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

## WRIT PETITION NO.4885 OF 2022

1. Mr. Sunil Gupta, age 58 years )
residing at 7/51, Tilak Nagar, Uttar Pradesh )

2. Mr. Sandeep Gupta, age 56 years )
residing at 7/51, Tilak Nagar, Uttar Pradesh )

3. Mr. Bharat Gupta, age 44 years )
residing at 7/51, Tilak Nagar, Uttar Pradesh ) ....Petitioners

V/s.

1. Asset Reconstruction Company (India) Ltd. )
A company incorporated under the Companies Act, )
1956 and registered as a Securitization and Asset )
Reconstruction Company pursuant to Section 3 of )
the SARFAESI Act having its registered office at )
The Ruby, 10th Floor, Senapati Bapat Marg, Dadar )
(West), Mumbai 400 028 )

2. M/s. Hi-Tech International )
having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

3. Mr. Rajiv Dharnidharka )
having his office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

4. Smt. Gangadevi Dharnidharka )
having her office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

5. Smt. Sunita Sanjiv Dharnidharka )
having her office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

6. Mr. Sanjiv Dharnidharka )
having his office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

7. Smt. Sharadha Dharnidharka )
having her office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

8. Smt. Sangeeta Agrawal )
W/o. Pawan Agrawal )
having her office at 5 Trishla Building )

122 Sheikh Memon Street, Mumbai 400 002 )

9. Mr. Ashok Dharma Bhoir (Deceased) )
through Legal Representatives : )

(i) Vimal Ashok Bhoir )
Village Sirol, Post Kashara, Tal. Shahpur, Thane )

(ii) Sonu Ashok Bhoir )
Village Sirol, Post Kashara, Tal. Shahpur, Thane )

10. Mr. Dashrath Dharma Bhoir (Deceased) )
through Legal Representative : )

(a) Darshana Dashrath Bhoir )
Village Sirol, Post Kashara, Tal. Shahpur, Thane )

11. Mr. Mahesh P. Goenka )
222-G Kewal Cross Lane No.10, Vigas Street, )
Mumbai 400 002 )

12. M/s. Agani Exports Private Limited )
having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

13. M/s. Ganesh Exports )
having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 ) ….Respondents

**WITH**

**WRIT PETITION NO.4880 OF 2022**

1. Mr. Shailesh Gupta, age 51 years )
residing at 7/51, Tilak Nagar, Uttar Pradesh )

2. Mr. Devesh Gupta, age 48 years )
residing at 7/51, Tilak Nagar, Kanpur, )
Uttar Pradesh )

3. Mr. Tarun Gupta, age 44 years )
residing at 7/51, Tilak Nagar, Kanpur, )
Uttar Pradesh )
Also at : A-46, Defence Colony, Mawana Road, )
Meerut )

4. Mr. Sanjay Gupta, age 59 years )
residing at 7/51, Tilak Nagar, Kanpur, )
Uttar Pradesh ) ….Petitioners

V/s.

1. Asset Reconstruction Company (India) Ltd. )
A company incorporated under the Companies Act, )

1956 and registered as a Securitization and Asset Reconstruction Company pursuant to Section 3 of the SARFAESI Act having its registered office at The Ruby, 10th Floor, Senapati Bapat Marg, Dadar (West), Mumbai 400 028 )

2. M/s. General Blends & Spirits Company having its office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

3. Mr. Rajiv Dharnidharka having his office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

4. Mr. Sanjiv Dharnidharka having his office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

5. Smt. Sunita Sanjiv Dharnidharka having her office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

6. Smt. Sharadha Dharnidharka having her office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

7. Smt. Sangeeta Agrawal W/o. Pawan Agrawal having her office at 5 Trishla Building 122 Sheikh Memon Street, Mumbai 400 002 )

8. Mr. Ashok Dharma Bhoir (Deceased) through Legal Representatives : )

(i) Vimal Ashok Bhoir Village Sirol, Post Kashara, Tal. Shahpur, Thane )

(ii) Sonu Ashok Bhoir Village Sirol, Post Kashara, Tal. Shahpur, Thane )

9. Mr. Dashrath Dharma Bhoir (Deceased) through Legal Representative : )

(a) Darshana Dashrath Bhoir Village Sirol, Post Kashara, Tal. Shahpur, Thane )

10. Mr. Mahesh P. Goenka 222-G Kewal Cross Lane No.10, Vigas Street, Mumbai 400 002 )

11. M/s. Hi-Tech International )

having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

12. M/s. Agani Exports Private Limited )
having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 )

13. M/s. Ganesh Exports )
having its office at 5 Trishla Building )
122 Sheikh Memon Street, Mumbai 400 002 ) ….Respondents

**WITH**

**WRIT PETITION (ST.) NO.11009 OF 2021**

Asset Reconstruction Company India Limited, )
a company registered under the provisions of the )
Companies Act, 1956 and under Section 5 of the )
Securitization and Reconstruction of Financial )
Assets and Enforcement of Security Interest Act, )
2002, having its registered office at 10th Floor, The )
Ruby, 29 Senapati Bapat Road, Dadar (West), )
Mumbai – 400 028 through its Authorised Officer )
Shri Jayesh Gharat, Age – 37 years ) ….Petitioner

V/s.

(i) Shri Sunil Gupta, Age – 58 years )
Occupation – Business )

(ii) Shri Sandeep Gupta, Age – 56 years )
Occupation – Business )

(iii) Shri Bahirat Gupta, Age – 44 years )
Occupation – Business )

Nos.(i) to (iii) are residing at 7/51, Tilak Nagar, )
Kanpur, Uttar Pradesh )

(iv) M/s. Hi-Tech International )

(v) Shri Rajiv Dharnidharka, Age – Adult )
Occupation – Business )

(vi) Smt. Gangadevi Dharnidharka, Age – Adult )
Occupation – Business )

(vii) Smt. Sunita Sanjiv Dharnidharka, Age – Adult )
Occupation – Business )

(viii) Shri Sanjiv Dharnidharka, Age – Adult )
Occupation – Business )

(ix) Smt. Sharadha Dharnidharka, Age – Adult )

Occupation – Business )

(x) Smt. Sangeeta Agrawal, Age – Adult )
Occupation – Business )

(xi) Smt. Vimal Ashok Bhoir, Age – Adult )
Occupation – Business )

(xii) Shri Sonu Ashok Bhoir, Age – Adult )
Occupation – Business )

(xiii) Smt. Darshana Dashrath Bhoir, Age – Adult )
Occupation – Business )

Nos. (iv) to (xiii) have office at 5, Trishla Building )
122, Sheikh Memon Street, Mumbai 400 002 )

(xiv) Shri Mahesh P. Goenka, Age – Adult )
Occupation – Business, R/a. 222-G Kewal Cross )
Lane No.10, Vigas Street, Mumbai 400 002 )

(xv) M/s. Agani Exports Private Limited )

(xvi) M/s. Ganesh Exports )

Nos. (xv) and (xvi) have its office at 5, Trishla )
Building, 122, Sheikh Memon Street, Mumbai 400 )
002 ) ….Respondents

**WITH**

**WRIT PETITION (ST.) NO.11010 OF 2021**

Asset Reconstruction Company India Limited, )
a company registered under the provisions of the )
Companies Act, 1956 and under Section 5 of the )
Securitization and Reconstruction of Financial )
Assets and Enforcement of Security Interest Act, )
2002, having its registered office at 10th Floor, The )
Ruby, 29 Senapati Bapat Road, Dadar (West), )
Mumbai – 400 028 through its Authorised Officer )
Shri Jayesh Gharat, Age – 37 years ) ….Petitioner

V/s.

(i) Shri Shailesh Gupta, Age – 51 years )
Occupation – Business )

(ii) Shri Devesh Gupta, Age – 48 years )
Occupation – Business )

(iii) Shri Tarun Gupta, Age – 54 years )
Occupation – Business )

(iv) Shri Sanjay Gupta, Age – 59 years )

Occupation - Business )

Nos.(i) to (iv) are residing at 7/51, Tilak Nagar, ) Kanpur, Uttar Pradesh )

(v) M/s. General Blends & Spirits Company )

(vi) Shri Rajiv Dharnidharka, Age – Adult ) Occupation - Business )

(vii) Shri Sanjiv Dharnidharka, Age – Adult ) Occupation - Business )

(viii) Smt. Sunita Sanjiv Dharnidharka, Age – Adult ) Occupation - Business )

(ix) Smt. Sharadha Dharnidharka, Age – Adult ) Occupation - Business )

(x) Smt. Sangeeta Agrawal, Age – Adult ) Occupation - Business )

Nos. (v) to (x) have office/Residence at 5, Trishla ) Building, 122, Sheikh Memon Street, Mumbai 400 ) 002 )

(xi) Vimal Ashok Bhoir, Age – Adult ) Occupation - Business )

(xii) Shri Sonu Ashok Bhoir, Age – Adult ) Occupation - Business )

(xii) Smt. Darshana Dashrath Bhoir, Age – Adult ) Occupation - Business )

Nos. (xi) to (xii) are R/a. Village Sirol, Post ) Kashara, Tal. Shahpur, Thane )

(xiv)Shri Mahesh P. Goenka, Age – Adult ) Occupation – Business, R/a. 222-G Kewal Cross ) Lane No.10, Vigas Street, Mumbai 400 002 )

(xv) M/s. Hi-Tech International )

(xvi) M/s. Agani Exports Private Limited )

(xvii) M/s. Ganesh Exports )

Nos. (xv) to (xvii) have its office at 5, Trishla ) Building, 122, Sheikh Memon Street, Mumbai 400 ) 002 ) ….Respondents

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Mr. Janak Dwarkadas, Senior Counsel a/w. Mr. Chirag Kamdar, Mr. Peshwan Jehangir, Mr. Rajat Jariwal, Ms. Jyoti Sinha, Mr. Naren Nimbalkar, Mr. Harsh

Salgia and Ms. Aayushi Khurana i/b. Khaitan and Co. for petitioners in WP/4885/2022 and for respondent nos.1 and 3 in WP(ST.)/11009/2021.

Mr. Chirag Kamdar a/w. Mr. Peshwan Jehangir, Mr. Rajat Jariwal, Ms. Jyoti Sinha, Mr. Naren Nimbalkar, Mr. Harsh Salgia and Ms. Aayushi Khurana i/b. Khaitan and Co. for petitioners in WP/4880/2022 and for respondent nos.1 and 4 in WP(ST.)/11010/2021.

Mr. Sushil Nimbkar for petitioner in WP(ST.)/11009/2021 and WP(ST.)/11010/2021 and for respondents in WP/4880/2022 and WP/4885/2022.

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CORAM : K.R. SHRIRAM & A.S. DOCTOR, JJ.
RESERVED ON : 27th JULY 2022
PRONOUNCED ON : 12th SEPTEMBER 2022

JUDGMENT (PER K.R. SHRIRAM, J.) :

WRIT PETITION NO.4885 OF 2022

1 By consent, this petition was taken as a lead matter. Counsel agreed that the findings in this petition would also equally apply to Writ Petition No.4880 2002. Counsel also stated that the order in Writ Petition (ST.) No.11009 of 2021 and Writ Petition (ST.) No.11010 of 2021 would depend on our conclusions in this petition. Counsel also stated that if the Court is inclined to allow this petition, Writ Petition No.4880 2002 will also have to be allowed and consequently, Writ Petition (ST.) No.11009 of 2021 and Writ Petition (ST.) No.11010 of 2021 will have to be dismissed.

2 In this petition, petitioners are impugning a judgment dated 12th May 2021 passed by the Debt Recovery Appellate Tribunal (the DRAT) by which the DRAT dismissed the appeal that petitioners had filed. In the appeal, petitioners were impugning an order dated 27th April 2011 passed

by the Debt Recovery Tribunal (the DRT).

3 The DRT, in O.A. No.927 of 2001, had passed an *ex-parte* decree dated 11th December 2009 *qua* petitioners. When petitioners applied for recall of the *ex-parte* decree, the DRT did not entertain the said Miscellaneous Application and dismissed the same by its order dated 27th April 2011. It was that order that petitioners had challenged before the DRAT, which dismissed the appeal by the impugned order and judgment dated 12th May 2021.

4 It is petitioners' case that the DRT, without enquiring into whether the summons was ever issued in O.A. No.927 of 2001 at all or whether the summons was issued to the correct address of petitioners, passed the *ex-parte* decree. It is petitioners' case that petitioners were never served with any summons.

5 The Miscellaneous Application of petitioners to recall the *ex-parte* decree was dismissed by the DRT solely on the ground that petitioners had at some stage appeared in the O.A. through an advocate in whose favour a Vakalatnama had been filed. It is petitioners' case that mere filing of a Vakalatnama by an advocate cannot amount to waiver or dispense with the requirement for service of the writ of summons on defendants which is essential for the time to file the written statement to commence.

