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D. Pandit
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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7455 OF 2015**

Suchin Eknath Patil Petitioner.
V/s
Arun Damodar Patil Respondent

Mr. Drupad S. Patil a/w Mr. Dheeraj Patil for the Petitioner.
Mr. K.S. Dewal i/by Mr. J.M. Joshi for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 28, 2021

P.C.:-

1] Heard Shri Patil learned Counsel for the Petitioner/original Defendant.

2] Application under Order 9 Rule 13 came to be moved by Petitioner/original Defendant for setting aside ex parte decree dated 1/2/2011 passed in RCS No.168 of 2010 which was rejected on 22/12/2011. Feeling aggrieved, Petitioner preferred an appeal which came to be dismissed on 17/3/2015. As such, this Petition.

3] There is one more facet to the matter and i.e. Petitioner preferred Regular Civil Appeal questioning the judgment on merit

under Section 96 of the Civil Procedure Code accompanied with application for condonation of delay on 9/3/2012. However, on 2/8/2014 the said proceedings were withdrawn in view of pendency of application for setting aside ex parte decree preferred under Order 9 Rule 13.

4] Mr. Patil, learned Counsel for original Defendant made threefold contentions viz (i) service of summons was ordered to be effected through RPAD, (ii) admittedly suit was initiated in the Civil Court at Alibaug and (iii) the Petitioner/Defendant is shown to be residing outside the jurisdiction of the said court. In that view of the matter, having regard to the scheme of **order 5** Rule 3 and 21, summons should **not** have been effected through RPAD where Petitioner/Defendant was residing. Assuming without admitting that the order of the Court of effecting service through RPAD directly on the Petitioner was justified under the provisions of Order 5, fact remains that envelope containing suit summons was returned with endorsement “summons returned as unclaimed, intimation posted”. According to him in view of the judgment of this Court in the matter of First Appeal (Stamp) No.13185 of 2013 delivered on 14th October,

2011 in the matter of *New India Assurance Co. Ltd. Vs Smt. Nasibunnisa Mohd. Israr Khan* such service cannot be termed as good service and that being so, ex parte decree is liable to be set aside as the same is based without opportunity of hearing.

5] Mr. Dewal, learned Counsel for the Respondent/original Plaintiff would urge that withdrawal of the appeal alongwith application for condonation of delay by the Petitioner/Defendant against the ex parte decree virtually amounts to finality of the judgment of the Trial Court and that being so, present proceedings are not sustainable. Support is drawn from the following judgments:-

(i) *Rani Choudhury vs. LT.COL. Suraj Jit Choudhury*

reported in (1982) 2 SCC 596

(ii) *Shyam Sundar Sharma vs. Pannalal Jaiswal and*

Others reported in (2005) 1 SCC 436

The learned Counsel would further urge that, on facts, address of the Petitioner is derived from public office and that being so, same was rightly relied on as there is no material placed on record by the

Petitioner to infer that at the relevant time he was not staying at the address at which summons was sought to be served.

6] Considered rival submissions.

7] At this stage, Mr. Dewal, learned Counsel for the Respondent consents for allowing of the Writ Petition in terms of **prayer clauses (a) to (d)**. However, he submits that the order of status quo passed on October 12, 2010 be continued till decision of the suit.

8] He would also submit that Respondent/Plaintiff be permitted to lead additional evidence.

9] Mr. Patil, learned Counsel appearing for the Petitioner consents for continuation of the status quo as was operating during pendency of the suit. Mr. Patil further urged that respective parties be granted liberty to carry out amendment to the pleadings and they be also permitted to lead additional evidence.

10] In the aforesaid backdrop, Writ Petition stands allowed in terms

of **prayer clauses 7(a) to (d).**

11] Both the parties are at liberty to amend their respective pleadings and shall also be at liberty to lead additional evidence in support of their rival claims. The order of status quo operating during pendency of the suit shall continue to operate till final decision of the suit. **Suit to be decided in 6 months.**

12] Petition stands allowed in the above terms. **R & P to be returned to trial court.**

(NITIN W. SAMBRE, J.)

Corrected as per order dated 15.2.2021.