

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14288 OF 2018

The Right Reverend Mr Oswald C. Gracius	... Petitioner
v/s	
Vishal Hari Prakash Gupta and others	... Respondents

Dr Birendra Saraf, Counsel with Mr Rohan Kadam, Mr Sunil Tilokchandani, Ms Subhashree Chatterjee i/b M/s Manilal Kher Ambalal and Co. for Petitioner.
Ms Purnima Bhatia for Respondent.

CORAM : B.P. COLABAWALLA, J.

DATE : 17th DECEMBER, 2018

P.C.:

1. Rule. Respondents waive service. By consent of parties, rule is made returnable forthwith and heard finally.

2. This Writ Petition has been filed taking exception to the order passed by the Bombay City Civil Court, Mumbai dated 15th January 2013 in Notice of Motion No.1752 of 2012 in Suit No.2658 of 1995. By the impugned order, the Notice of Motion filed by the original Defendant was dismissed. Notice of Motion

No.1752 of 2012 was filed by the Defendant seeking a condonation of delay of 130 days and to recall the order dated 24th January 2012 allowing Chamber Summons No.397 of 2010. Chamber Summons No.397 of 2010 was filed by the heirs of the original Plaintiff who passed away way back on 3rd October 2001. It was the case of the heirs as they came to know of this Suit in the year 2009 when they were vacating their premises and shifting their house and immediately thereafter Chamber Summons was filed to bring them on record. This Chamber Summons was served upon the Defendant and despite service, none appeared. It is in these circumstances that the Chamber Summons was allowed.

3. Since none had appeared on behalf of the Defendant Notice of Motion No.1752 of 2012 was filed to recall the order passed on the Chamber Summons. It is in this Notice of Motion that the impugned order has been passed.

4. Originally, this order passed in the Notice of Motion was challenged by filing an Appeal from Order. However, since Appeal from Order was not maintainable, it was allowed to be converted into a Writ Petition and this is how the present Writ Petition is numbered.

5. I have heard the learned counsel for the parties at some length. This

Writ Petition was opposed with great vehemence by original Plaintiff. It was submitted that absolutely no case has been made out in the Notice of Motion for condoning the delay to recall the order dated 24th January 2012 passed in Chamber Summons No.397 of 2010. The learned counsel submitted that the Defendant came with a specific case that they were not served with the Chamber summons and hence sought condonation of delay. This fact of non-service was disproved as recorded in the impugned order and therefore the delay was not condoned. She therefore submitted that there was nothing wrong with the impugned order that required interference.

6. I have heard the learned counsel for both the parties at some length. I have also perused the papers and proceedings in the Writ Petition. It is not in dispute that Chamber Summons No.397 of 2010 was decided in the absence of the Defendant. Once a Suit has abated, a valuable right accrues to the Defendant. Since the Defendant was not represented when the chamber summons was allowed and the abatement was set aside, the Defendant filed Notice of Motion No.1752 of 2012 to set aside the order passed on the Chamber Summons. What is important to note is that in this Notice of Motion, the Defendant has categorically stated that once the amended plaint was served upon them, they did a search in their own office and they found and discovered that a copy of the Chamber summons was served on the Defendant at the address of the

Archbishop's office in or around June 2010. It is further stated that the Defendant ceased to be a Trustee since the year 1996 and has thereafter even expired. It is in these circumstances that the delay was sought to be explained.

7. On going through the impugned order, I find that the Trial Court has taken a hyper-technical approach whilst rejecting the Notice of Motion filed by the Defendant. I cannot lose sight of the fact that the Chamber Summons for setting the abatement was filed after a period of nine years. That delay was condoned without any reasoning and merely on the ground that no reply was filed by the Defendant. Considering the explanation given by the Defendant in his Notice of Motion No.1752 of 2012, an opportunity ought to have been afforded to him to contest the order passed in the Chamber Summons especially since a valuable right had accrued in his favour. This opportunity has been denied to the Defendant by the impugned order.

8. This being the case, I have no hesitation in allowing the Writ Petition and setting aside the order dated 15th January 2013. Consequently, Notice of Motion No.1752 of 2012 is allowed in terms of prayer clause (a). As far as prayer clause (b) is concerned, the Notice of Motion is restored back to the file of the Trial Court to decide on merits whether the order dated 24th January 2012 allowing the Chamber summons No.397 of 2010 be recalled or otherwise.

9. Writ Petition is disposed of in the aforesaid terms. There shall be no order as to costs. It is made clear that I have not opined on the merits of the matter and all contentions in that regard of both the parties are expressly kept open to be agitated before the Trial Court.

(B. P. COLABAWALLA, J.)