6 It is also petitioners' case that the DRT did not appreciate that the advocate who had entered appearance for petitioners sometime in 2003 had stopped appearing sometime in 2005 and despite non appearance of any advocate for a period of almost four years, i.e., till the decree came to be passed by the DRT, petitioners had no notice of any of the hearing dates.

**Facts in brief :**

7 Respondent no.2 firm was constituted on 13th June 1989 with only 3 partners, i.e., respondent no.3, respondent no.4 and respondent no.5. The firm had availed three facilities. First one was on or about 27th July 1992 when IOB sanctioned certain facilities to the tune of Rs.1.41 Crores to respondent no.2. The sanction letter specified only respondent nos. 3 and 5 as partners.

8 Some time in 1995, IOB sanctioned a further facility of approximately Rs.2.49 Crores to respondent no.2 in relation to which personal guarantees were also issued. On or about 6th January 1997, IOB sanctioned a further facility of approximately Rs.2.49 Crores to respondent no.2. Respondent nos.3 to 5 also created equitable mortgage of their properties to secure the amounts borrowed.

9 None of the documents relating to the facilities sanctioned were signed by petitioners. Petitioners were neither shown as partners or guarantors or borrowers or mortgagors or otherwise. It does not appear that

even IOB had made out a case that petitioners were signatories to any of the bank agreements or that any property was mortgaged as security by petitioners. Respondent no.3 has alleged in the reply filed before the DRAT that petitioners became partners of respondent no.2 on 18th January 1997. Mr. Dwarkadas submitted that the names of petitioners are, however, not reflected in the record of the Registrar of Firms as partners of respondent no.2. This was not controverted by Mr. Nimbkar.

10 In respect of the above facilities, IOB, on 27th July 2001, filed an application being O.A. No.927 of 2001 before the DRT seeking recovery of Rs.19,43,10,174/- alongwith interest at the rate of 18% per annum. The said O.A. was filed not only against respondent no.2, which has its registered office at Mumbai, but also against petitioners and other respondents individually. Petitioners were also impleaded individually as defendant nos. 5 to 7 in the said O.A. The address given by applicant as against petitioners' name was respondent no.2 firm's registered address at Mumbai and not petitioner's permanent address at Kanpur. The O.A. filed before DRT was allowed vide order dated 11th December 2009 and recovery of Rs.11,32,89,246/- was directed to be made against each respondents including petitioners. The cause title of the said order records that petitioners appeared through advocate Bhushan Sakpal. However, he was mentioned as "Absent" in the said order. Since the writ of summons was not served on petitioners, petitioners herein did not file any written statement,

counter-affidavit or contest the evidence produced by respondent no.1. A recovery certificate was also issued *inter alia* against petitioners on 21st January 2010.

11 On 12th October 2010, petitioner no.3 received a letter dated 5th October 2010 issued by IOB at his permanent address in Kanpur informing him about the order dated 11th December 2009 passed by the DRT and the Recovery Certificate issued against petitioners. It was only at this stage that petitioners gained knowledge of the proceedings adopted by IOB. This was the first ever communication received by petitioners in respect of the O.A. In the cause title of the O.A., as stated herein above, petitioners' address was shown as the registered office of respondent no.2 firm. IOB, however, served petitioners a copy of the Recovery Certificate issued by the DRT at petitioners' address in Kanpur. In the reply filed by IOB in January 2011 to oppose the Miscellaneous Application filed by petitioners seeking to set aside the order dated 11th December 2009, IOB has stated "*The Bank by diligent efforts through market enquiries came to know of their permanent address only at the time of writing the letter dated 5th October 2010.*"

12 Mr. Dwarkadas commented that if diligent efforts had been made at the relevant time, IOB could have gathered the requisite details of the address of petitioners even at the time of filing of the O.A. and service thereof.

13 Petitioner no.3 on 13th October 2010 replied to IOB stating that the letter dated 5th October 2010 is the first communication received by him and he is unaware of the contents of the said letter. He sought three weeks time, without prejudice to his rights, to ascertain the facts and revert to IOB. He also stated that he is a resident of Kanpur and not Mumbai and, therefore, ignorant of the contents of the letter dated 12th October 2010. IOB, however, never responded to the letter dated 13th October 2010.

14 After becoming aware of the order dated 11th December 2009 pursuant to the receipt of letter dated 5th October 2010, petitioners immediately filed, on and around 23rd October 2010, an application (M.A. No.150 of 2010) praying for setting aside the order dated 11th December 2009 alongwith an application for condonation of delay (M.A. No.145 of 2010). The primary ground for this application was that petitioners never received any summons/notice in respect of the O.A. No.927 of 2001 and became aware of the order dated 11th December 2009 for the first time only on receipt of the letter dated 5th October 2010. Petitioners, in their application, *inter-alia* stated as follows :

> *1. The Applicants are permanent residents of 7/51, Tilak Nagar, Kanpur, having their permanent addresses as given in the cause title of this Application.*
>
> *…*
>
> *13. The Applicants state that since the Applicants never participated in the affairs of the Respondent firm, they were not aware of the activities of the said firm. The Applicants state that they have never received any summons or document relating to said alleged claim from anyone including Respondent Bank and Hon'ble Tribunal in the*

> *above O.A. No. 927 of 2001. The Applicants state that sometime in April, 2003, Mr. Rajiv Dharnidharka who was managing the affairs of the said firm, contacted the Applicants and informed that there was some case filed wherein the Applicants were also made parties and in order to defend the said case, the said Mr. Rajiv Dharnidharka requested Applicants to sign and deliver to him a Vakalatnama. The Applicants were informed that the said case was being settled but in order to avoid any exparte order against the Applicants, Vakalatnama in favour of an advocate Mr. Bhushan V. Sakpal nominated by Mr. Rajiv Dharnidharka needs to be filed. The Applicants completely relying on Mr. Rajiv Dharnidharka and without knowing the details of the said case and without having any documents of the said case signed and delivered in good faith the blank Vakalatnamas which were brought to them by the representatives of Mr. Rajiv Dharnidharka. The Applicants state that thereafter they were informed by the said Mr. Rajiv Dharnidharka that the said matter was already settled/concluded and accordingly Applicants treated the matter closed for ever and in absence of any notice/document/intimation whatsoever from the Hon'ble Tribunal Respondent Bank or Mr. Rajiv Dharnidharka or even the Advocate, Applicants did not have any reason to disbelieve the information given by Mr. Rajiv Dharnidharka and continued to believe so till such time, they received FIRST EVER communication from Respondent Bank at their address delivered to them last month. The Applicants state that they have never ever seen the Advocate in whose favour the Vakalatnamas were got signed by the said Mr. Rajiv Dharnidharka nor have they paid any fees. The Applicants were therefore, under the impression that the said matter was duly settled by the earlier partners.*

15 IOB, in its reply filed in January 2011 to this Miscellaneous Application admitted to not having petitioners' correct address. IOB also did not produce any evidence/document showing that petitioners were served with summons. IOB in its reply filed before the DRT submitted :

> *2. The Demand Notice in OA 927/2001 was posted by the Bank to their last known and recorded address with the Bank at the time of posting the registered letter. The address in question being Mr. Sunil, Sandeep & Bharat Gupta c/o M/s Hi-tech International at 5- Trishla Building, 122- Shaikh Memon Street, Mumbai 400002. These covers were returned un-claimed. The applicants had not advised the Bank of*

*change in the address and therefore it was not possible for the Bank to send the Demand Notices to their Kanpur address. Subsequently the demand notices were published in leading newspapers as per the directions of the Hon'ble Tribunal.*

*3. The Bank by diligent efforts through market enquiries came to know of their permanent address only at the time of writing the letter dated 05.10.2010.*

*…*

*12. It is denied that the applicants did not participate in the affairs of the firm. The summons and the Demand Notice were sent to their last know business address. They had deliberately suppressed their permanent address at Kanpur in a malafide manner to defeat the ends of justice. The Bank in its abundant interest to recover its just dues and also in recognition that it is lending the money out of the countless depositors savings took great interest in finding through market sources their other address. And on the very day it came to know the address it has written a letter calling upon the Applicants to honour the learned Presiding Officer's judgment and pay their decretal dues.*

*…*

*14. It is denied that any notice documentation did not emanate from the Bank. The bank took care to issue the demand notice/summons to the last known business address which was the only address with the bank. It is reiterated that the applicants have wilfully and with ulterior motive suppressed the information regarding their having a permanent address at Kanpur. The demand notices were published in newspapers as per the directions of the Hon'ble Tribunal. It is a travesty of truth that the applicants were under the impression that the dues were settled by the earlier partners. It is a pathetically lame excuse which should be rejected with the contempt it deserves*."

16 Mr. Dwarkadas submitted that from the procedural requirements found in the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and the Debt Recovery Tribunal (Procedure) Rules, 1993 and the Debts Recovery Tribunals, Maharashtra & Goa Regulations of Practice, 2003 framed thereunder, it would appear that the statement in

paragraph 14 above namely "*…The bank took care to issue the demand notice/summons to the last known business address which was the only address with the bank…*" is incorrect and/or unsupported by any documentary evidence produced by the bank on record to establish that a writ of summons in the prescribed form even came to be issued by the registry of the DRT. If that be the case the question of serving the summons upon petitioner could not and did not arise. Pertinently, the DRT vide order dated 27th April 2011 allowed the application seeking condonation of delay specifically observing as follows :

> *8. When this Tribunal decided the O.A., neither the Applicants nor their advocate were present. The record and proceeding of the O.A. shows that the copies of the judgment were sent by R.P.A.D. to the Applicants but the envelopes containing the same were returned back. There is nothing on record for imputing knowledge to the Applicants of passing of the judgment prior to the Applicant's receiving from the Bank letter Dt. 05.10.2010. The limitation for filing the application for condonation of delay would therefore have to be computed from the date of knowledge which is 12.10.2010 on which date the bank's letter dated 05.10.2010 was received. There was a delay of about 12 days which I am inclined to condone believing the reasons that the applicants are residing in Kanpur and therefore it took some time for them to contact lawyer, get the certified copies and file these applications.*

17 Despite the above observations made while condoning the delay, the very same presiding officer of the DRT dismissed the application for setting aside of the order dated 11th December 2009 on the ground that petitioners appeared before the Tribunal through advocate Bhushan Sakpal whose name is mentioned in the judgment dated 11th December 2009 and a

Vakalatnama was executed in his favour. In paragraph 11 of the order dated 27th April 2011, the DRT also observed that it is not necessary to impute knowledge of date of hearing to petitioners since they had appeared through an advocate. There was no enquiry or discussion whatsoever as to the service of summons being made on petitioners and petitioners' contention in this regard were dismissed solely on the basis that an advocate had entered appearance on their behalf.

18 Aggrieved by the order dated 27th April 2011, petitioners approached the DRAT by filing an appeal being Appeal No.117 of 2011. Petitioners also made a pre-deposit of Rs.5,75,00,000/- as per directions of the Tribunal.

19 On 23rd February 2021, respondent no.1 filed a reply, *inter alia* stating that petitioners have suffered due to their own fault as they were negligent in not maintaining contact with their advocate. Mr. Dwarkadas submitted that despite the fact that in the reply filed by the bank before the DRAT there was no specific traverse to the fact that the writ of summons was not served on petitioners, the DRAT has failed to apply its mind to these facts. According to Mr. Dwarkadas it has been virtually admitted in the reply filed by respondent no.1 (IOB) in the DRAT proceedings that no writ of summons was served on petitioners.

