & Co., for the Plaintiff.*

Ms Yashoda Desai, *with Mrs Prachi Mhatre, i/b M/s. Shiralkar & Co., for Defendants Nos. 1A to 1C.*

Mr Gauraj Shah, *with Sanjay Dubey & Omar Khayam Shaikh, for Defendant No. 1E/3, Applicants in Notice of Motion.*

CORAM: G.S. PATEL, J
DATED: 26th February 2018

PC:-

1. The application is by the original Defendant, Giles Herman Pereira, who is also arrayed as Defendant No. 1E. The Notice of Motion seeks to set aside what is described as an *ex parte* decree dated 19th September 2015 (KR Shriram J).

2. The first ground is that this decree was passed without a Notice of Motion for a judgment for want of Written Statement

under Rule 90 of the Bombay High Court (Original Side) Rules. This submission is based on my decision in *Madhu Sushil Gupta v M/s. VR Pictures*.¹ The submission misunderstands that decision and completely overlooks the purport of Rules 89 and 90 of the Bombay High Court (Original Side) Rules. These are to be found in Chapter 87 of the Bombay High Court (Original side) Rules. This is how Rules 89 and 90 read:

"R. 89. In default of filing appearance or vakalatnama and written statement, suit may be set down on board as undefended.— If the Defendant commits default in filing his appearance in person or a vakalatnama and Written Statement as provided in rule 74, the Judge in Chambers may, when the suit appears on board for directions, direct that the suit be set down on board for disposal as an undefended suit on the same day or on such other day.

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."

3. It is true that there is now settled authority as set out in *Madhu Sushil Gupta* that there can be no judgment for failure to return a Written Statement, i.e., the Suit cannot be decreed on that ground alone without a supporting Notice of Motion under Rule 90, but Rule 89 falls in a different category. It speaks of a situation

¹ Notice of Motion No. 456 of 2015 in Suit No. 1967 of 2009, decided on 14th December 2017.

where there is a default in filing appearance in person or by a vakalatnama *and* a default in filing a Written Statement as provided under Rule 74. In that situation, when the Suit appears for directions, the Judge in Chambers may direct that the Suit be set down on board for disposal as an undefended suit on the same day or on some other day.

4. Rule 74 says that in suits other than matrimonial and summary suits the Writ of Summons must require the Defendant to file an appearance in person or a vakalatnama and a Written Statement in defence within twelve weeks from service of the Writ of Summons and to serve a copy of the Written Statement on the Plaintiff or his Advocate on record.

5. In this scheme, two things happen. Once service of the Writ of Summons is established, but there is neither an appearance nor a Written Statement, and in addition the suit appears on board for directions, the Court may then direct that the suit be disposed of as an undefended Suit. Rule 90 operates in a different sphere. It is in one sense a stand-alone provision. It is an *additional* option given to a plaintiff. It is not a limitation placed on Rule 89. Once the Writ of Summons is served and no Written Statement is filed (which would postulate a previous entering of appearance) then the plaintiff has the option under Rule 90 of straightaway seeking a decree simply for failure to file a Written Statement. For this, a Notice of Motion must be filed. This is how the decision in *Madhu Sushil Gupta* has to be understood. On the other hand, where there is *either* no appearance *or* no written statement, *and* the suit appears for

directions, under Rule 89, the Chamber Judge may set it down as an undefended suit on that or some other day.

6. In the present case, it seems that the Applicant, Defendant No. 1E/3 was recorded as having been served on 25th March 2013. On 11th November 2013, he was said to have been represented before the Prothonotary and Senior Master by one Advocate Yadav who undertook to file his vakalatnama by 27th January 2014. The order of the Prothonotary and Senior Master made it clear that if no Written Statement was filed, the Suit against Defendant No. 1E/3 should be transferred to the list of undefended Suits. On 27th January 2014, neither Defendant No. 1E/3 was present, nor had the vakalatnama or Written Statement been filed. The Suit was specifically transferred to the list of undefended Suits, that is to say an order was passed under Rule 89 of the Bombay High Court (Original Side) Rules. At no point did the Plaintiff seek to exercise the option provided by Rule 90 demanding a judgment for want of Written Statement. The Plaintiff waited till the suit was taken up as an undefended suit and this was the decree that was ultimately passed by KR Shriram J on 19th September 2014.

