

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

**APPEAL FROM ORDER (STAMP) NO.14893 OF 2019
WITH
CIVIL APPLICATION (STAMP) NO.14894 OF 2019
IN
APPEAL FROM ORDER (STAMP) NO. 14893 OF 2019**

Bhavya Infomac Thr. Proprietor

Mr. Arvindkumar L. Jain

...Appellant

V/s.

Boss Infosolutions Pvt. Ltd.

Thr. Director Mr. Sandeep B. Giria

...Respondent

....

Shri Manoj Shukla, advocate for the appellant.

Ms. Disha Karambar-Mulgaonkar a/w Priya Rita I/b Disha Karambar & Associates, advocate for the respondent.

Shri Arvind Kumar Laxmichand Jain, Proprietor of appellant present in court.

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CORAM : M.S.KARNIK, J.

DATE : 20th JUNE, 2019

P.C. :

1. Heard learned counsel.
2. This is an appeal challenging the order dtd.07/02/2019 passed by the Judge, City Civil Court, Dindoshi, Mumbai rejecting Notice of Motion No.1992 of 2018 preferred by the original defendant for setting aside an ex-parte decree

dtd.22/09/2017.

3. The present respondent had filed a suit bearing Summary Suit No. 473 of 2016 for recovery of Rs.4,46,600/- alongwith interest. It is the case of respondent that though they have supplied goods to the appellant and despite agreeing to pay an amount of Rs.4,46,600/-, the appellant did not make the payment.

4. It is recorded by the trial court that despite service of writ of summons, the appellant did not appear and therefore ex-parte order came to be passed.

5. It is submitted by the learned counsel for the appellant that the suit summons was never served on him. My attention is invited to the affidavit in support of the notice of motion taken out for setting aside ex-parte decree. In paragraph No. 8 it is stated that the appellant was not aware about the suit being filed by the plaintiff and the suit summons was not served upon the appellant as provided under Order 5 of the Code of Civil Procedure. It is stated that as they were not aware about the proceeding of the suit, this resulted in their non-appearance. It is

further stated that non-appearance of the appellant before the trial court was neither intentional nor deliberate but the same has occurred because the suit summons was not served.

6. In the impugned order, the trial court has observed that the suit summons was served on the appellant on 20/09/2016 wherein the appellant has put seal. There is signature of A. Rathod on it. The address is also mentioned in the report. The address of the appellant in the report as well as the address of the appellant in the affidavit in support of the Notice of Motion is the same. Even the advocate for the appellant admitted that there is half signature of appellant on the summons (Exh.5). In this view of the matter, the trial court was of the view that despite service of suit summons, the appellant failed to appear and hence the suit proceeded ex-parte. Further it is observed by the trial court that there is no explanation for the delay in filing of the Notice of Motion for setting aside the ex-parte decree. The knowledge of date of the decree is not mentioned. For all these reasons, the Notice of Motion came to be rejected.

7. It is not in dispute that after the Notice of Motion was filed

for setting aside the ex-parte decree, the appellant has deposited the entire decreetal amount before the trial court.

8. Learned counsel for the respondent vehemently opposed the appeal. She argued in support of the impugned order. She would submit that all along the appellant avoided to appear before the trial court despite service of suit summons. She would submit that no interference is warranted in the order passed by the trial court. She would further submit that in the event this court is inclined to allow the appeal, then in that case the respondent be allowed to withdraw the decreetal amount which has been deposited with the trial court. She also submits that the appellant be saddled with heavy costs.

9. I have gone through the findings of the court below. The trial court has recorded that the suit summons has been duly served and there is half signature on the suit summons. The appellant has disputed receiving suit summons. In this context, it would be material to refer to the affidavit-in-reply filed on behalf of plaintiff opposing the Notice of Motion. In Paragraph No. 4 it is stated that the plaintiff alongwith bailiff went to the

address of the defendant and attempted to serve the writ of summons on the defendant, however, the defendant refused to accept the summons. Therefore on one hand the plaintiff states that the defendant refused to accept the suit summons and on the other the record indicates that there is half signature of one A. Rathod on the suit summons which is the circumstance as a result of which I am inclined to accept the version of the appellant.

10. Be that as it may, in my opinion as the appellant has already deposited the entire decretal amount before the trial court and as the learned counsel for the appellant on instructions of the proprietor of the appellant who is present in the court submitted that he is willing to pay costs to the respondent as well as some cost to a social organisation, I consider it appropriate and in the interest of justice, only with a view to give an opportunity to the appellant to defend the suit on merits, to set aside the ex-part decree.

11. In the present fact situation, I am inclined to allow the respondent/original plaintiff to withdraw some portion of the

amount that has been deposited before the trial court subject to the Undertaking to the trial court that in the event the suit is dismissed, he would deposit the amount in the trial court within four weeks from the date of decree.

Hence, the following order :-

(i) The order dtd.07/02/2019 passed by the trial court is set aside.

(ii) Notice of Motion No.1992 of 2018 is allowed.

12. Shri Arvind Kumar Laxmichand Jain, who is present in the court today and now claims to be the proprietor of the appellant undertakes that he will appear before the trial court on 01/07/2019 at 11.00 a.m., so as to enable the trial court to proceed further with the suit. He undertakes that he will co-operate with the suit proceeding and not take unnecessary adjournments. Further, he undertakes that he will file written statement positively within the time as may be permitted by the trial court.

13. The plaintiff/present respondent is permitted to take steps to take the matter up on board in the meantime.

14. The appellant to pay the cost of Rs.15,000/- to the respondent within a period of one week from today.

15. Further, Shri Arvind Kumar Laxmichand Jain present in court today undertakes to pay a sum of Rs.15,000/- to the National Association for the Blind India, Worli, Mumbai 400 030 as costs within one week from today. He would submit the compliance receipt before the trial court on 01/07/2019.

16. The respondent is permitted to withdraw a sum of Rs.1,00,000/- (Rupees One Lac Only) from the amount which has been deposited by the appellant before the trial court subject to filing Undertaking in terms indicated earlier.

17. The appeal is allowed in the above terms.

18. In view of the disposal of the appeal, nothing survives for consideration in the Civil Application. Civil Application is disposed of accordingly.

(M.S.KARNIK, J.)