

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.78 OF 2015**

MR. FRANCISCO F. P. D'SOUZA
(DECEASED) REP. BY MARIA DO
SOCORRO LEONORA FERNANDES

E SOUZA AND ANR.

... Petitioners

Versus

SHRI JOHN LOBO AND 8 ORS.

... Respondents

Mr. V. Menezes, Advocate for the Petitioners.

Mr. V. Korgaonkar, Advocate for the Respondents.

Coram:- N. M. JAMDAR, J.

Date:- 24 February 2015

ORAL ORDER :

The petitioners challenge the order passed by the Civil Judge, Senior Division, Panaji, dated 20 November 2014, dismissing the application filed by the petitioners to bring themselves on record in the suit along with condonation of delay of 3 years and 19 days.

2. The plaintiffs filed the Special Civil Suit No.63/2008 in the Court of Civil Judge Senior Division, Panaji. They were Mr. Vitorino Dias, Mr. Francisco F.P. D'Souza & M/s. Goan Bounty. According to them their property was contiguous and abutting the property which is claimed by defendant no.6. These

plaintiffs stated that the respondents were interfering with their access to the road and, therefore, relief of injunction was necessary to be granted. In the suit, an application for temporary injunction was moved. The learned Civil Judge dismissed the application for temporary injunction and an appeal from order was thereafter filed by the plaintiffs which was disposed of by this Court on 9 September 2009 and temporary injunction came to be granted in favour of the plaintiffs.

3. On 28 March 2010 plaintiff no.2 Mr. Francisco Pereira D'Souza expired. After 3 years and 19 days of his death, an application was moved by the present petitioners to set aside the abetment in relation to plaintiff no.2 Francisco and to bring themselves on record, after condoning the delay. Petitioner no.1(a) is the wife of Francisco and petitioner no.1(b) is the son of Francisco. The application was opposed by the respondents. The learned Civil Judge found that the cause made out for condonation of delay of 3 years and 19 days was not sufficient and accordingly rejected the application.

4. I have heard the learned Counsel appearing for the parties. Mr. V. Menezes for the petitioners submitted that the son of the deceased plaintiff no.2 was not aware of the proceedings and he had merely signed the plaint as a power of attorney holder. He submitted that the wife of the deceased plaintiff no.2 was not aware of the proceedings at all and it is only when while going through the cupboard some papers

were found, inquiries were made with plaintiff no.1 and then present application came to be filed. He submitted that the consequence of dismissal of suit as abated against plaintiff no.2 would be that they would be precluded from having access to their property, which will cause irreparable loss. He submitted that this is a fit case where writ jurisdiction be entertained.

5. The delay is substantial, 3 years and 19 days. After abatement of suit valuable right have accrued in favour of the respondents, which cannot be lightly taken away. The Apex Court in the case of ***Balwant Singh (dead) V/s. Jagdish Singh & Ors.*** reported in ***(2010) 8 SCC 685*** has discussed the parameters of 'sufficient cause' to be made out for setting aside abatement of suit and for condonation of delay. The Apex Court has observed as under:

“25. We may state that even if the term “sufficient cause” has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of “reasonableness” as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately, depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will

be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

27. *The application filed by the applicants lacks in details. Even the averments made are not correct and ex facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflects normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.”*

6. Keeping this dicta of Apex Court in mind, the reason given by the petitioners needs to be considered. The reason is found in only one paragraph of the application which reads as

under:

“3. The Applicants did not have knowledge of the pending suit as the deceased Plaintiff had not informed them of the same during his lifetime. While clearing/cleaning cupboards in the house of the deceased Plaintiff, the Applicants found some of the papers relating to the present suit and noticed the name of Plaintiff no.1 therein. On enquiries made with Plaintiff no.1, the Applicants gained knowledge of the subject matter of the suit and realized that they were necessary parties to the same since the cause therein survived to them.”

7. The learned Judge has found that this reason was not satisfactory. There is no error in this approach. One has to consider the nature of the proceedings to appreciate whether the petitioners i.e. son and wife of the deceased plaintiff no.2 were aware of the proceedings. The subject matter is the access through the property. The averments in the plaint are that the respondents repeatedly tried to block the access of the plaintiffs by digging in front of their house. Various incidents that have taken place, have been pleaded. The other plaintiffs stay next door. There is absolute no pleading in the application in respect of the wife of the deceased plaintiff no.2. She was residing with plaintiff no.2. It is not possible that she will not know of that the dispute regarding the access going on, if one goes by the averments in the plaint. The son has signed the plaint as an constituted attorney. He had signed on behalf of the appellants in the Appeal From Order, which was disposed of in favour of the plaintiffs. Though it is contended

that he does not stay with his parents, he resides in Goa and not in any other place. It is also not pleaded that his relationship with his parents are not good. It is impossible to believe that, having signed the plaint and having pursued the matter to the High Court, he will not know of the suit. Not only there is no sufficient cause made out but there is complete negligence on the part of the petitioners to prosecute their claim.

8. In these circumstances, the view taken by the learned Civil Judge cannot be faulted with. It is in consonance with the decision of the Apex Court in the case of ***Balwant Singh*** (supra). No interference is called for in writ jurisdiction. Petition is rejected.

N. M. JAMDAR, J.

NH/-