

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 768 OF 2023
WITH
INTERIM APPLICATION NO.15418 OF 2023

Morgan Alias Morgan Hactor
Alias Actor Gracias and Others

...Appellants/Applicants

Versus

Mr. Pandit R. Patil and Others

...Respondents

...

Mr. S.S. Kharat, for Appellants/Applicants.

Mr. Pankaj Pandey for Respondent No.4.

Mr. Smit Nagda, for Respondent Nos.1 to 3.

...

CORAM : SANDEEP V. MARNE, J.

DATE : SEPTEMBER 27, 2023.

P.C.:

1. By this Appeal, Appellants challenge order dated 6 December 2022 passed by the City Civil Court dismissing Notice of Motion No.2043 of 2016 filed seeking setting aside ex-parte decree dated 2 April 2013.

2. From the order passed by the City Civil Court it appears that the Appellants were aware of filing of suit and had engaged an Advocate, who had appeared on their behalf before the City Civil Court on 21 July 2004. Since the Advocate engaged by the Appellants did not appear thereafter, the City

Civil Court issued summons. On 6 October 2005, the Appellants refused to accept the summons. In my view, once the Appellants had engaged an Advocate in the suit, who had put in an appearance, it was not even necessary for the City Civil Court to issue fresh summons to the Appellants. In this regards reliance is placed by the learned counsel for Respondents on the judgment of this Court *in Suresh S/o. Daduram Abnave Vs. Municipal Corporation, Greater Mumbai & Anr.* in which it is held in Paragraph-10 as under:

“10 Admittedly the contesting Respondents were duly served and recorded also in the roznama accordingly. The parties represented through their Advocates. The vakalatnama, therefore, once filed by the Advocates and/or if the Advocate appears on behalf of the respective parties, the vakalatnama cannot be dissected and/or treated for filing only for Notice of Motion and not for any other proceedings. Considering the provisions so recorded above once the party appears through his Advocate and due Vakalatnama is filed, it is for all the proceedings. Therefore, to say that a separate summons required to be served to the Respondents/Defendants is unacceptable. No fresh service of writ of summons is contemplated in such circumstances. The Advocate’s appearance, not permitted for want of specific provision and/or instruction for a part of the proceedings arising out of the suit. The vakalatnama cannot be conditional and restricted to any part of the proceedings. The learned Judge, therefore, in my view, wrong in dismissing the Suit for want of service of writ of summons.”

3. The fact that the Appellants engaged an Advocate in the Suit, who appeared on their behalf on 21 July 2004 would indicate acquisition of knowledge on the part of Appellants about filing of the suit. It was therefore their responsibility to find out the progress of the suit. However, it appears that far from making any inquiries about the progress of the suit, they in fact refused summons on 6 October 2005. Even if such summons were not to be issued by the City Civil Court, the Court was entitled to proceed *ex parte* against the Appellants on account of their appearance through Advocate on 21 July 2004.

4. The contention of the learned counsel for the Appellants that the suit was transferred from City Civil Court, Mumbai to Dindoshi and therefore notices were required to be served on Appellant in the year 2010 is unfounded in view of the fact that the Appellants were made aware about filing of the suit and had engaged an Advocate in the year 2004 to defend the same. It was for the Appellants to track progress of the Suit. In my view therefore no case was made out for by the Appellants to set aside the decree passed as far back as on 2 April 2013. Allowing the Appellants to set aside the decree passed on 2 April 2013 at such a distant date would cause severe prejudice to the plaintiffs

in the suit. The City Civil Court has not committed any error in dismissing the notice of motion filed by the Appellants.

5. The Appeal being devoid of merits, is dismissed without any order as to costs.

6. In view of disposal of Appeal, Interim Application does not survive and stands disposed of.

(SANDEEP V. MARNE, J.)