7. This Judgment and Decree is a careful and elaborate one. It notes the evidence. It notes the pleadings. It notes briefly the relevant facts and the claim of the Plaintiff. It notes that the Defendants who have not filed their Written Statements are not present as against those who were present. Defendant No. 1E/3 was even then noted to be in illegal occupation. The mere fact that this judgment notes that no Written Statement is filed does not put it within the meaning of Rule 90 at all. If that was so then Rule 89

would have no meaning or effect and every judgment rendered under Rule 89 after the Suit was transferred to the list of undefended Suits would be vulnerable for not having a Notice of Motion. This not is not the purpose or ambit of Rule 90 at all.

8. It is moreover clear that even if Defendant No. 1E/3 had not filed a Written Statement he was nonetheless entitled to cross-examine the Plaintiff. At best, arguably, he would not have been able to put up an affirmative case to the Plaintiff for want of any supporting pleading. He could, however, confront the Plaintiff and Plaintiff's witness. I notice from the Judgment and Order of KR Shriram J that the Plaintiff's witness was in fact present as PW1. Paragraphs 4 and 8 make it clear that none wished to cross-examine him. Thus, the opportunity to cross-examine was offered but not availed of. Again this puts up squarely in the frame of Rule 89 and not Rule 90 of the Bombay High Court (Original Side) Rules.

9. Faced with this, Mr Shah is compelled to fall back on what I can only describe as an argument of utter desperation. His client is not present in Court. His son is. Mr Shah is now forced to argue that the Writ of Summons was never served. There are very many difficulties with this. Page 231 which is part of the Sheriff's Service Report notes service on the Applicant. Defendant No. 1E was pointed out by one Mangesh More, Clerk of the Plaintiff's Advocate. Now Mr Shah's instructions are to state that his client did not know Mangesh More. This does not mean that Mangesh More did not know him. More curiously, what this argument wholly overlooks is the signature of Defendant No. 3/1E on the docket of the summons at page 233, i.e. after page 232, where in the bottom

left hand next to the notarial stamp there is a signature of Defendant No. 1E/3 with a handwritten endorsement dated 10th July 2013. This signature exactly matches with the signature on the Affidavit in Support of this particular Notice of Motion. Indeed it would seem that this is the second attempt of service because the Prothonotary's Office noted that the Writ of Summons was served about four months earlier on 25th March 2013 (page 203).

10. This is not all. There is a detailed joint Affidavit of one KK Nayak, bailiff, and Mr Mangesh More at pages 214-218 which makes it clear that service was in fact effected on 10th July 2013, consistent with the docket endorsement.

11. There is a previous Affidavit of one RJ Tiwari at page 177 which shows that attempts to serve Defendant No. 3 resulted in the packet being returned unclaimed. We have an even earlier Affidavit of Sudhir Bhowad from pages 167 onwards. This makes for the most interesting reading. Apart from the fact that Defendant No. 3 could not be served at his address, this Affidavit says that this gentleman, a clerk with the Plaintiff's Advocate, went to the other address at 34-C Chimbai Road, Bandra 400 050. There, he met Defendant No. 3's wife, who spoke to Defendant No. 3 on the telephone, and on his instructions refused to accept the service documents and writ of summons. Defendant No. 2 in the meanwhile arrived. Then it is stated that both Defendant No. 2 and Defendant No. 3 refused to accept service. A third and final attempt was made on 12th February 2010 at 3.50 p.m. The Son of Defendant No. 3 was present (the gentleman I am told is instructing Mr Gauraj Shah in Court today). He said then that he had been instructed not to accept any

documents. The Clerk left two sets at the Chimbai Road address as both persons refused them.

12. The Applicant now argues is this that all these records must be wiped out or treated as being false and fabricated. He relies on Rule 84 to say that there is no proof of service as required by the Rules and, therefore, the Decree should be set aside. A mere dishonest application is hard to believe. This Rule has no application at all when the Defendant himself has signed in acknowledgement of service on the docket of a paper or filed in Court.

13. What Mr Shah is now instructed to say that not just KR Shriram J's order but every other document including the Prothonotary and Senior Master's order, all Affidavits and all endorsements must be set at naught and must be regarded as fabrications of Court records only because this Defendant says so. In paragraph 36 of his Affidavit in Support, this Defendant makes a statement that he has not received the Writ of Summons, the plaint or the amended plaint at any point of time. This statement is demonstrably false in view of his signatures on the summons to answer plaint, a document annexed to the Affidavit in Support of this Notice of Motion.

14. The Notice of Motion is completely frivolous, mischievous and motivated. It is dismissed. There will be an order of costs against the Applicant in the sum of Rs. 25,000/-.

(G. S. PATEL, J)