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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY JURISDICTION
NOTICE OF MOTION NO. 18 OF 2017
IN
INSOLVENCY NOTICE NO. 13 OF 2013**

Mansingh Mahavir Nayak

...Petitioning
Creditor

Versus

Asif Raza Khan

...Insolvent

Mr Vedchetan Patil, *for the Petitioning Creditor.*
Ms Seema S Singh, *for the Judgment Debtor.*

CORAM: G.S. PATEL, J
DATED: 5th February 2019

PC:-

1. Heard. The Notice of Motion is by the Judgment Debtor to set aside the Insolvency Notice No. 13 of 2013 which was allowed by an order dated 7th March 2017. The entire claim arises from an *ex parte* decree in a Summary Suit brought on a dishonoured cheque. That Summary Suit No. 1447 of 2011 was decreed on 31st January 2012. The Applicant/Judgment Debtor also faced proceedings under Section 138 of the Negotiable Instruments Act 1881. He claims that a total amount of Rs. 15 lakhs has been deposited in those criminal proceedings, Rs. 11 lakhs in a revision application in this Court and Rs. 4 lakhs before the Sessions Court. That is wholly

irrelevant. There is no dispute that the *ex parte* decree was not set aside or stayed. The decree was never satisfied. The Decree Holder then filed insolvency proceedings in which the captioned Insolvency Notice No. 13 of 2013 came to be issued. On 7th March 2017, RD Dhanuka J made that notice absolute. It is this order that is sought to be recalled in the present Notice of Motion.

2. Before I turn to that, I must note that while this Notice of Motion was filed some time in March 2017, it has almost consistently been adjourned at the request of one or the other party. But I notice that there has been a grievance made at least once before by Mr Patil on behalf of the Decree Holder that the Judgment Debtor was doing nothing to have the Notice of Motion heard. Indeed this Notice of Motion was once dismissed for default and was then restored by KR Shriram J on 6th March 2018. Finally, on 17th April 2018, KR Shriram J hearing this Notice of Motion granted a final opportunity and stood the matter over to 18th June 2018. The only reason I am noting this is that there is even now an application for further time. There is every reason to reject any application for a further adjournment at the instance of the Applicant/Judgment Debtor.

3. The only ground taken in support of the Notice of Motion is that the insolvency notice was never served. This is factually incorrect. It was the responsibility of the Insolvent and his Advocate to take search or at least to take leave to take search of these proceedings. Had they done so, they would have found an Affidavit of Service dated 15th February 2017 filed by the Judgment Creditor, Mansingh Mahavir Nayak. This makes for the most interested

reading and paragraphs 1 to 4 of this Affidavit of Service need to be reproduced in full:

"1. I say that, on 14.8.2013, at about 10.15 p.m., I visited the Judgment Debtor's residential premises mentioned in the title of the above Notice at 54, Sai Shakti, Yari Road, Versova, Andheri (West), Mumbai 400 063 (hereinafter referred to as the "the Sai Shakti premises") to serve the sealed duplicate of the above insolvency notice upon him. I say that at the Sai Shakti Premises, I met the watchman of the said building. I say that I explained to him the purpose of our visit and enquired about the Judgment Debtor. I say that the watchman informed us that the Judgment Debtor does not reside in the Sai Shakti premises and I attempted to verify the same by visiting the said Flat No. 54, Sai Shakti, where we were informed that one Mr M.P. Sharma had been residing at therein from January 2013 onwards and that Judgment Debtor had shifted residence to A-101, Ratnakar Coop. Housing Society Ltd., Opp. Raj Classic Coop. Society, Yari Road, Versova, Andheri (W), Mumbai – 400 061 (hereinafter referred to as "the Ratnakar premises").

2. I say that myself, therefore, on the same day (i.e. 14.8.2013), at about 10.345 a.m., visited the Ratnakar premises to serve the above Insolvency Notice upon the Judgment Debtor. I say that the watchman thereupon directed us to Flat No. 101 on the 1st Floor being the residence of the Judgment Debtor. I say that we were informed that the Judgment Debtor was having a bath and were requested to wait outside the Flat No. 101 (being the Ratnakar Premises). I say that we waited outside the Ratnakar Premises for about 30 minutes. I say that at about 11.00 a.m. the Judgment Debtor came out of the premises and met us when we explained to

him the purpose of our visit and handed over to him the said notice. However, after perusal of the said notice, the Judgment Debtor returned the same to me and informed us that he would not accept the Insolvency Notice. In view thereof, the Judgment Debtor refused to accept service of the Insolvency Notice.

