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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.1978 OF 2017
IN
SUMMARY SUIT NO.99 OF 2015**

M/s A.I.C. Chemicals and anr ... Applicants

IN THE MATTER BETWEEN

Sanjay Surendra Darooka ... Plaintiff.

V/s.

M/s A.I.C. Chemicals and anr ... Defendants

Mr. Amogh K. Karandikar, for applicants/Defendant Nos. 1
& 2 in suit.

Mr. Ibrahim Merchant, for the plaintiff.

CORAM : N. J. JAMADAR, J.

DATE : 19th December, 2019.

PC. :

1] Heard the learned counsel for the parties.

2] The applicant original defendants have taken out this Notice of Motion to set aside the ex parte judgment and decree dated 3rd February, 2017 passed by this Court, in Summary Suit No.99 of 2015, and restore the said suit to file for determination on merit.

3] The plaintiffs had instituted a Summary Suit for recovery of a sum of

Rs.1,40,98,808/- alongwith further interest at the rate of 18% per annum on the sum of Rs.1,35,58,820/- from the date of filing of the suit till realization of the said amount.

4] The suit claim was based on sale and delivery of the goods, under invoices. The defendants had issued cheques towards the payment of the price of the goods sold and delivered. Those cheques were returned uncashed. Thus, the plaintiff had instituted Summary Suit.

5] Writ of summons was issued. As the defendant could not be served, in the ordinary mode, the defendants were served by way of substituted service in the nature of paper publication. This Court, after accepting averments in the affidavit of service, recorded that the defendant did not appear despite due service and proceeded to pass ex parte decree, by judgment and order dated 3rd February, 2017.

6] The defendants/applicants claim that writ of summons was not duly served on the defendants. Though defendants do not dispute that the address on which Summons were sent is correct, yet the Summons could not be served upon the defendants as they are not in occupation of the said premises, which had been locked since more than two years. The defendants claim that they came to know about the passing of ex parte decree, when the defendant No.2 Ajay Agarwal had casually visited the said premises and found an envelope containing a copy of the judgment passed

by this Court. The defendants, thus, contend that as writ of summons was not duly served upon defendants, the ex parte decree be set aside lest the defendants would suffer irreparable loss.

7] The plaintiff/respondent has resisted the application. The claim of the defendant that they came to know about passing of decree, when one of the defendants had a casual visit to the premises in question, is stated to be malafide. It was contended that in pursuance of the direction of this Court, copy of the judgment and decree was sent to the defendant on the very same address and the postal envelopes containing copies of the judgment and decree were returned “unclaimed”. Thus, the claim of the defendant that they came to know about passing of the judgment and decree, upon finding an envelope containing copies thereof, is a subterfuge. Hence, the prayer for setting aside decree, which is based on false assertions, does not deserve to be allowed.

8] I have heard the learned counsels for the parties at some length.

9] The learned counsel for defendants urged that the material on record indicates that the writ of summons sent on the first address was returned with remarks, “not known”, whereas writ of summons sent on the second address was returned with remarks, “door closed”. Thus, the case of the defendants that they were not in actual occupation of the premises, on which writ of summons was sent, cannot be said to be unworthy of

credence. The defendants claim of non-service is bonafide. Thus, in the interest of justice the ex parte decree deserves to be set aside.

10] In opposition to this, the learned counsel for the plaintiff submitted that the basis of the claim is tainted with falsehood. The attention of the Court was invited to the copies of postal envelopes annexed to the affidavit-in-reply which indicate that the postal envelope containing copies of judgment and decree were returned “Unserved”. Thus, the claim of the defendants that they came to know about ex parte decree only upon finding an envelope containing copy thereof is a blatant lie. The party who approaches the Court with such false claim does not deserve any relief, urged the learned counsel for the plaintiff.

11] Before adverting to deal with the aforesaid submissions, it is necessary to note the facts and circumstance which weighed upon the Prothonotary, to pass the order dated 19th October, 2015. From the perusal of the said order, it is evident that writ of summons sent to defendant Nos. 1 and 2 on the first address, mentioned in the cause title, came back with the remarks “Not known”, and packet containing writ of summons sent to both the defendants, at the second address, came back with the remarks “door closed”.

12] I have perused the original envelopes. Upon perusal of the envelopes containing writ of summons, sent on the premises in question, especially

postal endorsement overleaf, it becomes abundantly clear that the envelopes were returned un-served for the reason that the premises was found locked. The postman has not made an endorsement to the effect that “intimation posted”. This endorsement lends support to the claim of the defendants that the premises in question had been locked since a couple of years prior to taking out the Notice of Motion.

13] In the aforesaid factual backdrop, the judgments in cases of i] **K. Bhaskaran vs Sankaran Vaidhyan Balan and anr¹**, ii] **Anant Tulshiramji Bajaj vs Sunil Gajanan Rasne²**, iii] **P. T. Thomas -vs Thomas JOB³**, on which reliance was placed by the learned counsel for the plaintiff, do not govern the facts of the instant case, as in those cases presumption of due service was drawn on the basis of endorsement of postman about intimation having been posted. In the instant case, the premises were found to be locked. There is no material to indicate that the defendants were aware of the efforts to serve them with the writ of summons at the premises in question. The service of summons through paper publication has it's own inherent limitations. Thus, in the facts of the instant case, the writ of summons cannot be said to have been duly served on the defendants, in the strict sense of the term.

1 (1999) 7 SCC 510k

2 2016 (2) Bom. C.R. 225

3 (2005) 6 SCC 478

14] The crucial factor which has a bearing upon the ultimate order to be passed is that the defendants do not dispute that the premises on which the writ of summons was sent, is possessed by them. Moreover, defendants claim to have learnt about passing of the ex parte decree by a chance visit to very same premises.

15] In the light of view which this Court is persuaded to take, the question whether the defendants have made a false assertion in the Notice of Motion, regarding the circumstances in which they came to know about passing of the decree, is not required to be determined conclusively.

16] Having regard to the nature of the claim, time lag and the undisputed position that the defendants are in the occupation of premises, it would be in the fitness of things to put the defendants to terms as regards the payment of a part of the suit claim in Court. Hence I am persuaded to pass the following order.

Order

- i] The Notice of Motion stands allowed.
- ii] The ex parte decree passed by this Court on 3rd February, 2017 in Summary Suit No. 99 of 2015 stands set aside and the Summary Suit is restored to file subject to defendants depositing an amount of Rs.50,00,000/- in this Court within a period of six weeks.

iii] In the event of default in deposit of the said amount within the said period, this order would stand vacated automatically and the decree passed by this Court dated 3rd February, 2017 would become operative and executable.

iii] In the event of deposit of the amount, Summary Suit No.99 of 2015 be listed before this Court on 30.01.2020.

iv] The Notice of Motion stands disposed of accordingly.

[N. J. JAMADAR, J.]