

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION (L) NO. 384 of 2016****IN****SUIT NO. 3846 OF 1994**

New India Assurance Co. Ltd.

... Applicant

In the matter between:

Zenith Computers Ltd.

...Plaintiff

vs.

New India Assurance Co. Ltd. and another

...Defendants

Mr. Pankaj Sawant, Senior Advocate, along with Mr. Ali Abbas Delhiwala and Ms. Kunjal Patil, instructed by M/s. Joy Legal Consultants for the Applicant/Defendant No.1.

Mr. R.R. Soni, instructed by Mr. M.U. Pandey & Mr. Rakesh M. Pandey, for the Plaintiff.

Mr. Jawahar Singh Tonk, Regional Manager, of the Applicant present.

CORAM: S.J. KATHAWALLA, J.

DATE : 25th February, 2016

P.C.

1. The above Notice of Motion is taken out by the Defendant No. 1, New India Assurance Co. Ltd. for setting aside /recall of the Ex-Parte Decree passed by this Court on 22nd January, 2015 in the above Suit.

2. The above Suit was filed in the year 1994 by the Plaintiff -- Zenith

Computers Ltd. against the Defendant No. 1 -- New India Assurance Co. Ltd. for an order and decree against Defendant No. 1 to pay to the Plaintiff a sum of Rs. 2,17,92,881.76 as per the particulars of the claim annexed and marked as Exhibit-E to the Plaint, together with further interest on Rs. 1,46,04,880/-, at the rate of 18 per cent per annum from the date of filing of the Suit till payment and/or realisation.

3. In the above Suit, M/s. Bhaishanker Kanga & Girdharlal, Advocates and Solicitors filed their appearance on behalf of Defendant No. 1. Mr. Jagdish M. Mehta, Partner of M/s. Bhaishankar Kanga and Girdharlal, Advocates and Solicitors attended the matter on behalf of Defendant No. 1, and also filed the Written Statement of the Defendant No. 1 on 5th October, 1999. After 5th October, 1999, M/s. Bhaishanker Kanga & Girdharlal have not appeared in the above Suit at any time, for and on behalf of Defendant No.1.

4. On 13th March, 2014, issues were framed in the above Suit. Paragraph 3 of the said Order reads as under:

"3. The Plaintiffs shall, on or before 28th March 2014, file in the registry and serve on the advocates for the defendants their affidavit in lieu of examination in chief and a compilation of documents, properly indexed and paginated along with an affidavit of documents."

5. By an Order dated 2nd July, 2014, the Plaintiff's documents were marked as Exhibits P-1 to P-6 respectively. On 22nd January, 2015, an ex-parte decree was passed in favour of the Plaintiff and against the Defendant No.1. Thereafter an Execution Application being No. 2187 of 2015 was filed by the Plaintiff. Accordingly, a warrant of attachment was issued by this Court. On 29th February, 2015, the Premium Collection Account of Defendant No. 1 being No. 002401601000451 with Corporation Bank, Dalal Street, Fort, Mumbai was attached. The representative of the Sheriff attended the Head Office of Defendant No. 1 on 2nd February, 2016 at around 11.15 a.m. and sought to attach the cabin of the Director of the Defendant No. 1. The Defendant No. 1 therefore issued a cheque of Rs. 4,20,50,901/- in favour of the Sheriff of Mumbai. The Advocates for Defendant No. 1 thereafter moved this Notice of Motion before this Court on 4th February, 2016 seeking a direction against the Sheriff of Mumbai not to hand over the said amount of Rs. 4,20,50,901/- to the Plaintiff. This Court therefore passed the following Order on 4th February, 2016 :

- "1. Mentioned. Not on board. Taken on board.*
- 2. The Deputy Sheriff informs the Court that the cheque issued in favour of the Sheriff of Mumbai by the New India Assurance Company Limited is already deposited for realization in the PLA Account. Upon realization of the amount, the office of the Sheriff of Mumbai shall issue a cheque in favour of the*

Prothonotary and Senior Master. The Prothonotary and Senior master shall invest the said amount in a fixed deposit of a nationalized Bank initially for a period of thirty days and not disburse the amount until further orders.

3. The original Plaintiff -- Zenith Computers Limited is directed to file its reply within a period of two weeks from today.

4. Stand over to 18th February, 2016"

6. The parties have thereafter filed their Affidavit-in-Reply and Affidavit-in-Rejoinder and the Notice of Motion is taken up for hearing.

7. The Learned Senior Advocate appearing for the Applicant/Defendant No. 1 has submitted that Defendant No. 1 had in the Suit filed the appearance of M/s. Bhaishanker Kanga & Girdharlal who had also filed the written statement on behalf of Defendant No.1. They were not aware that Mr. Jagdish Mehta, Partner, who was attending to the matter had passed away about 9-10 years back and was thus not attending to the matter. The Defendant No. 1 was therefore not aware of anything that had transpired in Court in the above Suit and were taken by surprise when they learnt about their account being attached, and when the representative from the Office of the Sheriff of Mumbai attended their Office to attach the cabin of the Director. It is submitted that it was made clear to the representative from the office of the Sheriff of Mumbai that the amount of Rs. 4,20,50,901/- was paid by Defendant No. 1 under protest and the same should not be disbursed. It is submitted that the decree has been obtained by the Plaintiff

in breach of the Order passed by this Court dated 13th March, 2014, wherein the Plaintiff was directed to forward their Affidavit-in-Lieu of Examination-in-Chief and Compilation of Documents, properly indexed and paginated, along with an Affidavit of Documents to the Advocates for the Defendants. It is submitted that therefore the Ex-Parte Decree deserves to be set aside and the amount of Rs. 4,20,50,901/- handed over to Defendant No. 1. In the alternative, it is submitted that the Plaintiff be allowed to provide a Bank Guarantee of a Nationalised Bank to the Prothonotary and Senior Master for an amount of Rs. 4,20,50,901/-.