3. I say that thereafter I had changed my advocate, and my new Advocate had moved the Hon'ble High Court on 20/12/2016, wherein this Hon'ble Court was pleased to extend the time for service till 17th January 2017. That as the Judgment Debtor had already discontinued his residence from the Versova address, which is the address in Insolvency Notice. I say that Judgment debtor was once detained by Versova Police Station, as he was convicted in a cheque dishonour case. **I say that hence, Judgment Creditor had sought the new residential address of the Judgment debtor from the Versova Police Station. I say that the new address of Judgment Debtor provided by the Versova Police is "Flat No. 207, C Wing, Shakti Bldg. Kalyan Complex, Yari Rd. Versova, Andheri (W), Mumbai.**

4. **I say that thereafter the Advocate of Judgment Creditor had also sent the Insolvency Notice via Speed Post on 03/01/2017 at "Flat No. 207, C Wing, Shakti Bldg., Kalyan Complex, Yari Rd. Versova, Andheri (W), Mumbai."** I say that the said Notice was returned as **unclaimed**. Hereto annexed and marked as Exhibit A is the copy of the Postal receipt and the returned Notice."

(Emphasis added)

4. The Affidavit of Service then says that on 17th January 2017, this Court permitted service by advertisement. A copy of that order

(RD Dhanuka J) is also on file. It is only after the advertisement was issued in the Free Press Journal and Navshakti, that Dhanuka J made the notice absolute. This is the sequence of events.

5. Now what the Applicant/Judgment Debtor says in the Affidavit in Support of the present Notice of Motion in paragraph 8 is that the insolvency notice was not served “as I am not residing on the earlier address given in the Summary Suit and the Summons for Judgment”. That is all that he says, and that is the whole of it. The leave and licence agreement mentioned in that paragraph is only described as such, i.e., as a leave and licence agreement. There is no date and there are no particulars. It is not produced and I am told that I should adjourn the matter so that it can be produced. None of this addresses the question at all because the Service Affidavit says that while the Judgment Debtor was not found at the address given in the cause-title, the watchman of those premises at Flat No.54, Sai Shakti, Yari Road, Versova, Andheri (West), Mumbai 400 063 told the Decree Holder that the Judgment Debtor had shifted to A-101, Ratnakar Coop Housing Society Ltd., Opposite Raj Classic Coop Society, Yari Road, Versova, Andheri (West), Mumbai 400 061. The Service Affidavit says that on that very day, 14th August 2013, at 10.35 am the Plaintiff went to the Ratnakar premises. The Judgment Debtor was bathing. The Plaintiff waited. The Judgment Debtor emerged after his ablutions. He took a look at what was being served on him and promptly decided that he did not want to take it. He refused service. This is *good* service. But, as the extract above shows, that is not all. In the criminal proceedings, a new address at Flat No. 207, C Wing, Shakti Bldg., Kalyan Complex, Yari Road, Versova, Andheri (West), Mumbai was provided and a notice was

sent to that address by speed post which was returned as unclaimed. It is only thereafter that the Plaintiff obtained directions for the issuance of an advertisement. Thus we have (a) refusal of service; (b) a return 'unclaimed'; and (c) substituted service by publication after leave of the Court.

6. If the Judgment Debtor chooses to constantly move from place to place and imagines that this is a clever or even wise tactic to avoid service, he is mistaken. He will be served wherever he is found irrespective of whether he stays there or not and whether those premises are on leave and licence basis or otherwise. There is no law that requires the noticee to own any particular premises. As long as it can be shown that it was he who was properly served, that is enough. There is simply no answer to any of this as set out in the Affidavit of Service, and the Affidavit in Support of the present Notice of Motion, is, in my view, deliberately misleading, mischievous and vague.

7. There is no substance in the Notice of Motion. It is dismissed. There will be no order as to costs.

8. List the Insolvency Petition on 5th March 2019.

(G. S. PATEL, J)