20 The DRAT, by the impugned order, rejected petitioner's appeal, *inter alia*, on the following grounds summarised below :

> *(i) The purpose of issuing a summons is to secure the presence of the party and to make the party aware of the case filed against him or her;*
>
> *(ii) There is a presumption that a party engages an advocate to defend him or her after knowing about the proceedings as a party. The filing of the vakalatnama gives rise to such presumption;*
>
> *(iii) It is for the party who complains that they have no notice of the proceedings to rebut such a presumption;*
>
> *(iv) Petitioners failed to produce any material to establish that they did not engage advocate Bhushan Sakpal;*
>
> *(v) Petitioners failed to place any material to show that advocate Bhushan Sakpal was not appearing before the DRT since 24th August 2005 and only contended as such in the written submissions filed for the first time;*
>
> *(vi) If petitioners had really not engaged any advocate, their pleadings would have been at every place as alleged advocate or advocate said to have been engaged by them, instead they specifically referred to advocate Bhushan Sakpal as 'their advocate' in paragraph 14 of the Miscellaneous Application;*
>
> *(vii) The contention that it was incumbent on the DRT to issue a fresh notice to petitioners in view of avocate Bhushan Sakpal not appearing with effect form 24th August 2005 amounts to making unwarranted comments against the Tribunal below without any basis and evidence;*
>
> *(viii) The contention that the order dated 11th December 2009 is an ex-parte order is incorrect as the order records the contentions advanced on behalf of respondent no.2 Firm. Petitioners are shown as partners of the firm but not in their individual capacity;*
>
> *(ix) While examining principles of natural justice, what is to be seen is whether opportunity was given or not. As seen from record, ample opportunity was given to petitioners' advocate and it was not utilized. Only ground harped is that petitioners had not engaged Mr. Bhushan Sakpal, therefore, they have no occasion or opportunity to participate in the proceedings;*

*(x) Once Vakalatnama is executed, it will be in force till it is cancelled. Remedy is to take action against such person and get the authorization set aside or cancelled through process of law. Without such steps, contention that the Vakalatnama was obtained by misrepresentation is of no use and such contention in the absence of cogent and convincing evidence cannot be accepted;*

*(xi) Petitioners projected as written statement is not filed order dated 11th December 2009 is treated as an ex-parte order and not an order on merits. Petitioners have no clarity on the nature of order dated 11th December 2009. From a reading of the order dated 11th December 2009 it cannot be termed as ex-parte order and it is a final order which should have been appealed;*

*(xii) In this case, DRT accepted the delay as petitioners could satisfactorily show that they have no knowledge of passing order on 11th December 2009. But to the other petition, petitioners have to show that order dated 11th December 2009 is an ex-parte order and that petitioners are not served with summons or though served they were prevented from attending the Tribunal to the date on which O.A. was called for hearing and on both these counts petitioners failed. Therefore, simply because delay is condoned, petitioners are not entitled automatically for the second relief namely setting aside of the ex-parte order.*

21 Mr. Dwarkadas submitted as under :

(a) Petitioners were never served with any writ of summons or documents of the proceedings before the DRT. The burden of proof to establish that petitioners had been served the summons is on IOB/respondent no.1 and petitioners should not be asked to prove a negative averment. He relied upon ***New India Assurance Company Ltd. V/s. Nusli Neville Wadia & Anr.***[1] where the Court held that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. To prove a negative is usually

1. (2008) 3 SCC 279

incapable of proof.

(b) Sections 22 (2) (f) and 22 (2) (g) of Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("Act") provides that the DRT and DRAT shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (CPC) while trying a suit in respect of dismissing an application for default or deciding it *ex-parte* or setting aside any order of dismissal of any application for default or any order passed by it *ex-parte.* The DRT was, therefore, duty bound to consider the provisions of the CPC when it heard petitioners Miscellaneous Application.

(c) Service of summons is a mandatory requirement as per the Act, the Debt Recovery Tribunal (Procedure) Rules, 1993, ("DRT Rules") and the Debts Recovery Tribunals, Maharashtra & Goa Regulations of Practice, 2003 ("DRT Regulations"). Section 19(4) and 19(5) of the Act, as they then stood, provided for issuance of summons indicating the number of days from the date of summons to present defence. Rule 11 of the DRT Rules also provided for service of a copy of the application and paper book on respondents by the Registrar of DRT and Rule 12 of the DRT Rules provided for a time within which reply was to be filed. Rule 22 of the DRT Rules provides that the summons and other proceedings shall also have the seal of the Tribunal. The DRT Regulations also provide for issuance of summons/ notice under the signature of Registrar and the person who serves or attempts to serve the summons/notice shall file an affidavit of service and

also file evidence of service. The DRT Regulations provides that where the summons/notices are returned undelivered with postal endorsement "refused" or "not claimed", the Registrar has to declare that the summons/notice has been duly served and order that the matter shall proceed *ex-parte*. The DRT Regulations even provide that where the summons/notice was properly addressed but the registered post acknowledgment due is not received within thirty days from the date of the issue of summons/notice, the Registrar may declare on submission of the affidavit by applicant regarding correctness of the address and evidence of posting that the summons/notice is duly served and the matter shall proceed further. Therefore, the provisions of the Act, DRT Rules and DRT Regulations prescribed the steps required to be adopted for issuance of summons under the seal of Registrar. IOB has not produced any writ of summons that they claimed was returned or a copy thereof or even an affidavit of service that may have been contemporaneously filed in the DRT. There is not even any evidence that the summons/notice was created/issued or any inquiry was made by the Registrar to declare that the summons/notice has been duly served and the matter shall proceed *ex-parte*.

(d) The time to file written statement would commence only from the date of service of writ of summons and serving writ of summons was a mandatory procedural requirement. This Court (per K.R. Shriram, J.),

in ***Ganpatraj K. Sanghvi V/s. Vishal Udyog & Ors.***[2], has held that before leave to serve by substituted service is granted, the Registrar should have formed a reason to believe that petitioners were keeping out of the way for the purpose of avoiding service or for any other reason summons cannot be served. The onus is on the parties seeking service by substituted service to prove that defendant was keeping out of the way for the purpose of avoiding service. Leave to serve by substituted service cannot be granted as a matter of course.

(e) The Apex Court in ***Uma Nath Pandey and Ors. V/s. State of Uttar Pradesh and Anr.***[3] had held that service of summons was mandatory. The Apex Court in ***Auto Cars V/s. Trimurti Cargo Movers Private Limited & Ors.***[4] has held that not only service of summons was mandatory but also the date of the hearing must be communicated. The Apex Court in ***Sushil Kumar Sabharwal V/s. Gurpreet Singh and Ors.***[5] also has held so.

(f) This Court in ***Tardeo Properties Pvt. Ltd. V/s. Bank of Baroda***[6] has held that time to file written statement commences only from the date of service of summons and, therefore, when summons itself has not been served, the time to file written statement had not commenced.

(g) On the findings of DRAT that filing of Vakalatnama or appearance through an advocate amounted to waiver of the mandatory

2. 2016 SCC Online Bom. 5336
3. (2009) 12 SCC 40
4. (2018) 15 SCC 166
5. (2002) 5 SCC 377
6. 2007 SCC Online Bom 614

requirement of service of summons, Courts, as noted earlier, have held that service of summons is a mandatory procedural requirement and is not dispensed with merely on account of the party entering appearance by filing a Vakalatnama. *Tardeo Properties Pvt. Ltd.* (Supra) has held that failure to comply with the mandatory requirement of the service of writ of summons to enable defendant to file the written statement cannot be said to be a mere procedural irregularity. The provisions of law essentially prescribe fetters on the power of the Court to proceed with the matter against defendant in the absence of the service of the writ of summons. Given the almost identical language in Rule 12(1) of the DRT Rules when compared with the amendments brought about to the High Court (O.S.) Rules and Order 8 Rule 1 of the CPC by the Commercial Courts Act, 2015, it is clear that the time to file written statement contemplated in the DRT Rules could have only commenced on due and proper service of the writ of summons. The appearance of an advocate and filing of a Vakalatnama by him cannot and does not dispense with the requirement to serve the writ of summons. These submissions were made without prejudice to petitioners' case that petitioners were under the impression that the matter had been settled and were not aware that the advocate was not appearing.

(h) Where partners are sought to be proceeded against individually, the DRT should have ensured that summons were served individually on each of the partners. If plaintiff needs to sue only the firm

but if he wants to bind the partners individually, he must serve them personally. If IOB wanted to sue petitioners individually, they could have and ought to have made diligent efforts at the relevant time and gathered the requisite details of the address of petitioners even at the time of filing of the O.A. and claimed service thereof as they claimed to be served while serving the Recovery Certificate. If that was done, petitioners would have appeared and filed written statements and taken a stand that they were not partners when the cause of action arose. IOB not having done that, the order dated 11th December 2009 passed by the DRT itself would get vitiated *qua* petitioners. Two judgments, one of the Apex Court in ***Gambhir Mal Pandiya V/s. JK Jute Mills Co. Ltd., Kanpur and Ors.***[7] and another of the Hon'ble Punjab and Haryana High Court in ***Rajinder Kaur V/s. Darshan Singh & Ors.***[8] were relied upon in support of these submissions.

(i) Without prejudice to the above submissions, a party must not be made to suffer on account of the mistake committed by the advocate engaged as held by this Court in ***Fertilisers and Chemicals Travancore Ltd. V/s. Rajkumar Lines Limited***[9]. Even if the DRT or DRAT were correct in holding that the advocate had been lawfully engaged, the said advocate could not have made an effective appearance as he had never been instructed by petitioners. Under Rule 13 of the DRT Rules, the DRT was bound to have issued fresh notice at the time of the hearing when petitioner

7. (1963) 2 SCR 190
8. (2012) 4 PLR 390
9. 1970 (72) Bom LR 271

was not represented on the date of the hearing. Order sheets in DRT indicates that advocate Bhushan Sakpal had stopped appearing on behalf of petitioners with effect from 24th August 2005 and had not filed any written statement or contested any evidence. Therefore, it was incumbent upon the DRT to make an enquiry regarding service of summons upon petitioners and call upon IOB to prove the service. When the advocate had not appeared between August 2005 and December 2009 when the matter came to be finally disposed, Rule 13 of the DRT Rules required DRT to have issued one final notice and DRT not having done that, the order of DRT had to be set aside.

(j) Even if one assumes that the service of summons was not mandatory on account of the appearance of advocate Bhushan Sakpal, the order dated 11th December 2009 of DRT was nevertheless an *ex-parte* order and ought to be set aside under Order 9 Rule 13 of the CPC. A judgment of the Apex Court in ***G. Ratna Raj (D) by LRs V/s. Sri Muthukumarasamy Permanent Fund Ltd. and Ors.***[10] was relied upon.

22 Mr. Nimbkar on behalf of respondent no.1, to whom the rights of IOB has been assigned, in response relied upon legal propositions only. Mr. Nimbkar submitted that the facts are there before the Court as per the records and proceedings and his endeavor will be to only tackle petitioners' case on legal submissions.

10. (2019) 11 SCC 301

23 Mr. Nimbkar's submissions were as under :

(a) Relying upon a judgment of the Apex Court in ***Siraj Ahmad Siddiqui V/s. Prem Nath Kapoor***[11], it was submitted that when defendant has appeared in the matter after registration of the suit either on receiving the information about the suit or suo moto, defendant must be deemed to have waived the right to get served the summons. It was permissible under the CPC for defendant to file a written statement even after the date for that purpose mentioned in the summons, the only requirement being it should be filed prior to the first hearing when the Court takes up the case. If defendant appears before the Court after the registration of the suit and he is informed about the nature of the claim and the date fixed for reply thereto, defendant must be deemed to have waived the right to the summons to be served upon him and that would be the position when defendant suo moto appeared before the Court before the actual service of the summons. On petitioners' case that as the summons was not served, there was no occasion to file written statement as a written statement in accordance with the provisions of the Act was to be filed within thirty days from the date of receipt of summons, *Siraj Ahmad Siddiqui* (Supra) has held that where defendant has appeared before the Court after the registration of the suit and is informed about the nature of the claim and date fixed for reply without service of summons upon him and directed to file written statement before a particular date or is informed of the date of hearing of the suit, it would be

11. (1993) 4 SCC 406

too technical to hold that service of the summons in the ordinary course was still required and further proceedings in the suit would take place thereafter.

(b) Relying upon a judgment of the Apex Court in the case of ***Sunil Poddar V/s. Union Bank of India***[12], it was submitted that that was a case where the suit was transferred from Civil Court to DRT and defendants alleged that they were not informed about the transfer or summons was not served upon them. Claimant there opposed and contended that defendants were aware about the proceedings initiated because defendants have also appeared before the Court and filed written statement. The fact that defendant had appeared before the Civil Court and even filed written statement weighed against defendants before the High Court as well and the Apex Court had held that it was obligatory on the part of defendants to have appeared before the DRT when the matter was transferred. The Apex Court held that it was duty of defendants to inquire into the matter which they did not.

(c) It is evident from *Sunil Poddar* (Supra) that if the Court was convinced that defendant had otherwise knowledge of the proceedings and he could have appeared and answered plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside the *ex-parte* decree against him by invoking Rule 13 of Order 9 of CPC. In this case, petitioners had knowledge of the proceedings in DRT and had appeared in the matter but were not diligent enough to proceed in the case. Hence,

12. 2008 2 SCC 326

petitioners are deemed to have neglected the matter till they received the recovery notice.

