

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

**COMMERCIAL APPEAL NO.45 OF 2016
IN
NOTICE OF MOTION (L) NO.384 OF 2016
IN
SUIT NO.3846 OF 1994**

RAJESH
VASANT
CHITTEWAN

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Zenith Computers Limited ... Appellant
Versus
New India Assurance Co. Ltd.
And Another ... Respondents

.....

Mr. Yash Joglekar for the Appellant.

Mr. Aliabbas Delhiwalla a/w Ms. Tripty Kapadia i/b Joy Legal
Consultants for Respondent No.1.

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**CORAM : NITIN JAMDAR AND
G.A. SANAP, JJ.**

DATE : 9 SEPTEMBER 2021

P. C. :

. The Appellant-Zenith Computers Limited by this Commercial Appeal challenges the order dated 25 February 2016 passed by the learned Single Judge in Notice of Motion (L) No.384 of 2016 in Suit No.3846 of 1994 taken out by Respondent No.1. The learned Single Judge by impugned order set aside the *ex-parte* decree passed in favour of the Appellant on 22 January 2015 on certain conditions.

2 We are informed that the original plaintiff is in liquidation and the Insolvency Resolution Professional is prosecuting this appeal. Learned Counsel for Respondent No.1 has drawn our attention to the interim order passed in this appeal, whereby the proceedings in the suit have been stayed.

3 The Appellant filed a suit against the Respondents in the year 1994 praying for a decree against the Respondents for the sum of Rs.2,17,92,881.76 with 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 realization was directed to be paid to the Appellant herein. On 22 January 2015, the learned Single Judge decreed the suit and directing that the Appellant-Plaintiff was entitled to an amount of Rs.1,46,04,880/- with interest thereon at the rate of 8% per annum from 11 February 1993 till the date of the decree and with further interest on the principal sum awarded at the rate of 12% per annum from the date of decree till the payment or realization. The Appellant-Plaintiff was also held entitled to an order of costs against the First Defendant, and in addition, interest on the award of costs at the rate of 8% per annum from the date of decree till payment or realization.

4 The Respondents took out Notice of Motion (L) No.384 of 2016 to set aside an *ex-parte* decree dated 22 January 2015. The Respondents contended that though they had engaged advocates, there were

difficulties at the end of the advocates and therefore, the matter went unattended. The Respondents contended that they had made payment to the Office of Sheriff under protest. They also contended that that the Appellant did not comply with the order dated 13 March 2014 to forward an affidavit in lieu of examination-in-chief. The Appellant contested the notice of motion, contending that the Respondents cannot blame their Advocate as they ought to have been diligent in prosecuting their suit.

5 The learned Single Judge allowed the Notice of Motion filed by the Respondents and passed the following order :

- “(i) *The Ex-parte Decree dated 22 January 2015 is set aside.*
- (ii) *The Defendant No.1 shall on or before 18 March 2016 provide a Bank Guarantee of a Nationalized 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 of.*
- (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 hand over 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 18 March 2016.*
- (v) *Place the Suit for directions on 28 March 2016.*
Notice of Motion is accordingly disposed off.”

The learned Counsel for the Respondents states that as directed in the impugned order, the Respondents have given a bank guarantee of Rs.4,20,50,901/- and also deposited costs of Rs.1,00,000/-.

6 The grounds on which the Appellant have challenged the order are that the learned Single Judge has not given sufficient reasons to set aside the *ex-parte* decree; requirement of Order IX Rule 13 of the Code of Civil Procedure 1908, has not been fulfilled and the conduct of the Respondents is not *bona fide*.

7 The order under challenge is a discretionary order and the scope of an appeal against the discretionary order has to be kept in mind. It is not that the impugned order has no reasons. The learned Single Judge reflected on the rival contentions and has perused documents and in paragraph-9 of the impugned order, has given the following reasons :

“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 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 Act 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 this Court. However, since the Learned Senior Advocate appearing for Defendant No.1 has, on instructions, pending the hearing and final hearing and final disposal of the Suit, agreed to provide a Bank Guarantee in the sum of Rs.4,20,50,901/- of a Nationalized Bank, and has further agreed to pay cost of Rs.one lakh to the Plaintiff as suggested by this Court.”

8 The above reasons given in the impugned order would show that the learned Single Judge has taken a possible view of the matter. The learned Single Judge has noted that the office of the firm had shifted, and used the discretion to set aside the *ex-parte* decree. The discretion used cannot be said to be perverse. The Respondents have been directed to procure the amount by giving a bank guarantee, which they

have done. They have also paid costs of Rs.1,00,000/-. Considering these facts in totality, we are of the opinion that no interference in the impugned order is warranted.

9 The Commercial Appeal is, accordingly, dismissed. In the facts and circumstances, no costs.

10 The learned Single Judge will consider whether the suit can be taken up at an early date for disposal, subject of course to the S.O.P. in operation and the time schedule as available. Learned Counsel for the Respondents assures that Respondents will co-operate for early disposal of the suit and will not seek needless adjournment/s.

(G.A. SANAP, J.)

(NITIN JAMDAR, J.)