8. The Learned Advocate appearing for the Plaintiff has pointed out that the Plaintiff has not committed any breach of the Order passed by this Court dated 13th March, 2014, nor have they suppressed any facts from this Court. They had made an attempt to serve the Affidavit-of-Evidence and documents as directed by this Court on M/s. Bhaishanker Kanga & Girdharlal. However, they were informed that they were no longer available at their address shown in the Written Statement. This fact was pointed out to the learned Judge also. It is submitted that in any event the Defendants are responsible for abandoning the above Suit and are now trying to blame their Advocates for the same. The Defendants have not appeared in the matter since the year 1999. The Defendant No. 1 who claims to be the largest General Insurance Company in the country ought to have enquired in the last 16 years regarding the status of the above Suit. The Defendant No.1 not having done so, by making payment of the decretal

amount by stating that the said payment is made under protest, are not entitled to any relief/s. It is submitted that the Plaintiff has always been vigilant and has throughout attended the proceedings in the above Suit. If the Ex-Parte Decree is now set aside, grave harm, loss and injury will be caused to Defendant No. 1 who has not come forward to defend the Suit at any stage after filing of the Written Statement.

9. I have considered the submissions advanced by the Learned Advocates appearing for the parties. From the Roznama it is clear that the Advocates for the Defendant No. 1 have not appeared before the Court at any time after 5th October, 1999. The Defendant No. 1 which claims to be the largest Insurance Company in the country is certainly not new to litigation. They are parties to several suits and proceedings filed before several courts of law. They have a Legal Department of their own. They cannot be equated with an individual litigant or with a small firm or company litigating in Court. From their pleadings it appears that in the last 15 years they have not bothered to even enquire once with their Attorneys as to what is the status of the Suit filed against them by the Plaintiff in the year 1994 i.e. more than 20 years back. Defendant No. 1 is not even aware that the Partner who was attending to their matter has passed away about 10 years back and even the firm of Solicitors - M/s. Bhaishanker Kanga & Girdharlal has shifted from their original premises to some other premises. The present Partner of the Solicitor Firm has correctly stated in his letter dated 10th

February, 2016 addressed to Defendant No. 1 that, " *We do not know how your office which must be having a legal cell, does not have any papers of the matter and what they were doing for the last more than 22 years. Do they not have a chart of various litigations and how they are being followed and what is the stage at which they are? By having such a system you can have a control of all the matters and their present status.*"

The attempt now made to blame the Plaintiff by alleging that they have not followed the directions of this Court dated 22nd January, 2015, by not serving their Affidavit of Evidence etc. on the Advocate for Defendant No. 1 and not informing the Court that the Advocates who have filed their appearance on behalf of Defendant No. 1 are not found at the given address, is only a desperate attempt to shift the blame on the Plaintiff. It is submitted on behalf of the Plaintiff that they had informed the Court before the Ex-Parte Decree was passed that they did make an attempt to serve the Affidavit, as directed by this Court, on M/s. Bhaishanker Kanga & Girdharlal, however, their Office was no more in existence at the address shown in the records of the proceedings, and that they had informed the Court about the same. I do not see any reason why the Advocates for the Plaintiff should not be believed when it is an admitted fact that on 13th March, 2014, M/s. Bhaishanker Kanga & Girdharlal had shifted their Office and were not available at the address shown in the records of the Court. However, since the Learned Senior Advocate appearing for Defendant No. 1 has,

on instructions, pending the hearing and final disposal of the Suit, agreed to provide a Bank Guarantee in the sum of Rs. 4,20,50,901/- of a Nationalised Bank, and has further agreed to pay cost of Rs. one lakh to the Plaintiff as suggested by this Court, I pass the following Order:

- (i) The Ex Parte Decree dated 22nd January, 2015 is set aside.
- (ii) The Defendant No. 1 shall on or before 18th March, 2016 provide a Bank Guarantee of a Nationalised Bank, in the sum of Rs. 4,20,50,901/-, in favour of the Prothonotary and Senior Master of this Court, initially for a period of one year and thereafter the same shall be renewed from time to time until the above Suit is disposed off.
- (iii) Upon Defendant No. 1 providing the Bank Guarantee as directed in clause (ii) above, the Prothonotary and Senior Master shall issue a cheque in favour of the Defendant No.1 in the sum of Rs. 4,20,50,901/- along with interest accrued thereon, if any, and handover the same to the present Advocates for the Defendant No.1 for encashment.
- (iv) The Defendant No. 1 shall pay cost of Rs. 1,00,000/- to the Plaintiff on or before 18th March, 2016.
- (v) Place the Suit for directions on 28th March, 2016.

Notice of Motion is accordingly disposed off.

(S.J. KATHAWALLA, J.)