(d) The Apex Court in ***Salil Dutta V/s. T.M. and M.C. Private Ltd.***[13] held that after engaging an advocate when the advocate remains absent, such a party should be held to have not co-operated with the Court and having adopted such a stand, petitioners have no right to ask Court's indulgence. Even in *Salil Dutta* (Supra) the advocate for defendant had advised them that they need not be present at the hearing of the suit, the advocate also did not remain present and an *ex-parte* decree came to be passed. Defendants applied for setting aside the *ex-parte* decree and blamed the advocate. The Apex Court held that putting the entire blame upon the advocate and trying to make out as if they were totally unaware of the nature and significance of the proceedings is a theory which cannot be accepted and not to be accepted.

(e) Where an *ex-parte* decree granted was set aside by the High Court on an application under Order 9 Rule 13 of CPC, the Apex Court in ***Parimal V/s. Veena @Bharti***[14] has explained the meaning of sufficient cause and in the case at hand, there was no sufficient cause shown.

(f) *Auto Cars* (Supra) relied upon by petitioner can be distinguished. That was a case where defendant had no knowledge of filing of the suit. Also the date, time and year alongwith the date on which the

13. 1993 2 SCC 185
14. 2011 3 SCC 545

matter was fixed was also not mentioned in the summons and, therefore, the Apex Court held that defendant could not appear in the Court as day, date and year alongwith time was not mentioned in the summons. But in the case at hand, however, defendant was very much aware and even appointed an advocate to represent him in the case. There can be no issues on the findings of the judgment in *Auto Cars* (Supra) where the Apex Court has mentioned that the objectives behind sending the summons is essentially three fold, firstly it is to apprise defendant about the filing of the case, secondly to serve defendant with copy of plaint and thirdly to inform defendant about actual date, day, year, time and particulars of Court so that he is able to appear in the Court on the day fixed. But in the case at hand, petitioners were very much aware about actual day, date, year, time and particulars of the Court and had even appointed a lawyer to represent them in Court. Therefore, *Auto Cars* (Supra) was not applicable to the facts and circumstances of the case at hand.

(g) *Fertilisers and Chemicals Travancore Ltd.* (Supra) relied upon by petitioners is not at all applicable. In that case, the issue involved was whether the order passed was under Order 9 Rule 8 of CPC and in exercise of inherent jurisdiction under Section 151 of CPC. Rule 8 of Order 9 deals with cases where defendant was present and plaintiff was absent, which was not the case in the case at hand.

(h) *G. Ratna Raj (D) by LRS* (Supra) relied upon by petitioners was a case where defendant after service had appeared, filed written statement, issues were framed and defendants even cross examined plaintiff's witness and plaintiff had also closed the case and matter was posted for defendants' evidence. Defendant thereafter, did not appear in the suit and consequently, the suit proceeded *ex-parte* and preliminary decree came to be passed. On defendants' application for setting aside the preliminary decree, the Apex Court, after considering the provisions of Order 17 Rule 2 and 3 of CPC observed that defendant could not lead evidence because of his absence and, therefore, the case was covered under Order 17 Rule 2 which was sufficient ground for setting aside the *ex-parte* decree. Order 17 Rule 2 was not applicable to DRT and, therefore, this judgment also is not applicable to the present case.

(i) *Gambhir Mal Pandiya* (Supra) relied upon by petitioners was a case that related to execution of a decree passed against the firm. The decree holder wished to proceed against a personal property of partner and filed an execution application under Order 21 Rule 50(2) of CPC. The partner came with a case that he had not received the summons. The Civil Judge rejected the application and High Court arrived at a finding that the partner had admitted that he was a partner in the firm and, therefore, was not entitled to raise any objection either to the contract or to the reference to arbitration or the award. The High Court also rejected the revision. The

Apex Court held that once a person admits that he is partner of the firm, when a decree is passed against the firm, such a decree is capable of being executed against the property of the partnership and also persons who appeared in answer to summons served on them as partners and either admitted that they were partners and were found to be so and those persons who were summoned as partners but stayed away. The Apex Court held that decree can also be executed against persons who are not summoned in the suit as partners but Rule 50(2) of Order 21 gave them an opportunity of showing cause and plaintiff must prove their liability. Such a person can only prove that he was not a partner or prove that the decree is result of collusion, fraud or the like. But once he admits that he was a partner, he has no special defence of collusion, fraud etc. The issues in the case at hand and the issues in *Gambhir Mal Pandiya* (Supra) were totally different and hence, the same was not applicable to the facts of the case.

(j) As regards *New India Assurance Company Ltd.* (Supra), that was a case where the issue involved was under the Public Premises Eviction of Unauthorised Occupants Act, 1971 and, therefore, was not applicable to the case at hand.

(k) As regards ***Rafiq and Anr. V/s. Munshilal and Anr.***[15] and *Salil Dutta* (Supra), the Apex Court has held that the observations made in Rafiq case must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. In the case of *Rafiq*

15.(1981) 2 SCC 788

(Supra) no case law has been discussed and, therefore, the said case cannot be used as precedent. The facts in that case were also totally different because that was a case where one of the ground raised was that it was a practice in Uttar Pradesh where the lawyers remained absent when they did not like a particular bench. The facts in the case at hand are totally different.

(l) As regards *Rajinder Kaur* (Supra) relied upon by petitioners, this case was also distinguishable. As regards *Uma Nath Pandey and Ors.* (Supra) relied upon by petitioners, that case also was distinguishable because the question involved therein was whether principles of natural justice have been violated and if so, to what extent any prejudice has been caused. In the case at hand, there is not even a whisper about violation of principles of natural justice. On the contrary, in the case at hand, there was gross negligence on the part of petitioners who chose not to remain present at the time of hearing of the original application.

(m) As regards *Tardeo Properties Pvt. Ltd*. (Supra) relied upon by petitioners, there the Court was considering Rule 88 of the High Court (O.S.) Rules which provides for defendant to file written statement only on service of writ of summons which was not the case with DRT. Defendant in DRT can file written statement once he appears in the O.A. with or without receipt of summons.

(n) As regards *Sushil Kumar Sabharwal* (Supra) relied upon by petitioners, the same also was distinguishable because that was a case

where there was inconsistency in the statement made by process server in the Court in respect of the service of writ of summons. Service was effected by substituted service and the Court found several infirmities and lapses on the part of process server. The main difference in *Sushil Kumar Sabharwal* (Supra) is that defendant never appeared in the suit, whereas in the case at hand, petitioners have appeared through lawyer but later completely neglected the proceedings throughout till they received demand notice from the bank.

(o) Petitioners' stand that sometime in April 2003 one Rajiv Dharnidharka, who was managing the affairs of respondent no.2 firm, contacted petitioners and informed that there was some case filed wherein petitioners were also made parties and in order to defend the case, requested petitioners to sign and deliver to him a Vakalatnama or that petitioners were informed that the case was being settled but in order to avoid an *ex-parte* order Vakalatnama in favour of one Bhushan Sakpal nominated by Mr. Rajiv Dharnidharka needs to be filed are all evidence of utter carelessness on the part of petitioners. Petitioners were not illiterate or novices but were successful businessmen and it was unbelievable that the persons who invest in crores of rupees in business would simply rely or believe someone and surrender their fate in the hands of the said Rajiv Dharnidharka. The story put forth by petitioners, therefore, was unbelievable and if at all they had really done what they did, it would only

show gross negligence on petitioners' part and this Court should not interfere where negligent litigant was demanding setting aside an *ex-parte* order passed in the year 2009. The DRT has recorded negligence on the part of petitioners which is not challenged in the petition.

Discussions and findings :

**I - Service of summons upon petitioners :**

24 Petitioners, it is clear, were never served with any writ of summons/documents of the proceedings before the DRT. The burden of proof to establish that petitioners had been served with summons is on IOB/respondent no.1 and petitioners should not be asked to prove a negative averment. In this respect, the Hon'ble Supreme Court in *New India Assurance Company Ltd.* (Supra) had observed as follows :

> *"55. Although the provisions of the Evidence Act are not applicable, the underlying principles of Section 101 thereof would apply. In Sarkar on Law of Evidence 16th Edition Volume 2 at pg. 1584 it is stated as under :*
>
> > *Principle and Scope - This section is based on the rule, ie incumbit probation qui dicit, non qui negat the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons. [per LORD MAUGHAM in Constantine Line vs. I S Corpn. (1941) 2 All ER 165, 179]. This rule is derived from the Roman law, and is supportable not only upon the ground of fairness, but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative [Hals 3rd Ed Vol 15 para 488].*

> *56. The said principle has been approved by this Court in (1983) 4 SCC 491: Shambhu Nath Goyal vs. Bank of Baroda and others; (1999) 8 SCC 744:Garden Silk Mills Ltd. and another vs. Union of India and others and (2007) 2 SCC 433 (para 18) : J.K. Synthetics Ltd. vs. K.P. Agrawal and another.*"
>
> (emphasis supplied)

25 It is pertinent to note that Sections 22 (2) (f) and 22 (2) (g) of the Act, i.e., Recovery of Debts due to Banks and Financial Institutions Act, 1993, provides as follows :

> *"(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Prcoedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :*
>
> *…*
>
> *(f) dimissing an application for default or deciding it ex-parte;*
>
> *(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;*
>
> *…"*

26 Consequently, the DRT was duty bound to consider the provisions of the Code of Civil Procedure, 1908 ("the Code") whilst considering petitioners application to set aside the order dated 11th December 2009.

27 Further and in any event, the service of summons is a mandatory requirement as per the Act, the Debt Recovery Tribunal (Procedure) Rules, 1993, ("DRT Rules") and the Debts Recovery Tribunals, Maharashtra & Goa Regulations of Practice, 2003 ("DRT Regulations"). Issuance of a notice informing the other party of the date, place and time of

hearing and giving him/her a chance to make representation, is also an essential tenet of the principles of natural justice.

28 Sections 19(4) and 19(5) of the Act, as they then stood, provided as follows :

> *"(4) On receipt of the application under sub-section (1) or sub-section (2) the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.*
>
> *(5) The defendant shall, within a period of thirty days from the date of service of summons, present a written statement of this defence :*
>
> *Provided that where the defendant fails to file the written statement within the said period of thirty days, the Presiding Officer may, in exceptional cases and in special circumstances to be recorded in writing, allow not more than two extensions to the defendant to file the written statement.*"

29 Rule 11 of the DRT Rules provide as follows :

> "*11. Endorsing copy of application to the respondent: A copy of the application and paper book shall be served on each of the respondents as soon as they are filed, by the Registrar by registered post."…*

30 Rule 12 of the said Rules, to the extent relevant, provides as follows:

> "*12. Filing of reply and other documents by the defendant :*
>
> *(1) The defendant may file two complete sets containing the reply to the application along with documents in a paper book form with the registry within one month of the service of the notice of the filing of the application on him.*
>
> *(2) The defendant shall also endorse one copy of the reply along with documents as mentioned in sub-rule (1) to the applicant.*

*(3) The Tribunal may, in its discretion on application by the respondent, allow the filing of reply referred to in sub-rule (1), after the expiry of the period referred to therein.*

*(4) If the defendant fails to file the reply under sub-rule (1) or on the date fixed for hearing of the application, the Tribunal may proceed forthwith to pass an order on the application as it thinks fit.…*"

31 Further, Rule 22 of the said Rules provide as follows:

*"22. Powers and Functions of the Registrar—(1) The Registrar shall have the custody of the records of the Tribunal and shall exercise such other functions as are assigned to him under these rules or by the Presiding Officer by a separate order in writing.*

*(2) The official seal shall be kept in the custody of the Registrar.*

*(3) Subject to any general or special direction by the Presiding Officer, the seal of the Tribunal shall not be affixed to any order, summons or other process save under the authority in writing from the Registrar.*

*(4) The seal of the Tribunal shall not be affixed to any certified copy issued by the Tribunal save under the authority in writing of the Registrar."*

32 The procedure for issuance of Summons by the DRT, as provided in the DRT Regulations of 2003, are as under :

*"Chapter-VI: Service of Summons/Notice*

*19(1) The tribunal shall issue summons/Notice and the Registrar or Assistant Registrar or official authorized by the Registrar shall sign the Summons/Notice adding thereto the date of signing. The Registrar may by an order in writing dispense with the remittance of annexure and may direct that the paper book shall be collected from the Registry on the date of appearance.*

*(a) Every Summons of O.A. shall be in Form No. 14.*

*(b) …*

*19(2) The seal of the Tribunal shall be affixed on every Summons/ Notice.*

*19(3) Summons/Notice shall ordinarily be served by R.P.A.D./Speed Post. It may be served after obtaining the*

*leave from the Registrar by E-mail, fax or through Courier. On written application being allowed, the summons/Notice may be served by Personal Service within the local limits of the jurisdiction of the Tribunal and the person who serve/attempts to serve the summons/notice shall file service affidavit and also file evidence of service.*

