

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

**APPEAL FROM ORDER NO.109 OF 2016
WITH
CIVIL APPLICATION NO.515 OF 2016
IN
APPEAL FROM ORDER NO.109 OF 2016**

Ganesh Atmaram Puranik	... Appellant (Org. Defendant)
Vs.	
Jeevan Vidhya Mission, A Public Charitable Trust & Ors.	... Respondents (Org. Plaintiffs)

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L.M. Jenkins a/w Mihir Kawade I/b. Haresh G. Ganatra for Appellant.
Mr. Sujeet G. Kurup for Respondent No.1.

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CORAM : M. S. KARNIK, J.

DATE : 24th JULY, 2019.

P. C.:

1. Heard learned counsel for the appellant and learned counsel for the respondent No.1.

2. The appellant is the original defendant. The respondents-original plaintiffs had filed a suit for recovery of an amount of Rs.5,00,000/- (Rupees Five Lakhs) with interest. It is the case of the plaintiffs that the defendant had promised sale of one property of which defendant claimed to be the owner. It is

in these circumstances that the plaintiffs paid a sum of Rs.5,00,000/- (Rupees Five Lakhs) to the defendant. Later on it was realised that defendant was not the owner of the property but the property belonged to National Textile Corporation.

3. Initially the suit was filed in this Court. This Court vide order dated 4.6.2002 granted unconditional leave to the defendant to defend the suit. Later on when the pecuniary jurisdiction of the City Civil Court increased, the said suit came to be transferred to the City Civil Court and numbered as Summary Suit No.8357 of 1998.

4. It is the contention of the appellant that he did not receive any notice about transfer of the suit. Learned counsel submitted that appellant was neither aware of this fact nor was he informed by his advocate about the transfer of proceedings. Learned counsel would submit that it is in these circumstances that the defendant could not remain present before the City Civil Court to contest the suit. The Trial Court vide judgment and order dated 2.2.2013 decreed the suit. The Trial Court proceeded ex-parte as the defendant failed to remain present when the suit was heard.

5. Later on when the defendant was served with the warrant of attachment on 26.9.2014, he came to know about the ex-parte decree. Therefore, he filed the Notice of Motion No.4289 of 2014 for setting aside the ex-parte decree. The Trial Court by the impugned order dated 17.8.2015 dismissed the Notice of Motion as it found that the explanation given by the defendant was not satisfactory.

6. Learned counsel for the appellant submits that pursuant to the ex-parte decree and after filing of the present Appeal, pursuant to the order passed by this Court, the appellant has already deposited a sum of Rs.11,00,000/- (Rupees Eleven Lakhs). The entire amount has been withdrawn by the respondents-original plaintiffs. A part of the amount has been withdrawn upon furnishing security.

7. Learned counsel for the appellant would submit that the appellant was not aware of the transfer of the proceedings from the High Court to the City Civil Court. He invited my attention to the reasons mentioned in the Notice of Motion. This Court granted unconditional leave as some triable issues were involved in this matter. Learned counsel for the appellant orally

submitted that as the appellant has some health issues and considerable expenses are incurred for medical treatment, he would find it difficult to pay heavy cost. This submission is made as I had indicated an inclination to allow the Appeal subject to payment of heavy cost to compensate the respondents. Learned counsel urged that reasonable cost may be imposed and opportunity be given to the appellant to contest the matter on merits.

8. Learned counsel for the respondent No.1 opposed the application. According to him in the Notice of Motion and the affidavit filed in support of the Motion contains no satisfactory explanation as to why the appellant failed to remain present. He invited my attention to the order passed by the Trial Court where it is recorded that the summons were duly served upon the appellant. In his submission, the appellant has not been pursuing the proceedings diligently and therefore, no interference is warranted.

9. I have heard learned counsel. It is true that the only explanation given in the affidavit in reply to the Notice of Motion

by the appellant is that no notice of transfer of the suit from the High Court to the City Civil Court was given to him. However in my opinion the right of the appellant to contest the suit should not be foreclosed because he has failed to appear before the City Civil Court after the transfer of the suit. The suit in fact has been transferred from this Court to the City Civil Court. Even this Court had granted unconditional leave to the appellant to defend as there are triable issues involved. Moreover even during the pendency of this Appeal, the appellant has deposited an amount of Rs.11,00,000/- (Rupees Eleven Lakhs) as directed by this Court being the decretal amount. The said amount has been withdrawn by the respondents. The appellant has serious health issues which in all fairness even the respondents admit.

10. In my opinion, considering these circumstances, it would be in the interest of justice, if an opportunity is given to the appellant to contest the suit on merits. The Respondents can be compensated by imposing cost of Rs.10,000/- (Rupees Ten Thousand) on the appellant. Cost to be paid within three weeks. The decretal amount is already withdrawn by the respondents.

11. The Appeal is allowed by setting aside the impugned order. The Trial Court to proceed with the suit on merits. The defendant to file the written statement within a period of six weeks from today. The appellant not to seek unnecessary adjournments in the suit. The Trial Court is requested to expedite the suit. The parties to appear before the Trial Court on 6.8.2019 when the matter may be taken on board. The amount which has been withdrawn and the security furnished will be subject to the final order of the Trial Court. Parties undertake to appear before the Trial Court alongwith copy of this order. Parties to act on the authenticated copy of this order.

12. In view of the disposal of the Appeal, nothing survives for consideration in the Civil Application. The Civil Application is disposed of accordingly.

(M. S. KARNIK, J.)