

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 102 OF 2015

Mr. Simao Xavier Silva,
son of Mr. Custodio C. Silva

...Petitioner.

Versus

Mr. Dioginho Coelho,
s/o late Mr. Simao Coelho

...Respondent.

Mr. Thalmann Pradeep Pereira, Advocate for the petitioner.
Mr. Prasad Dessai, Advocate for the respondent.

Coram :- M. S. SANKLECHA, J

Date : - 25th March, 2015.

Order :

By an order dated 11 March, 2015 the parties were put to notice that this petition would be disposed of finally at the stage of admission. Therefore, with the consent of the counsel the petition is being disposed of finally at the stage of admission.

2. This petition challenges the order dated 20 December, 2014, passed by the learned Civil Judge, Junior Division, Vasco-da-Gama, by which the applications of the petitioner in a pending suit for condonation of delay and for setting aside ex parte order are dismissed.

3. The brief facts of the case are that the petitioner and the respondent are closely related being nephew and uncle. On 4 February,

2014 the respondent has filed the suit in the Court of Civil Judge seeking cancellation of the Deed of Gift dated 8 January, 2009, executed by the respondent in favour of the petitioner. At that time the petitioner was serving abroad in Doha, Qatar. In spite of being aware of the above fact the summons was served upon at the petitioner's residence at Salcete. As the petitioner was not there the same was not accepted. Thereafter, on 26 March, 2014 respondent sought to serve the summons at address of the petitioner being "P. O. Box 22083, Doha, Qatar, U.A.E." The summons which were served at the above address was received back with an endorsement "unclaimed" on 26 May, 2014. Thereafter, on 12 June, 2014 the suit was ordered to be proceed ex parte against the petitioner. On 17 September, 2014 the petitioner received a notice under Section 66 of the Evidence Act calling upon the petitioner to produce the original Gift Deed dated 8 January, 2009. At that time, the petitioner realized that there was some proceedings in a Civil Court at Vasco against him. Thereafter, the petitioner took steps and filed an application for condonation of delay along with an application for setting aside the order dated 12 June, 2014 to proceed ex parte. This application was filed on 4 November, 2014. On 20 December, 2014, by the impugned order, the application was rejected on the ground that no sufficient ground has been made out to condone the delay of 5 months and 12 days in filing the application for setting aside the order to

proceed ex parte. As a consequence, the impugned order also dismissed the application for setting aside the ex parte order.

4. The petitioner's grievance is that sufficient cause was made out to explain the delay in moving an application against order to proceed ex parte by the respondent in the Civil Court at Vasco-da-Gama. It is pointed out in the application filed by the Power of Attorney Holder of the petitioner that the petitioner continues to be employed in Gulf. The summons served at the address of his employer at "P. O. Box 22083, Doha, Qatar, U.A.E" was not served by him as he had ceased to work for them. It is pointed out that the petitioner learnt for the first time about the pending proceedings on 17 September, 2014 when notice under Section 66 of the Evidence Act was received by him posted at the address to "P. O. Box 22083, Doha, Qatar, U.A.E", which is the address of his former employer and it was noticed by one of his ex colleague who informed him that Court notice seems to have been received. Consequently, the petitioner retrieved the notice from his ex employer and realized that there were some proceedings pending against him. However, the notice under Section 66 of the Evidence Act did not indicate the particulars of the proceedings except that there are proceedings in the Civil Court at Vasco-da-Gama. It is stated that that no sooner the petitioner learnt of the same on 17 September, 2014 he

started acting upon it by asking his relative to find out about the case and the Court in which it was pending by seeking advice of an advocate. Thereafter a Power of Attorney was executed in favour of person at Vasco to the further defend the proceedings. It was in the above circumstances, that there was a delay in moving the application for setting aside the order dated 12 June, 2014.

5. On the other hand, Mr. Prasad Dessai, learned counsel for the respondent states that no sufficient cause has been made by the petitioner out to explain the delay in moving an application to set aside the order directing to proceed ex parte. Thus the impugned order calls for no interference.

6. The issue of condonation of delay is a subject of exercise of discretion by the Judge on the facts seeking to explain the delay. This exercise of discretion if positively exercised on accepting the explanation as sufficient, then a superior Court would not in the absence of it being perverse or arbitrary, interfere with it. However, when the lower Court refuses to condone the delay, then the higher forum is free to consider the explanation of the delay afresh. (see N. Balkrishna v. M. Krishnamurty 1998 (7) SCC 123). It is also an admitted point in law that the approach to application for condonation of delay has to receive a

liberal construction bearing in mind the justice oriented approach as balanced by any prejudice likely to be caused to the other party. Thus, normally if there is no negligence and / or carelessness on the part of the applicant and no grave prejudice is caused to the other side, the application should be allowed.

7. It is clear that the petitioner learnt about the pending suit only on receipt of the notice under Section 66 of the Evidence Act on 17 September, 2014 at Doha, Qatar, U.A.E. The petitioner continues to employment in Gulf. Thus on receipt of notice of the pending proceedings in Doha, the petitioner had to find out in which Court the proceedings were pending as the notice under Section 66 of the Evidence Act was silent on that aspect. Thereafter, the advice of an advocate of what action to be taken, thereafter appoint a Power of Attorney Holder who in turn appoints an advocate on his behalf. In such circumstances, the application for condonation of delay along with an application for setting aside the order dated 12 June, 2014 filed on 14 November 2014 have been sufficiently explained. Moreover, no prejudice is shown to be caused to the respondent if the delay is condoned and application to set aside the order to proceed ex parte dated 12 June, 2014 is set aside, as evidence is yet to begin. The same can take place after a written statement is filed by the petitioner.

8. In the above view, the impugned order is set aside and the applications for condonation of delay and setting aside the ex parte order are allowed. The petitioner is permitted to file his written statement within three weeks from today and thereafter the suit shall proceed in accordance with the law.

9. Petition accordingly allowed. No order as to costs. Parties to act upon the authenticated copy of this order duly authenticated by the Advocate of this Court.

M. S. SANKLECHA, J.

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