*…*

*19(7) Where the summons/notices are returned to the Tribunal with postal endorsement 'refused' or 'not claimed' the Registrar may declare that the summons/notice has been duly served on such defendants/respondents and order that the matter shall proceed ex-parte.*

*19(8) Where the summons/notice was properly addressed (pre-paid and duly issued) by Registered Post Acknowledgment due is not received within 30 days from the date of the issue of summons/notice, the Registrar may declare, on submission of the Affidavit by the applicant regarding correctness of the address and evidence of posting that the summons/notice is duly served and the matter shall proceed further.*

*19(9) Where the summons/notice is sent by E-mail/Fax on proper address, the Registrar may on affidavit and proof of delivery declare that it was duly served.*

*19(10) Where the summons/notice is returned un-served except in the above circumstances, the Applicant/Appellant shall take steps for service within 15 days from the date of return of summons/notice failing which the matter shall be kept before Presiding Officer for further orders.*

*…*

*19(13) A summons need not be served on the defendant personally, if his Advocate accepts the service and undertakes to file the Vakalatnama.*"

33 From the aforesaid provisions of the Act, DRT Rules and DRT Regulations, it is clear that the following steps are required to be adopted for the writ of summons to be issued under the Seal of the Registrar and served on the Defendants to the O.A. (including petitioners herein):

| *Steps* | *Provision* | *Particulars* |
|---|---|---|
| Step 1 | Section 19(4) of the | Direction of issuance of summons : |

| | | |
|---|---|---|
| | Act | On receipt of the Application, the Tribunal is required to issue summons requiring the Defendants to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.<br><br>Mr. Dwarkadas, on instructions stated that (and not denied by Mr. Nimbkar for respondent no.1) not even a copy of the Writ of Summons is available on the record of the DRT nor has IOB produced any proof of the Writ of Summons being created or served.<br><br>Admittedly no documents were filed by IOB in response to the MA filed by petitioners to set aside the ex parte order. IOB has not produced any Writ of Summons that they claim was returned, or a copy thereof, or even an Affidavit of Service that may have been contemporaneously filed in the Ld. DRT. |
| Step 2 | Regulation 19(1), 19(2) of the DRT Regulations r/w Rule 13, 22 of the DRT Rules | Creation of summons:<br><br>The Tribunal shall issue summons/Notice and the Registrar or the Assistant Registrar or official authorized by Registrar shall sign the summons/notice adding thereto the date of signing.<br>Each summons of O.A. shall be in Form No. 14.<br><br>The seal of the Tribunal is required to be affixed on every Summons/Notice. Date and place of hearing should also be notified.<br><br>There is a need for creation of summons/notice even in case of pending proceedings and service of the same on the Advocate. |
| Step 3 | Regulation 19(3) of the DRT Regulations r/w Rule 11 of the DRT Rules | Service of summons:<br><br>Summons/Notice are ordinarily required to be served by Registered Post Acknowledgment Due.<br><br>The Registrar shall also serve a copy of the application and paper book, as soon as they are filed, on defendants by registered post. |
| Step 4 | Regulations 19(7), 19(8), 19(10) of the DRT Regulations | Enquiry regarding service:<br><br>Where the summons/notice was properly addressed (pre-paid and duly issued) by Registered Post Acknowledgment due is not received within 30 days from the date of the issue of summons/notice, the Registrar is required to declare, on submission of the Affidavit by the applicant regarding correctness of the address and evidence of posting that the |

| | | |
|---|---|---|
| | | summons/notice is duly served and the matter would proceed further.<br><br>Where the summons/notice is returned un-served except in the above circumstances, the Applicant shall take steps for service within 15 days from the date of return of summons/notice failing which the matter is required to be kept before Presiding Officer for further orders.<br><br>Where summons are returned with postal endorsement 'refused' or 'not claimed', the Registrar is required to declare that the summons/notice has been duly served and the matter shall proceed exparte. |
| Step 5 | Section 19 (5) of the Act r/w Rule 12(1) of the DRT Rules | Filing of Written Statement:<br><br>If Step 3 has been duly completed, then defendant is required, within a period of thirty days/one month from the date of service of summons, to present a written statement of his defence. |
| Step 6 | Proviso to Section 19(5) of the Act r/w Rules 12(3) and 12(4) of the DRT Rules | Enquiry on non-filing of Written Statement:<br><br>However, where defendant fails to file the written statement within the said period of thirty days, the Presiding Officer may, in exceptional cases and in special circumstances to be recorded in writing, allow not more than two extensions to defendant to file the written statement.<br><br>If defendant fails to file the reply within 30 days/ 1 month of service of summons or on the date fixed for hearing of the application, the Tribunal may proceed forthwith to pass an order on the application as it thinks fit. |
| Step 7 | Rule 13 of the DRT Rules | Requirement of issuance of notice for date and place of hearing:<br><br>The Tribunal is also required to notify the parties the date and place of hearing of the application in such a manner as the Presiding Officer may by general or special order direct. |

34 In the instant case, respondent no.1/IOB has not produced any evidence/document to establish that summons was in fact created and served on petitioners in accordance with the aforesaid Act, DRT Rules and

the aforesaid DRT Regulations or that any of the steps set out hereinabove were complied with. Even if we proceed on the assumption that a writ of summons, as required by the DRT Rules and Regulations was issued, the same was never served on petitioners as is clear from the reply filed by IOB before the DRT in M.A. No.145/2010.

35 Even if the case of IOB that the Demand Notices (details of which have not been supplied) or summons had returned as unclaimed, even then it was incumbent on IOB to follow the procedure contemplated in Rule 12 read with Regulation 19 as set out herein above before the matter could be proceeded *ex-parte*. This is particularly the case where the address on the record of the judicial proceedings is incorrect as is evident from a mere perusal of the cause title in the O.A. and the subsequent affidavit filed by IOB accepting that on due diligence IOB could ascertain the correct address of petitioners in Kanpur. As submitted by Mr. Dwarkadas there is no material whatsoever available or on the record of the DRT to establish that this was in fact done. This was not controverted or denied by Mr. Nimbkar.

36 In the affidavit in reply dated 15th July 2021 filed to the present petition, at paragraph 4(n) IOB has in fact tried to justify the non-service of summons. Paragraph 4(n) reads as follows :

> *"4(n) The contentions raised by petitioners demonstrates the malafides on the part of petitioners. There is no provision under which the contention raised by petitioners can be justify. Petitioners, despite appointing lawyer to contest the proceedings, have come up with the case that, petitioners are not served with the notice of Original*

> *Application. It is pertinent to note that, petitioners chose not to file Written Statement in the Original Application wherein petitioners could have raised the contentions relating to lack of service. By not raising the contention despite appearing in the Original Application, petitioners have waived the service of notice and therefore, petitioners do not have the said contention to contest the present appeal. Petitioners have also not mentioned either in the Miscellaneous Application No. 150 of 2010 or in the Appeal before the Learned Debts Recovery Appellate Tribunal as to what prevented petitioners to file the Written Statement raising all the contentions including the contention relating to lack of service of notice/summons. But the acts and behaviour of petitioners demonstrates Petitioner's gross negligence in the proceedings.*"

37 These averments in the affidavit in reply filed by respondent no.1, we would say, are virtually an admission that no notice or writ of summons was ever served on petitioners. Petitioners have complained about the non-service of the notice/writ of summons since the very inception, i.e., from the very stage of becoming aware of the impugned order vide the letter dated 5th October 2010. Petitioners have raised this issue in paragraphs 13 and 14 of the Miscellaneous Application filed before the DRT for setting aside the order dated 11th December 2009, paragraph 5.6 of the Appeal No.117 of 2011 filed before the DRAT challenging the DRT's order dated 27th April 2011 refusing to set aside the order dated 11th December 2009, paragraph 4 of the order dated 27th April 2011 refusing to set aside the order dated 11th December 2009 and paragraph 2 of the impugned order.

<u>Where packet is unclaimed more than one attempt must be made to serve particularly where the address to which the summons was posted in incorrect</u>

38 It is settled law that the serving of the summons is a mandatory procedural requirement and the time for filing the written statement commences only from the date of service of summons.

39 This Court (per Justice K.R. Shriram) in *Ganpatraj K. Sanghvi* (Supra) while dealing with the issue of setting aside of an *ex-parte* order in case of return of summons with the endorsement "intimation and unclaimed" and substituted service held as follows :

> *"8. Moreover, the packet that was dispatched by the plaintiff of the Sheriff of Bombay has been returned with the endorsement "intimation and unclaimed". If intimation is posted at the wrong address, can the defendant be stated to be avoiding service? I would go a step further that even if the intimation was posted at the right address and the defendant has not claimed the packet from the postal authorities, would it still be a reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or for any other reason summons cannot be served, for the Prothonotary and Senior Master to permit to serve the writ of summons by substituted service. In my view, by dropping the intimation once we cannot conclude that the defendant is keeping out of way for the purpose of avoiding service or writ of summons cannot be served. The plaintiff should make further attempts before the Prothonotary & Senior Master permits him to serve writ of summons by substituted service particularly when it is a Summary suit and within 10 days defendants have to enter appearance. I have been observing that the Prothonotary & Senior Master and Addl. Prothonotary & Senior master has been granting leave to serve by substituted service as a matter of course. They must while granting such a leave, record reason why they feel the defendant was keeping out of the way for avoiding service or why the summons cannot be served in the normal way. There could be various reasons why when intimation is posted, a party may not have collected the packet from postal authorities or the courier for e.g. the party may not be residing at the address where the intimation was dropped like in this case; (b) The party may be out of town and before they returned, the time provided to claim would have lapsed; (c) the party may be too old or unwell to receive the parcel or go and claim. There could be many reasons. Plaintiff cannot just make one attempt and come and ask for leave to*

> *serve by substituted service. The onus is on the plaintiff to prove that the defendant was keeping out of the way for the purpose of avoiding service. Leave to serve by substituted service cannot be granted as a matter of course and the Prothonotary & Senior Master should satisfy himself and give reasons why he is permitting service by substituted service.*
>
> *…*
>
> *10. The Apex court has held that non-service of summons will undoubtedly be a special circumstance. I am satisfied that the summons has not been served upon the defendants and therefore, it will be a special circumstance under Order 37 Rule 4 to recall the exparte decree passed. Substituted service may be good service in law but the fact that leave to serve by substituted service was granted without valid reason will go to the root of the matter. In my view leave was granted without valid reasons. Substituted service can be permitted only when there are reasons to believe that the defendant is keeping out of the way to avoid service or if summons cannot be served. There was nothing in the present case to believe the defendants were keeping out of the way to avoid service.*
>
> *…*
>
> *13. In the circumstances, the ex-parte decree passed on 1.4.2013 is recalled.*
> *14. In view of the above, the question of executing ex-parte decree will not arise and therefore, Thane court is directed to return the process."*
>
> (emphasis supplied)

Service of Writ of Summons is held to be mandatory

40 In this respect, the Hon'ble Supreme Court of India in *Uma Nath Pandey and Ors.* (Supra) had held as follow :

> *"8. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to*

> *enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play."*
>
> (emphasis supplied)

Not merely service of summons but also the date of the hearing must be communicated

41 Furthermore, the Hon'ble Supreme Court of India in *Auto Cars* (Supra), while dealing with the issue of substituted service of summons, held as follows :

> *"6. The summons of the suit was initially sent to the Defendants at their place of business mentioned in the cause title of the plaint, which was shown at Aurangabad (MH). Since the Defendants were not being served with the ordinary mode of service, the Plaintiff sought permission to serve them with the substituted service by way of publication Under Order V Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). The permission was granted to the Plaintiff.*
>
> *7. The summons dated 17.11.2014 was accordingly published in the Times of India (Pune Edition) and Dainik Bhaskar (Aurangabad Edition) on 25.11.2014. The summons, which was published in papers, reads as under :*
>
> *…*
>
> *16. Section 27 of the Code deals with issuance of the summons to Defendants. It says that where a suit has been instituted, summons may be issued to the Defendant to appear and answer the claim and may be served in the "manner prescribed on such day" not beyond thirty days from the date of the institution of the suit.*
>
> *…*
>
> *21. In other words, the legislature while prescribing the format of summons in the Code has provided one column where the Court is required to mention a specific "day, date,*

*year and time" for the Defendant's appearance in the Court to enable him to answer the suit filed against him/her. This is also the requirement prescribed Under Section 27 of the Code as is clear from the words occurring therein "and may be served in the manner prescribed on such day".*

*…*

*24. Indeed, mentioning of the specific "day, date, year and time" in the summons is a statutory requirement prescribed in law (Code) and, therefore, it cannot be said to be an empty formality. It is essentially meant and for the benefit of the Defendant because it enables the Defendant to know the exact date, time and the place to appear in the particular Court in answer to the suit filed by the Plaintiff against him.*

