

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3929 OF 2014

Sunil George Neralaly & Ors. .. Petitioners
vs.
Vindu Devi Rai & Ors. .. Respondents

Mr. Chetan Akerkar for Petitioners.
None for Respondents.

CORAM : M. S. SONAK, J.
DATE: 05 MAY 2015

P.C. :-

1] By order dated 13 August 2014 the parties were put to notice that this petition may be disposed of finally at the stage of admission.

2] Rule.

3] The learned counsel for the petitioners has stated that service has been affected upon all the respondents, including by way of substituted service.

4] This petition, is directed against the order dated 31 January 2014, by which the learned City Civil Court Judge, Greater Mumbai, has dismissed the petitioners chamber summons no. 2643 of 2013

seeking condonation of delay in setting aside the abatement which had set in in suit no. 9170 of 1993.

5] The delay in the present case was no doubt substantial. However, in every case, length of the time is not the only relevant factor. Quality of explanation is required to be considered. In making the impugned order, the learned City Civil Court Judge, appears to have merely gone by the length of the delay.

6] In the present case, the suit was originally instituted in this Court. However, consequent upon amendments in the statute, in the year 2013, the suit was transferred to the City Civil Court. It is the case of the petitioners that they had not only engaged an Advocate to pursue the matter, but further furnished the said Advocate with the details of the legal heirs of some of the deceased plaintiffs. Pursuant to the same, it is set out in the affidavit in support of the chamber summons that the Advocate prepared necessary chamber summons and the affidavit in support thereof was also affirmed. In such circumstances, it is stated that the petitioners were under the bonafide impression that necessary steps to bring on record the legal heirs of some of the deceased plaintiffs had already been taken. It is stated that only after the suit was dismissed by the City Civil Court consequent upon transfer of

the same that the petitioners realised that no steps had been taken by their Advocate.

7] The learned counsel for the petitioners submits that the Advocate, to whom the petitioners had entrusted the matter has also expired. All this contributed to the delay in taking steps for brining the legal heirs of some of the deceased plaintiffs on record.

8] In the present case, the learned City Civil Court Judge has dismissed the chamber summons without any notice to the respondents. In the facts and circumstances of the present case, it cannot be said that the case set out by the petitioners in their affidavit in support of the chamber summons was totally perverse. In this Court, notices have been served upon the respondents. The respondents have however not chosen to appear in this matter.

9] In matters of condonation of delay, it is possible that there is some lapse on the part of the parties. However, as long as the explanation offered is not malafide or in order to protract the proceedings without any reasonable cause, there is no harm in accepting the explanation so offered. This would enable the parties to obtain adjudication of their disputed on merits. Rather than matters go by default. Applying such principles, case has been

made out by the petitioners for condonation of delay and setting aside the abatement, no doubt subject to payment of substantial costs.

10] Payment of costs is necessary because the defendants in the suit, are bound to occasion prejudice by way of recommencement of a cause, which had been effectively dismissed almost fifteen years ago. In such circumstances, the petitioners to pay costs of Rs.46,000/- (Rupees Forty Six Thousand) to the defendants in the suit. Such costs to be deposited by the petitioners within a period of six weeks from today. Upon deposit of the costs, the City Civil Court to issue notices to the defendants in the suit, so that the suit can proceed further. Upon receipt of the notices, the defendants shall be entitled within a period of two months from the date of receipt of notice from the City Civil Court to file their written statements, in case such written statements have not already been filed. Such concession is required to be granted, because it is possible that the defendants may have also lost interest in defending the suit, on account of failure on the part of the petitioners to take timely steps in the matter.

11] Accordingly, the impugned order is set aside. The abatement, if any, is also set aside. The suit is restored to the file of the City

Civil Court which shall proceed to decide the same on its own merits and in accordance with law.

12] In case, the amount of costs as aforesaid are not deposited by the petitioners within a period of six weeks from today, this petition shall be deemed to have been dismissed. In case costs are deposited, each of the defendants shall be at liberty to withdraw the sum of Rs.2,000/- (Rupees Two Thousand) unconditionally.

13] Rule is made absolute to the aforesaid extent. There shall be no separate orders as to costs in this petition.

14] All concerned to act on basis of an authenticated copy of this order.

(M. S. SONAK, J.)

Chandka