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

WRIT PETITION NO. 102 OF 2016

Mr. Rajesh Babulal Shah and Ors.

...Petitioners.

V/s.

Ms. Swaran Fouja Singh and Ors.

...Respondents.

Mr. P.S. Dani, Senior Advocate i/b. Ms. Jui Nerurkar for the
Petitioners.

Ms. Nupur Mukharjee i/b. M/s. N.N. Vaishnawa & Co. for
Respondents 1 and 3.

CORAM : N.M. Jamdar, J.

14 September, 2016.

Oral Order :-

The Petition is taken up for disposal by consent. The learned Counsel for the Petitioners seeks leave to delete Respondent Nos.4 and 5 from the array of parties in this Petition. Leave to amend granted. Amendment to be carried out forthwith.

2. Heard learned Counsel for the parties.

3. By the impugned order the learned City Civil Court Judge has rejected Notice of Motion No.1734 of 2015 in Suit No. 9019 of 1993 wherein the Petitioners have sought to recall/set aside the “No W.S.” order dated 17 August 2011. The learned City Civil Court Judge has rejected the Notice of Motion primarily on the ground that the delay of 22 years has not been properly explained. The learned Counsel for the Petitioners submitted that one of the main grounds on which the prayer was made to recall the “No W.S.” order was that after the Petitioners – Defendant Nos.3(a) to 3(c) were brought on record, no notice was given to them and the Advocate who was engaged earlier expired during the proceedings. The learned Counsel for the Respondents – Plaintiffs submitted that the affidavit in support of the Notice of Motion indicates that the Advocate had appeared on behalf of Defendant Nos.3(a) to 3(c) and therefore, as per the Bombay High Court Original Side Rules, fresh issuance of summons is not necessary once a party has been represented through an Advocate.

4. Perusal of the impugned order shows that the main submission based on factual assertion made by the Petitioners has not been considered by the learned City Civil Court Judge. The contention of the Petitioners that they were not served with suit summons after they were brought on record is in fact mistakenly considered as a contention that the Defendant Nos.3(a) to 3(c) and 4

were not served with a fresh notice after the suit was transferred to the City Civil Court. Proceeding on these lines, the learned City Civil Court Judge held that in view of the provisions of Section 6 of the Bombay City Civil Court (Amendment) Act, 2012, there is no such requirement. However, the main contention as referred to above has not been considered by the learned Judge at all.

5. Considering the fact that this contention of the Petitioners, which is contested by the Respondents, will require factual adjudication, including whether the Advocate had appeared for the heirs after they were brought on record, it will be appropriate if the matter is remanded back to the learned City Civil Court for re-consideration.

6. The impugned order dated 1 October 2015 is quashed and set aside. The Notice of Motion No.1734 of 2015 stands restored to file to be considered on its own merits by the learned City Civil Court Judge. Considering the fact that the suit is pending since the year 1993, the learned City Civil Court Judge will take up the Notice of Motion on priority basis and dispose off the same as early as possible. The Petition is disposed of as above, no order as to costs.

(N.M. Jamdar, J.)