*25. If the specific day, date, year and the time for Defendant's appearance in the Court concerned is not mentioned in the summons though validly served on the Defendant by any mode of service prescribed Under Order V, it will not be possible for him/her to attend the Court for want of any fixed date given for his/her appearance.*

*26. The object behind sending the summons is essentially threefold-First, it is to apprise the Defendant about the filing of a case by the Plaintiff against him; Second, to serve the Defendant with the copy of the plaint filed against him; and Third, to inform the Defendant about actual day, date, year, time and the particular Court so that he is able to appear in the Court on the date fixed for his/her appearance in the said case and answer the suit either personally or through his lawyer.*

*…*

*29. The material infirmity in the summons was that it did not mention any specific day, date, year and time for the Defendants' appearance in the Court. This being the requirement of Section 27 read with Order V Rule 20(3) and Process-IA of Appendix-B, it was mandatory for the Court to mention the specific working day, date, year and time in the columns meant for such filling. It would have enabled the Defendants to appear before the Court on the date so fixed therein. It is a settled Rule of interpretation that when the legislature provides a particular thing to be done in a particular manner then such thing has to be done in the same prescribed manner and in no other manner.*

*…*

> *32. In the light of the foregoing discussions, service of summons on the Defendants without mentioning therein a specific day, date, year and time cannot be held as "summons duly served" on the Defendants within the meaning of Order IX Rule 13 of the Code. In other words, such summons and the service effected pursuant thereto cannot be held to be in conformity with Section 27 read with the statutory format prescribed in Appendix B Process (I and IA) and Order 5 Rule 20(3) of the Code.*
>
> *…*
>
> *34. Once the Appellant (Defendant No. 1) is able to show that "summons were not duly served on him" as prescribed Under Section 27 read with Appendix B Process IA and Order V Rule 20(3) of the Code then it is one of the grounds for setting aside the ex parte decree Under Order IX Rule 13 of the Code. In our view, the Appellant (Defendant No. 1) is able to make out the ground."*
>
> (emphasis supplied)

42 Further, it is not the knowledge of 'pendency of suit' but the knowledge of 'date of hearing' which is relevant to determine if a case falls within the category of "irregularity of summons". In this regard, the Hon'ble Supreme Court of India in *Sushil Kumar Sabharwal* (Supra) held as follows:

> *"11. The High Court has overlooked the second proviso to Rule 13 of Order 9 C.P.C., added by the 1976 Amendment which provides that no court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had noticed of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for the purpose of the proviso above said. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross-examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim which he did not avail and utilise.*

> *12. The provision contained in Order 9 Rule 6 of the C.P.C. is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three course to be followed by the Court depending on the given situation. The three situations are: (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, which is relevant here, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex-parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex-parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his. If only the Trial Court would have been conscious of its obligation cast on it by Order 9 Rule 6 of the C.P.C., the case would not have proceeded ex-parte against the defendant-appellant and a wasteful period of over eight years would not have been added to the life of this litigation.*
>
> *13. Be that as it may, we are satisfied that the summons was not served on the defendant-appellant. He did not have an opportunity of appearing in the Trial Court and contesting the suit on merits. The Trial Court and the High Court have committed a serious error of law resulting in failure of justice by refusing to set aside the ex-parte decree."*
>
> (emphasis supplied)

43 In view of the above, it is evident that no enquiry was ever conducted by both DRT and DRAT into whether a notice/summons was ever served on petitioners herein. The said enquiry ought to have been made more so when the said advocate had stopped appearing on behalf of petitioners before the DRT, w.e.f., 24th August 2005. The enquiry would have

required the IOB/respondent no.1 to discharge its burden *qua* service of summons (which it has not been able to discharge till date) and would have established that petitioners had never been served with the summons. The alleged knowledge about the pendency of the case by IOB/respondent no.1 cannot dispense with the requirement of service of summons, which should have been issued to petitioners to notify to them the day, date, time and place of hearing of the Original Application.

Time to file Written Statement commences only after service of the Writ of Summons

44 Furthermore, it is settled law that the time to file written statement commences only from the date of service of summons. This Court in *Tardeo Properties Pvt. Ltd.* (Supra) held as follows:

> *"17… Being so, mere filing of the vakalatnama would not begin the period of twelve weeks for filing of the written statement nor the defendant of his own can file written statement, without the permission of the Court. It is not a matter of right for any party to the proceedings to place on record pleadings in the suit. The pleadings in the suit are allowed to be placed on record in accordance with the rules framed for that purpose and for taking on record the pleadings on behalf of the defendant, initially the issuance of writ of summons for that purpose is absolutely necessary. Undoubtedly, such a period can be extended by specific order in case the defendant fails to file the written statement within the specified period and further seeks extension of such period."*
>
> (emphasis supplied)

**II - Mere filing of the Vakalatnama or appearance through an Advocate does not amount to waiver of the mandatory requirement of service of summons :**

45 Service of summons is a mandatory procedural requirement and

is not dispensed with merely on account of the party entering appearance by filing a Vakalatnama. This Court in *Tardeo Properties Pvt. Ltd.* (Supra) held as follows:

> *"12. Taking into consideration the decision of the Division Bench in Motorola's case and plain reading of the above referred Rules on the Original Side, it is apparent that in order to enable the defendant to file the written statement, there has to be a writ of summons served upon the defendant, specifying the period within which he can file the written statement. Undoubtedly, such writ of summons can be served upon the Advocate for the defendant. Undoubtedly, the Advocate for the defendant can certainly file his vakalatnama in the Court but by that itself it would not lead to the conclusion that the defendant is served with the writ of summons. Though the Rule 79 empowers the Advocate to accept the writ of summons on behalf of the defendant, nevertheless, Rule 69 clearly requires the writ of summons to be issued in a particular Form and further Rule 88 specifically speaks of the occasion to file the written statement only when the defendant is called upon to do so by service of writ of summons specifying the period within which the written statement to be filed. The requirement of law in terms of the rules on the Original Side, therefore, is that in order to enable the defendant to place the written statement on record, there has to be an order of the Court either in the form of writ of summons or specific order extending the time to file the written statement, same having not been filed after service of the writ of summons within the period specified thereunder. But in the absence of such writ of summons or order there could not arise an occasion for the defendant to file the written statement. Albeit it cannot be said that the defendant cannot volunteer to file the written statement but that by itself would not create any right in favour of the plaintiff to contend that moment the Advocate files vakalatnama on behalf of the defendant, the period for filing the written statement would commence and within twelve weeks therefrom the defendant must file the written statement. The Rules nowhere provide either expressly or impliedly in that regard. On the contrary, the Rules clearly suggest that the occasion for filing the written statement by the defendant could arise only after direction in that regard being issued by the Court, either in the form of writ of summons or by specific order and not otherwise, and duly served either upon the party or his/her Advocate who has filed the vakalatnama on behalf of such party, or made known to the party.*

*13. Even under the CPC, the position is not different. The Rule 10 of Order 8 of the CPC specifically refers to Rule 1 being the pre-condition for invoking the power under the said provisions of law to pronounce the judgment on account of failure to file the written statement. Unless the Court is satisfied that there has been due compliance of the requirement of Rule 1 of Order 8, there can be no occasion for the Court to pronounce judgment merely on account of failure on the part of the defendant to file written statement.*

*…*

*17… Being so, mere filing of the vakalatnama would not begin the period of twelve weeks for filing of the written statement nor the defendant of his own can file written statement, without the permission of the Court. It is not a matter of right for any party to the proceedings to place on record pleadings in the suit. The pleadings in the suit are allowed to be placed on record in accordance with the rules framed for that purpose and for taking on record the pleadings on behalf of the defendant, initially the issuance of writ of summons for that purpose is absolutely necessary. Undoubtedly, such a period can be extended by specific order in case the defendant fails to file the written statement within the specified period and further seeks extension of such period.*

*18… Undoubtedly, once the dispute arises as to whether the defendant is served with the writ of summons or not, filing of vakalatnama can be a proof of service of summons but when the records clearly disclose that the writ of summons was never served, mere filing of the vakalatnama would not establish to the contrary, otherwise Rules 70 and 79 would be rendered redundant.*

*…*

*22. Much ado was made of the statement made on behalf of the appellants in their affidavit that the appellants were always ready and willing to file the written statement and even the written statement was prepared but it remained to be filed. Once we hold that there can be no obligation to file the written statement, in the absence of service of the writ of summons or order in that regard, question of merely because the defendants had prepared the written statement but did not file the same, it would not enure to the benefit of the plaintiffs to get the suit disposed of and certainly not under Order 8, Rule 10 of the CPC.*

*23. Being so, the suit could not have been disposed of in the absence of service of writ of summons as in the absence of service of writ of summons there was no obligation on the*

> *part of the defendants to file the written statement and certainly, under no circumstances, the suit could have been disposed of in terms of Order 8, Rule 10 of the CPC as the same have no application to the suits filed on the Original Side in this High Court.*
>
> *…*
>
> *25…The service of the writ of summons being absolutely necessary for affording opportunity to the defendant to contest the suit, in the absence of compliance thereof, there cannot be an occasion to proceed ex-parte against the defendant in a suit filed on the Original Side of this Court.*
>
> *26… In this view of the matter, there is no substance in the argument that the matter relating to the service of writ of summons pertains to the procedural law and that, therefore, non-compliance or any irregularity in that regard would not relate to the jurisdictional error. Failure to comply with the mandatory requirement of the service of writ of summons to enable the defendant to file the written statement cannot be said to be a mere procedural irregularity. The provisions of law essentially prescribe fetters on the power of the Court to proceed with the matter against the defendant in the absence of the service of the writ of summons. For the reasons stated above, in the absence of service of writ of summons upon the defendants/appellants, the learned Single Judge could not have proceeded to dispose of the suit, and certainly not under Order VIII of the CPC, and hence the impugned judgment cannot be sustained and is liable to be set aside and the matter to be remanded, allowing the defendants to file the written statement and the Court to proceed to dispose of the suit thereafter in accordance with the provisions of law."*
>
> (emphasis supplied)

46 This Court recently had an occasion to interpret a provision introduced in the Code of Civil Procedure, 1908 with similar, if not identical language as Rule 12(1) of the DRT Rules, as quoted above. In that case, this Court (per Hon'ble Justice S.J. Kathawalla) in ***Axis Bank Limited V/s. Mira Gehani***[16] observed as follows:

> *"110. Having answered the question of law as above, it would also be necessary to clarify when the aforesaid period of 120*

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*days commences. In this context, it has been brought to my notice that the Ld. Prothonotary & Senior Master of this Court had previously issued a Notice dated 29th September, 2008 directing :*

*"IT IS HEREBY NOTIFIED for the information of the Advocates and those appearing-in-person that whenever the learned Counsel has filed Power of Attorney or Vakalatnama and appears for the Defendant/s Respondent/s etc., in the matter, there shall be no necessity of serving the Writ of Summons or filing Affidavit of Service."*

*111. In view of the above notification, it may be argued that in Commercial Suits before this Court, where the Defendant enters its appearance prior to receipt of the summons, the period of 120 days ought to commence from such earlier date viz. the date a Defendant enters its appearance. However, as has been recorded above, this Court is mandated to follow the provisions of the CPC as amended by the Commercial Courts Act whilst adjudicating Commercial Disputes. Hence, as the amendments to Order V Rule 1 and Order VIII Rule 1 now state "…but which shall not be later than one hundred twenty days from the date of service of summons…" the period of 120 days ought to be calculated from the date of service of summons and not the date on which a Defendant enters its appearance as provided for in the above notification. This will not only ensure that the provisions of the Commercial Courts Act are implemented uniformly but also that a Defendant will be made aware of the case it has to meet after being served with the Plaint duly registered with this Court after the removal of all office objections etc. In fact, the Writ of Summons now being served by our Court have the following endorsement :*

*"And you are hereby summoned to file a written statement within 30 days of the service of the present summons and in case you fail to file the written statement within the said period of 30 days, you shall be allowed to file the written statement on such other day, as may be specified by the court for reasons to be recorded in writing and on payment of such costs as the court may deem fit, but which shall not be later than 120 days from the date of service of summons. On expiry of one hundred and twenty days from the date of service of summons, you shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record."*

*112. In view of the above, it is clarified that the period of 120 days will commence from the date of service of the Writ of Summons and not the date a Defendant first enters appearance. In other words, a party or its Advocate/s can no longer rely on the above notification and avoid serving the*

> *writ of summons on the Defendant/s. However, in order to ensure expeditious disposal of Commercial Suits and in order to save time of this Court as also the office of Ld. Prothonotary & Senior Master of this Court, in the event a Defendant/its Advocate enters appearance and by consent, agrees to waive service, the period of 120 days will commence from the date of such waiver. In such instance, there would be no requirement to serve the Writ of Summons. This will prevent the loss of days involved in serving the Writ of Summons and will expedite commencement of trial and consequently, disposal of Commercial Suits.*
>
> *113. The question of law is decided as above."*
>
> (emphasis supplied)

47 Given the almost identical language in Rule 12(1) of the DRT Rules when compared with the amendments brought about to the Original Side Rules and Order 8 Rule 1 of the Code by the Commercial Courts Act, 2015, it is clear that the time to file written statement contemplated in the DRT Rules, could only commence on due and proper service of the writ of summons. The appearance of an Advocate and filing of a Vakalatnama by him cannot and does not dispense with the requirement to serve the writ of summons. Accordingly, petitioners, in the absence of service of summons, could not have made any representation and/or file their written statement before the DRT.

