

(2013) 02 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition No. 815 of 2012

Suresh Bhat and Others

APPELLANT

Vs

Pedro Damiao Lazario Caeiro and Another

RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2013) 3 ABR 78 : (2013) 4 ALLMR 590

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : S.D. Padiyar, for the Appellant; A. Gomes Pereira, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri S.D. Padiyar, learned counsel appearing for the petitioners and Shri A. Gomes Pereira, learned counsel appearing for the respondents. Rule. Heard forthwith with the consent of the learned counsel. Learned counsel appearing for the respondents waives service.

2. The above petition seeks to quash an orders passed by the learned Civil Judge, Junior Division dated 17.10.2012 and 9.11.2012 whereby the learned Judge has closed the evidence of PW 3 and proceeded to record the evidence of the respondents herein and rejected the application to recall/review the said order.

3. Shri S.D. Padiyar, learned counsel appearing for the petitioners has pointed out that the matter was posted for evidence of PW 3 on 17.10.2012 and there was a direction by the learned Judge to initially produce the affidavit of the said witness on 29.9.2012. The learned counsel further points out that on the said date the learned Judge had directed the petitioners to furnish such advance copy of the affidavit to the learned advocate appearing for the respondents before the next date of hearing i.e. 17.10.2012. The learned counsel further pointed out that in compliance with the direction of the learned Judge the petitioners tried to serve the copy on the learned advocate on 12.10.2012 when according to him

the concerned advocate was not available at his office. The learned counsel further pointed out that 13.10.2012 and 14.10.2012 were Saturday and Sunday when the advocate could not be contacted and as such the affidavit was sought to be filed on 17.10.2012 when the concerned witness PW 3 was also present. The learned counsel further pointed out that the learned Judge had noted that no advance copy of the affidavit was furnished to the respondent and closed the evidence of the petitioner on 17.10.2012. The learned counsel further pointed out that on the same date an application for review/recall of the said order came to be filed on the ground that PW 3 was present in Court and stating the facts that an advance copy was sought to be served on the learned advocate appearing for the respondents, who was not available. The said application was also supported by an affidavit of PW 3 inter alia stating that he was present in the Court when the matter was called out. The learned counsel, as such, submits that grave injustice would occasion to the petitioners in case they are not permitted to proceed with the evidence and, as such, the impugned orders deserve to be quashed and set aside.

4. On the other hand, Shri A. Gomes Pereira, learned counsel appearing for the respondents has supported the impugned order. The learned counsel pointed out that the negligence on the part of the petitioners to diligently pursue the case disentitles them for any discretion of this Court under Article 227 of the Constitution of India. The learned counsel has taken me through the minutes of order in the suit and pointed out that there are successive occasions when the petitioners have failed to remain present in Court and failed to ensure the presence of their witness. The learned counsel further pointed out that the petitioners are unnecessarily delaying the matter without any justification and as such the question of invoking any jurisdiction to set aside the impugned order would not arise. The learned counsel has thereafter pointed out that on the date, the matter was fixed even the advocate or PW 3 was not present and as such the question of contending that they were present in the Court cannot be accepted. The learned counsel further pointed out that it is not justifiable that the petitioners should wait at the last minute to serve the advance copy of the affidavit and this itself disentitles them for any relief from this Court. The learned counsel has taken me through the impugned order as well as material on record and pointed out that no interference is called for in the impugned orders.

5. I have carefully considered the submissions of the learned counsel and have also gone through the records. The point for consideration is whether the petitioners are entitled to proceed with the evidence on 17.10.2012. It is not in dispute that as per the direction of the learned Judge an advance copy of the affidavit was to be served on the advocate appearing for the respondents. The affidavit also discloses that an attempt was made by the petitioners to serve such advance copy on the advocate appearing for the respondent on 12.10.2012. No doubt, there was some lapse on the part of the petitioners in ensuring that such advance copy was duly served on the advocate appearing for the respondents, nevertheless taking note of the affidavit of PW 3 and the fact that

PW 3 was in fact present in Court on the relevant date i.e. 17.10.2012, I find that the learned Judge was not justified to pass a drastic order in closing the evidence of the petitioners. Apart from that, an application to recall the order was also moved on the same day which shows that the petitioners wanted to proceed with the evidence. The Apex Court in the judgment reported in Rameshwari Devi and Others Vs. Nirmala Devi and Others, , has inter alia observed that imposition of heavy costs would also control unnecessary adjournments by the parties. Considering the said aspect, I find that an opportunity can be given to the petitioners to proceed with their evidence subject to the payment of costs.

6. In view of the above, and taking note of the fact that the dispute between parties is to be decided on merits and in the peculiar facts of the present case, I find that the impugned orders passed by the learned Judge dated 17.10.2012 and 9.11.2012 cannot be sustained and deserve to be quashed and set aside. But however, inconvenience cause to the respondents would have to be compensated by the petitioners by paying costs to the respondents. In the facts and circumstances of the case, costs to be paid by the petitioners to the respondents is quantified at Rs. 7,500/-. Shri D. Pangam, learned counsel appearing for the petitioners, upon instruction, submits that he will ensure that the petitioners will proceed with the evidence with due diligence and shall not seek adjournments on flimsy grounds. In view of the above, I pass the following order:--

ORDER

(i) The impugned orders dated 17.10.2012 and 9.11.2012 are quashed and set aside subject to payment of costs of Rs. 7,500/- as condition precedent.

(ii) The petitioners shall ensure the presence of PW 3 on the date fixed by the learned Judge and the learned Judge shall proceed with the said proceedings in accordance with law.

(iii) Rule is made absolute in the above terms.

(iv) The petition stands disposed of.