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

APPEAL (LODGING) NO.614 OF 2014
IN
NOTICE OF MOTION (LODGING) NO.1835 OF 2014
IN
SUIT NO.2350 OF 2009

WITH
NOTICE OF MOTION (LODGING) NO.2242 OF 2014
IN
APPEAL (LODGING) NO.614 OF 2014
IN
NOTICE OF MOTION (LODGING) NO.1835 OF 2014
IN
SUIT NO.2350 OF 2009

New India Assurance Co. Ltd.	...Appellant
V/s.	
HDFC Bank Limited	...Respondents

Mr.Pankaj Sawant with Mr.Ali Abbas Delhiwalla with Mr.V.C. Murlidharan i/b Joy Legal Consultant for the Appellant.

Mr.Virag Tulzapurkar, Senior Counsel with Mr.Kingshuk Banerjee and Mr.Y. Choksy i/b Wadia Ghandy & Co. for the Respondents.

CORAM : S.J. VAZIFDAR &
REVATI MOHITE DERE, JJ.
DATE : 30TH SEPTEMBER, 2014.

P.C. :-

1. Admit. The appeal is heard finally.
2. This is an appeal against the order and judgment of the

learned Judge, dismissing the appellant's notice of motion for setting aside an *ex-parte* decree dated 20.01.2014. The appellant has furnished an unconditional bank guarantee for the entire decretal amount together with interest. The only question that really fell for consideration was whether the appellant was entitled to have the *ex-parte* decree set-aside. The merits of the case were not really relevant in this matter.

3. The appellant admits that the writ of summons was served upon its head office on 28.11.2009. According to the appellant, the head office forwarded the same to the Mumbai Regional Office-1 (MRO-1), as it is that office that was supposed to deal with the present litigation. The appellant states that the writ of summons appears to have been misplaced and had never found its way to MRO-1. The learned Judge has recorded that the inward register of MRO-1 has not been produced for inspection. The inward register would indicate whether the writ of summons forwarded by the head office had been received by the same or not. We directed the appellant to offer inspection of the inward register of MRO-1. The respondent however did not want the same.

4. There is nothing to indicate that the MRO-1 had in fact received the writ of summons. It is difficult to believe that had it been received, the appellant would have done nothing in the matter. The

appellant did not even appoint an advocate. This is the least that the appellant would have done had it in fact received the writ of summons.

5. In the circumstances, according to us, the ends of justice would be met by affording the appellant an opportunity of defending the case on merits.

6. The learned Judge held that sufficient cause has been shown for explaining the delay between the date of knowledge of the writ of summons and the date of filing of the notice of motion. That observation has not been challenged. It is not necessary therefore, to go into the question of the delay in taking out the notice of motion for setting aside the *ex-parte* decree from the date of the knowledge of the writ of summons.

7. The detailed observations of the learned Judge regarding the merits of the matter are only for the purpose of the notice of motion. Strictly speaking they were not relevant considering the facts of this case. They shall therefore, not be binding at the trial.

8. Mr.Tulzapurkar, the learned counsel appearing on behalf of the respondent stated that even if the appeal is allowed, the appellant ought to be directed to pay the respondent's decretal amount subject to the respondent furnishing a guarantee for the same. That would not be permissible at this stage, as the suit is still

to be heard on merits.

9. In the circumstances, the impugned order is set-aside. The *ex-parte* decree is set-aside. The appellant agrees to the evidence being recorded on commission if the respondent so desires. The guarantee shall however, be kept alive pending the hearing and final disposal of the suit and for a period of twelve weeks thereafter. The appellant's undertaking to pay the decretal amount as finally determined without compelling the respondent to execute the decree is accepted.

The appellant shall pay the costs of this appeal to the respondent fixed at Rs.50,000/- within eight weeks from today.

10. In view of disposal of the appeal, nothing further survives in the notice of motion. The same is also accordingly disposed of.

(REVATI MOHITE DERE, J.)

(S.J. VAZIFDAR, J.)