48 In light of the above, it is immaterial that the said advocate appeared on behalf of petitioners in the proceedings before the DRT. Mere filing of a Vakalatnama and appearance of the said advocate could not have dispensed/waived the requirement of service of summons. The said Vakalatnama cannot be considered to be a proof of service of summons,

particularly when the purpose for which it has been obtained is disputed and when it has been virtually admitted by IOB/respondent no.1 that petitioners were never served with the summons. Thus, the proceedings in O.A. No.927/2001, without the issuance of summons, were in complete derogation and ignorance of the principles of natural justice.

III - Individual service of summons on each partner :

49 As petitioners are sought to be proceeded against individually, as Partners of respondent no.2 firm, it was incumbent on the DRT to ensure that summons were served individually on each of the Partners. In this regard, it is first pertinent to note that the DRAT has incorrectly purported to hold at Para 16 of the impugned order that the individual partners of the firm, including petitioners herein are not being proceeded against personally. On account of this error alone, the impugned order deserves to be set aside. If that is assumed to be true, no recovery can be initiated in law against petitioners in their individual capacity and the recovery can only be made against respondent no.2 firm.

50 Order 30 of the Code of Civil Procedure (Code) deals with the procedure in respect of suits against Partnership Firms. The Courts have, on an interpretation of Order 30 of the Code, held that if a person wants to bind the partners of a firm individually, he must serve the partners personally. The Hon'ble Supreme Court of India in *Gambhir Mal Pandiya*

(Supra) held as follows:

> *"8. From the above analysis, it is clear that a plaintiff need sue only the firm, but if he wants to bind the partners individually he must serve them personally, for which purpose he can get a discovery of the names of the partners of the firm. Persons served individually may appear and file written statements, but the proceedings go on against the firm only. They may, however, appear and plead that they are not partners or were not partners when the cause of action arose. But even if no other partner appears, there may be a decree against the firm if the firm has been served with the summons. The gist of O. 30 thus is that the action proceeds against the firm, and the defence to the action by persons admitting that they are partners is on behalf of the firm. Persons sued as partners may, however, appear and seek to establish that they are not partners or were not partners when the cause of action arose; but if they raise this special plea, they cannot defend the firm."*
>
> (emphasis supplied)

51 The Hon'ble Punjab and Haryana High Court in *Rajinder Kaur* (Supra) also held as follows in paragraph 3 at page 3 :

> "*Courts below proceeded erroneously on the assumption that service of summons on defendant no. 4 partner of defendant no. 1 - Firm was sufficient service and therefore ex parte judgment and decree against defendant no. 2 are not liable to be set aside. However, service of summons on defendant no. 4 partner could be legal and valid service on the Firm - defendant no. 1 but cannot be deemed to be legal and proper service on defendant no. 2 who has been sued in individual capacity although allegedly being partner of the Firm. Nevertheless when defendant no. 2 was impleaded as defendant in individual capacity, it was necessary to serve defendant no. 2 individually and service of another partner of the Firm cannot be said to be valid and legal service of defendant no. 2 herself in her individual capacity. Consequently, impugned orders of the courts below are erroneous and illegal and suffer from jurisdictional error.*

52 In the present case, the O.A. filed by respondent no.1 (IOB) has sought to bind each of petitioners personally. The order dated

11th December 2009 is accordingly passed against respondent no. 2 firm as well as against each of petitioners individually. In our view, petitioners ought to have been personally served with the summons as mandated by law. Non-service of summons on petitioners vitiates the order dated 11th December 2009 *qua* them.

**IV – A party must not be made to suffer on account of the mistake committed by the Advocate engaged. This was a without prejudice submission made on behalf of petitioners :**

53 In addition to the above, the findings of the DRT and DRAT, in regard to the Vakalatnama, are erroneous for the following reasons as well :

(i) Petitioners' case that the Vakalatnama was executed on the misrepresentation of respondent no.3 to settle the matter must have been dealt with more sensitively.

(ii) In any event, the Vakalatnama is not proof of service and cannot substitute the mandatory requirement of serving summons.

(iii) Even if one holds the said advocate had been lawfully engaged, he could not have made an effective appearance as he had never been instructed by petitioners. In this respect, this Court in *Fertilisers and Chemicals Travancore Ltd.* (Supra) had held as follows:

> *"4. Apart from that, we find that it is settled law that where parties are not personally present and are represented by pleaders, appearance by a pleader within the meaning of Order IX does not mean mere presence in Court. It means appearance by a pleader" duly instructed and able to answer all material questions relating to the suit" or by a pleader "accompanied by some person able to answer all such questions," as stated in Order V, Rule 1. It is true that Order V,*

> *Rule 1(2)(a), (I) and (c) deal with appearance of defendants, but there is weighty authority in support of the proposition that the same rule would apply even with regard to the appearance by the plaintiffs. The words 'appear' and 'appearance' are used in several places in the Civil Procedure Code including Order Ill, Rule 1, Order V, Rule 1, Order IX, Rules 1, 6, 8, 9 and 13 and Order XVII, Rule 2 and considering the scheme of these provisions, it is, in our opinion, clear that there cannot be any difference between the meaning of appearance by a pleader on behalf of the plaintiff and appearance by pleader on behalf of the defendant. The effective appearance by the pleader is possible only when he is duly instructed to answer all material questions or is accompanied by a person who is able to answer all material questions, whether the pleader is appearing for the plaintiffs or for the defendants. On principle, we find no reason whatsoever to make a distinction between the appearance of the pleader on behalf of the plaintiff and the appearance by a pleader on behalf of the defendants. That is why we find no such distinction being made in any of the cases decided by any Court."*
>
> (emphasis supplied)

(iv) It is a matter of record that the concerned advocate, Bhushan Sakpal did not appear before the DRT, on behalf of petitioners, with effect from 24th August 2005. By not filing any written statement or dispute any evidence, the said advocate can be stated to have failed to perform his duties towards petitioners, for which petitioners cannot be made to suffer. The Hon'ble Supreme Court of India in *Rafiq* (Supra) held as follows:

> "*3... What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem agitates us is whether it is proper that the party should suffer for the inaction deliberate omission, or misdemeanour of his agent. The answer obviously in the negative. Maybe that the learned Advocate absented itself deliberately or intentionally.*

> *We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law…."*
>
> (emphasis supplied)

**V - Requirement of issuance of fresh notice at the time of the hearing when the party is not represented on the date of the hearing :**

54 It is relevant to refer Rule 13 of the DRT Rules, which provides as follows:

> *"13. Date and place of hearing to be notified*
>
> *(1) The Tribunal shall notify the parties the date and place of hearing of the application in such a manner as the Presiding Officer may by general or special order direct."*

55 It is a matter of record that the said advocate had stopped appearing on behalf of petitioners, with effect from 24th August 2005 and had not filed any written statement or contested any evidence. In view of the above, and basis the settled principles of law, it was incumbent upon the DRT to make an enquiry regarding service of summons to petitioners herein and call upon IOB/respondent no. 1 to prove the same. In terms of Rule 13 of the DRT Rules, the DRT should have issued at least one notice to petitioners between August 2005 and December 2009, when the matter came to be finally disposed. The finding of the DRAT to the contrary is clearly erroneous and contrary to the said Rule.

**VI - Despite appearance of the said Advocate, order dated 11.12.2009 is nevertheless an *ex-parte* order :**

56 In case we proceed on the basis that the service of summons was not mandatory on account of the appearance of advocate Bhushan Sakpal for petitioners, the order dated 11th December 2009 is nevertheless an *ex-parte* order and ought to be set aside under Order 9 Rule 13 of the Code. The DRAT has wrongly held in the impugned order that the order dated 11th December 2009 was not in the nature of an *ex-parte* order. As noted above, the said advocate Bhushan Sakpal stopped appearing on behalf of petitioners, w.e.f. 24th August 2005. This being the case, the DRT should have proceeded to decide the O.A. in accordance with the provisions of Order 17 Rules 2 and 3 read with Order 9 Rule 6 of the Code.

57 Thus, on such non-appearance of the said advocate on behalf of petitioners, the DRT should have inquired if the summons had been duly served. If it was considered to be duly served, the DRT essentially proceeded *ex-parte* against petitioners under Order 9 Rule 6(1)(a) of the Code. If the summons were considered not to be duly served, the DRT should have effected a fresh service of summons under Order 9 Rule (6)(1)(b) of the Code. In this respect, the Hon'ble Supreme Court of India in *G. Ratna Raj (D) by LRS* (Supra) held as follows:

> *"10. By order dated 14.03.2006, the Single Judge dismissed both the applications and held that the application filed by Defendant No. 1 under Order 9 Rule 13 of the Code was not maintainable because the preliminary decree dated 25.02.2003 was not an "ex parte decree". In other words,*

*he was of the view that since the preliminary decree dated 25.02.2003 was not an ex parte decree, an application Under Order 9 Rule 13 of the Code could not be filed for its setting aside.*

*13. The short question, which arises for consideration in these appeals, is whether the Division Bench was justified in setting aside the preliminary decree dated 25.02.2003 by holding the same to be an "ex parte decree" for the purpose of Order 9 Rule 13 of the Code.*

*…*

*23. Now when we examine the facts of the case at hand keeping in view the law laid down in the case of B. Janakiramaiah Chetty (supra), we find that the Plaintiff's evidence was recorded and his case was also closed. It is not in dispute that the Defendants were placed ex parte on the date when the case was fixed for recording Defendants' evidence but the same was not recorded due to the Defendants' absence on the said date. In other words, it was a case where the Defendants did not lead any evidence.*

*24. In such a situation arising in the case, in our view, the case at hand would not fall under Explanation to Order 17 Rule 2 of the Code because in order to attract the Explanation, "such party" which has led evidence or has led substantial part of the evidence, if fails to appear on any day to which the hearing of the case is adjourned, the Court may treat "such party" as "present" on that day and is accordingly empowered to proceed in the suit.*

*25. In this case, the party, who was absent and was proceeded ex parte was the "Defendants" and they had not led any evidence whereas it was the Plaintiff, who was present and had led his evidence.*

*26. In other words, if the Plaintiff had remained absent and was found to have led evidence, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the Plaintiff as "present" for passing appropriate orders. Such is, however, not the case here.*

*27. Similarly, in converse situation, if the Defendants had remained absent (as has happened in this case) on that date and if it would have noticed that they had adduced the evidence either fully or substantially prior to the date on which they were proceeded ex parte, the Court could have invoked its powers under Explanation to Order 17 Rule 2 of the Code treating the Defendants as "present" on that day for passing appropriate orders in the suit. Such is,*

*however, again not the case here.*

*28. We are, therefore, of the view that since the Defendants were proceeded ex parte and were found not to have led any evidence in the suit, the Court could only proceed Under Order 17 Rule 3 (b) read with Order 17 Rule 2 of the Code for disposal of the suit by taking recourse to one of the modes directed in that behalf by Order 9 of the Code or could have made any other order as it thinks fit.*

*29. As mentioned above, the Trial Court did proceed to hear the suit ex parte by taking recourse to the Order 9 Rule 6 (a) in terms of Order 17 Rule 2 of the Code because on that day, the Plaintiff was present when the suit was called on for hearing whereas the Defendants were absent despite service of summons and accordingly the Trial Court passed the preliminary decree. Such decree, in our opinion, was an "ex parte decree" within the meaning of Order 9 Rule 6 (a) read with Order 9 Rule 13 of the Code and, therefore, could be set aside Under Order 9 Rule 13 on making out a sufficient ground by the Defendants.*

*30. In view of the foregoing discussion, we are of the view that the Division Bench was justified in allowing the applications filed by Defendant No. 1 Under Order 9 Rule 13 of the Code and, in consequence, was justified in setting aside the preliminary decree dated 25.02.2003 passed in O.S. No. 131/1999 treating the said decree as "ex parte decree".”*

(emphasis supplied)

58 The impugned order, in fact, being in the nature of an *ex-parte* order, petitioners are entitled to seek to set aside the same in accordance with Order 9 Rule 13 of the Code on making out sufficient grounds. In the present case, the following grounds are clearly sufficient grounds to set aside the order dated 11th December 2009 :

(i) The signing of the Vakalatnama and consequent appearance of advocate Bhushan Sakpal was on the alleged misrepresentation made to petitioners that the matter was being settled;

(ii) That petitioners had clearly averred that they were neither issued a notice of the filing of the O.A. nor served with any copies of the papers, an assertion which respondent no.1 (IOB) has not been able to disprove;

(iii)The DRT did not observe Rule 13 of the said Rules and did not issue any notice to petitioners between August 2005 and 2009 intimating petitioners of the hearing fixed in the matter;

(iv) The DRT failed to consider the admitted position that petitioners were not aware of the date, day and time of hearing of the matter.

59 The DRT and DRAT having failed to consider the order dated 11th December 2009 as an *ex-parte* order did not apply the test laid down in Order 9 Rules 6 and 13 of the Code, thereby failing to afford petitioners an opportunity to seek to set aside the order dated 11th December 2009 despite having sufficient grounds. In view thereof, it is evident that there has been a serious lapse of procedure in the present case. There has been no service of the writ of summons on petitioners and respondent no.1 (IOB) has been unable to establish otherwise. The advocate appearing for petitioners was engaged only for a very limited purpose and has not appeared on behalf of petitioners in the matter since August 2005. The passing of the order in 2009 and the recovery certificates issued pursuant thereto, therefore, suffer

from a serious procedural infirmity and the order dated 11th December 2009 ought to be set aside.

60 As regards the judgments of the Hon'ble Supreme Court of India relied upon by Mr. Nimbkar in support of the contentions advanced and, to submit that the prayers in the present petition should not be allowed, the judgments relied upon by Mr. Nimbkar particularly in the context of (i) service of summons; (ii) negligence of an advocate; and (iii) 'sufficient reasons' in respect of setting aside an *ex-parte* order, in our view, are not applicable to the facts of the present case.

61 The first decision relied upon by respondent no.1 is in the case of *Siraj Ahmad Siddiqui (Supra)*. In that case, the dispute pertained to the interpretation of the phrase "*first hearing of the suit*" specifically in the context of Section 20(4) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 ("U.P. Urban Buildings Act"). That Section contemplates relieving the tenant against immediate eviction on an unconditional payment on the "*first hearing of the suit*" of the entire amount of rent and damages due. In the facts of that case, defendant/tenant appeared on the first date of hearing (despite non-receipt of summons) and sought time to file his written statement as well as to tender the rent. Subsequently, however, despite appearance and offering to tender the rent, the tenant raised a defense that there was no service of the writ of summons. It was in the facts of that case and the peculiar context of Section

20(4) of the U.P. Urban Buildings Act that the High Court made the observations contained in Paragraph 14 of the said judgment. In fact, the Supreme Court also clarified that it was in agreement with the observations of the High Court in so far as it states that "*when time is fixed by the court for filing of the written statement and the hearing, these dates bind the defendant, regardless of the service of summons, and compliance with the provisions of Section 20(4) of the said Act must be judged upon the basis of the dates so fixed.*" The observations made in the said case are made only in respect of the rights available to a tenant as per Section 20(4) of the U.P. Urban Buildings Act.

These observations cannot be relied in the instant matter to submit that in a case instituted before the DRT, filing of Vakalatnama would waive the right to service of summons on the party. The service of the writ of summons is mandatory for the time to file the written statement to commence.

62 Next, respondent no.1 has relied on the decision in the case of *Sunil Poddar* (Supra). This case is also in stark contrast to petitioners' case and must be restricted to facts and circumstances of that case, for the following reasons :

(a) the matter had been transferred from District Court to the Debt Recovery Tribunal, Jabalpur in 1995;

(b) even though summons had not been served before the District Court, the concerned defendants after coming to know of the matter had appeared and filed written statement before the District Court;

(c) after the transfer of the matter to the Debt Recovery Tribunal, defendants did not appear and an *ex-parte* decree was passed against them;

(d) summonses were issued by the DRT and were later published in a newspaper;

(e) the Supreme Court observed that it cannot be argued successfully that defendants were not subscribers of the said newspaper by which substituted service had been effected;

(f) the material facts that defendants had appeared and filed written statement before the District Court were suppressed by defendants while filing the application before the Debt Recovery Tribunal for setting aside the *ex-parte* order.

It is only in this background that the Supreme Court had held that once there was knowledge of the date of hearing and defendants had sufficient time to appear and answer the claim of plaintiff, the decree cannot be set aside even if it is established that there was irregularity in service of summons. In observing so, the conduct of defendants of non-disclosure of appearance and filing of written statement before the District Court also weighed heavily with the Supreme Court and the Court specifically observed

that defendants had not approached the Court with clean hands and wanted to delay the proceedings.

These observations in respect of service and irregularity in service of summons cannot be relied in the instant case as admittedly no writ of summons at all informing petitioners herein of the date, day, time and place of hearing was ever served.

63 Respondent no.1 relied on the decision in the case of *Salil Dutta* (Supra) to deal with petitioners' authorities and to contend that a party who was negligent cannot seek to lay blame on the advocate's failure to appear. This decision is also distinguishable and must be restricted to the facts and circumstances of the said case. In that case, defendants were set *ex-parte* only after defendants failed to appear for 3 consecutive hearings (despite themselves seeking adjournment on the day the suit was first listed for final hearing) when the suit was posted for final hearing after 7 years of its institution. After the *ex-parte* decree came to be passed, defendant filed an application stating that he had acted on advocate's advice and not appeared and thus, he should not suffer because of the negligence of the said Advocate. The Supreme Court while holding the litigant to be negligent also observed that *"Firstly, in the case before us it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing seven years after the institution of the suit.*" In this background, the Supreme Court had categorically observed that defendant had himself chosen to not

co-operate with the court and having adopted such a stand towards the Court, the Defendant had no right to ask its indulgence.

In the absence of any such negligence on part of petitioners herein (who are admittedly permanent residents of Kanpur), petitioners who are seemingly innocent litigants and were admittedly never served with a summons, in our view, should not be made to suffer because of the act or omission of the said advocate who, in any event, failed to appear on behalf of petitioners after 24th August 2005.

64 The case of *Parimal V/s. Veena @Bharti* (Supra) relied upon by respondent no.1 is also distinguishable as in the said case :

(a) a matrimonial dispute had arisen between the parties which eventually led to passing of an *ex-parte* judgment in favour of appellant/husband and the marriage between the parties was dissolved;

(b) respondent/wife had refused to accept the notice sent by Court through process server;

(c) fresh notices were issued, however, respondent/wife had refused to accept the said notices too and Registered AD had returned with the report of refusal;

(d) summons were thereafter, even affixed at the house of Respondent/wife, but she chose not to appear;

(e) Respondent/wife was again served through public notice published in the newspaper 'National Herald' sent to her address;

(f) after service by publication and affixation and on failure of respondent to appear, the matter proceeded *ex-parte*.

It is in this background and facts that the Supreme Court interpreted "Sufficient Cause" in terms of Order 9 Rule 13 of the Code of Civil Procedure, 1908 which provides for setting aside of an *ex-parte* decree in the event defendant satisfies the Court that (i) the summons was not duly served; or (ii) that he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. The instant case is a case of non-service of summons and respondent no.1 has failed to discharge the burden of proof *qua* creation/issuance/service of summons on petitioners herein. In any event, in our view, petitioners have made out "sufficient cause" as contemplated in Order 9 Rule 13 of the Code for the following reasons :

(a) That petitioners had clearly averred that they were neither issued a notice/summons of the filing of the O.A. nor served with any copies of the papers, an assertion which respondent no.1 (IOB) has not been able to disprove;

(b) The DRT did not observe Rule 13 of the Debt Recovery Tribunal (Procedure) Rules, 1993 and did not issue any notice to petitioners between August 2005 and 2009 intimating petitioners of the hearing fixed in the matter;

(c) The DRT failed to consider the admitted position that petitioners were not aware of the date, day and time of hearing of the matter.

65 The DRAT and the DRT have completely overlooked the procedural irregularity and instead sought to cast the burden on petitioners to prove a negative fact, i.e., that they did not receive the writ of summons. This was contrary to the well settled principles set out in the Code as well as in the said Act, DRT Rules and DRT Regulations. Once petitioners are able to show that summons was not duly served on them, the *ex-parte* decree ought to have been set aside.

66 In these circumstances, the reliefs sought for in the captioned petition ought to be granted. Rule made absolute. Petition disposed in terms of prayer clause – (i), which reads as under :

> *(i) That this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, after calling for the papers and proceedings before the Ld. DRT and Ld. DRAT culminating in order dated 12.05.2021 being Exhibit A and after examining the legality and propriety thereof be pleased to quash and set aside the Impugned Order dated 12.05.2021 passed by the Ld. DRAT, the order dated 11.12.2009 and 27.04.2011 passed by the Ld. DRT and the Recovery Certificate dated 21.01.2010.*

67 The *ex-parte* decree dated 11th December 2009 passed by the DRT and order dated 27th April 2011 passed by the DRAT and Recovery Certificate dated 21st January 2010 issued by the Recovery Officer are hereby quashed and set aside.

68 O.A. is remanded for *denovo* hearing to DRT. Written statement to be filed by petitioners within four weeks. Petitioners waive service of writ of summons. DRT to dispose the O.A. by 31st January 2023.

## WRIT PETITION NO.4880 OF 2022

69 Since we have allowed Writ Petition No.4885 of 2022, this petition also is allowed and accordingly disposed. Direction give in Writ Petition No.4885 of 2022 shall apply. So also waiver of writ of summons by petitioners.

## WRIT PETITION (ST.) NO.11009 OF 2021

70 This petition has been filed by ARCIL against the order passed by DRAT on 12th May 2021 rejecting ARCIL's application for withdrawing the amount of Rs.5,75,00,000/- deposited by respondents, who were petitioners in Writ Petition No.4885 of 2022. Since petitioners' appeal was dismissed by DRAT, ARCIL wanted to withdraw the amount, which application came to be dismissed. It is against that order of dismissal this petition is filed.

71 Since we have set aside the order dated 12th May 2021 passed by DRAT by our order and judgment in Writ Petition No.4885 of 2022, the

question of ARCIL being allowed to withdraw the amount deposited by petitioners in Writ Petition No.4885 of 2022 would not arise.

72 Petition, therefore, dismissed.

73 Since we have allowed Writ Petition No.4885 of 2022, the order dated 11th December 2009 alongwith Recovery Certificate dated 21st January 2010 issued by the DRT having been set aside, consequently, respondent nos.1 to 3, who are petitioners in Writ Petition No.4885 of 2022, should be allowed refund of the pre-deposit which was made by them before the DRAT as a condition for entertaining their appeal being Appeal No.117 of 2011. The pre-deposit was made under Section 21 of the Act. DRAT to return the amount together with accumulated interest within four weeks of receiving copy of this order authenticated by the Associate of this Court.

## WRIT PETITION (ST.) NO.11010 OF 2021

74 This petition has been filed by ARCIL against the order passed by DRAT on 12th May 2021 rejecting ARCIL's application for withdrawing the amount of Rs.6,25,00,000/- deposited by respondents, who were petitioners in Writ Petition No.4880 of 2022. Since petitioners' appeal was dismissed by DRAT, ARCIL wanted to withdraw the amount, which application came to be dismissed. It is against that order of dismissal this petition is filed.

75 Since we have set aside the order dated 12th May 2021 passed by DRAT by our order and judgment in Writ Petition No.4885 of 2022 (and

Writ Petition No.4880 of 2022), the question of ARCIL being allowed to withdraw the amount deposited by petitioners in Writ Petition No.4885 of 2022 would not arise.

76 Petition, therefore, dismissed.

77 Since we have allowed Writ Petition No.4885 of 2022, the order dated 11th December 2009 alongwith Recovery Certificate dated 21st January 2010 issued by the DRT having been set aside, consequently, respondent nos.1 to 3, who are petitioners in Writ Petition No.4885 of 2022, should be allowed refund of the pre-deposit which was made by them before the DRAT as a condition for entertaining their appeal being Appeal No.117 of 2011. The pre-deposit was made under Section 21 of the Act. DRAT to return the amount together with accumulated interest within four weeks of receiving copy of this order authenticated by the Associate of this Court.

78 Certified copy expedited.

(A.S. DOCTOR, J.) (K.R. SHRIRAM, J.)