

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.164 of 2015**

Mr. Bolu Bandodkar
65 years of age,
Son Shanu Bandodkar,
r/o H.No.82/52/5, Manik
Apartments, Ward Raigini
Bandora, Ponda Taluka, Goa. .. Petitioner

Versus

1. Diana Zita Agnela D' Souza e
Martyres,
major of age,
r/o H. No.87/3, 2nd Ward Colva,
Salcete- Goa.
2. Maria Avita Martyres,
major of age, businesswoman,
r/o H. No. 87/3 2nd Ward,
Colva, Salcete- Goa.
3. Jude Domnic Fernandes
Major of age, businessman,
r/o H.No.87/3, 2nd Ward,
Colva, Salcete- Goa. .. Respondents

Mr. A. D. Bhobe, Advocate for the petitioner.

Mr. J. J. Mulgaonkar, Advocate for the respondents.

CORAM :- C. V. BHADANG, J.

Date : 3rd September, 2015.

ORAL JUDGMENT :

Rule. Rule made returnable forthwith. Shri
Mulgaonkar, the learned Counsel for the respondents waives

service. Heard finally, by consent.

2. By this petition, the petitioner/ original defendant is challenging the order dated 19/01/2015 passed by the learned Adhoc District Judge-I, South Goa, Margao in C.M.A. No.104/2014, by which, the learned Appellate Court has refused to condone the delay of approximately 95 days in filing an appeal. The appellant seems to challenge the order, by which the learned Trial Court has granted temporary injunction to the respondents, while refusing similar relief to the petitioner.

3. The brief facts are that in a suit filed by the respondents, the petitioner raised a counterclaim. There were applications for temporary injunction filed by both the parties. Indisputably, by the order dated 11/04/2014, the application for temporary injunction filed by the respondents was allowed, confirming the ex-parte order while rejecting the application for temporary injunction filed by the petitioner. According to the petitioner, under the garb of temporary injunction order, the respondents had obtained possession of the disputed structure.

4. The ground on which the condonation of delay was sought was that the petitioner was represented before the Trial

Court by Advocate Shri S. M. Tendulkar. It was contended that the petitioner had instructed Shri Tendulkar to file an appeal, who had promised to do so after the summer vacation in 2014. It is contended that the concerned Counsel failed to file an appeal. It was next contended that Shri S. M. Tendulkar was appointed as Additional President of Administrative Tribunal at Panaji, Goa and he kept the file with him until July, 2014, without informing the petitioner about his appointment. It was in the midst of July, 2014 that the petitioner came to know about the appointment of Shri S. M. Tendulkar as the President of the Administrative Tribunal, whereupon, he contacted his office and obtained the no objection from him on 20/07/2014. It was thus contended that firstly on account of lapse, on the part of the Counsel and secondly, on account of the Counsel being appointed as the President of Administrative Tribunal, which fact was not informed to the petitioner, that the delay has occasioned.

5. The application was opposed on behalf of the respondents.

6. The learned District Judge found that although a party should not be made to suffer for the lapse of his Counsel, on facts, it was found that the case set up by the petitioner in support of the

prayer for condonation of delay, was not consistent. It was also found that nothing prevented the petitioner from contacting his Counsel after the summer vacation of 2014 and to take steps for filing the appeal. The learned District Judge also found that the case made out in para 3 of the application was vague. It was also found that in fact the Counsel, who was representing the petitioner, was not appointed as President of the Administrative Tribunal. In para 17 of the impugned order, the learned District Judge has found that the petitioner cannot escape from the case set up that his Counsel, who was representing the petitioner, was appointed as the President of the Administrative Tribunal (when in fact he was not appointed) on the ground that it was out of some inadvertent mistake. In the face of such finding, the application came to be dismissed.

7. It is submitted by Shri Bhobe, the learned Counsel for the petitioner that the petitioner had clearly come up with a case that the Counsel, who was representing the petitioner, was instructed to file an appeal. This was not done, although the Counsel had stated that the appeal would be filed, after summer vacation of 2014. It is submitted that, it was purely on account of a mistake, which was unintentional that it was mentioned on account of similarity of name that the Counsel representing the

petitioner was appointed as President of Administrative Tribunal. The learned Counsel would submit that the petitioner had nothing to gain by making such incorrect statement. Thus, no intention can be attributed to the petitioner for deliberately making such an incorrect statement. He, therefore, submitted that the delay deserves to be condoned.

8. On the contrary, it is submitted by Shri Mulgaonkar, the learned Counsel for the respondents that the learned District Judge has rightly come to the conclusion that the application is vague and that the petitioner was negligent and/ or was not diligent in contacting the Counsel and taking steps for filing the appeal. It is submitted that an attempt to wriggle out of the contention about appointment of his Counsel as the President of Administrative Tribunal, has rightly not been allowed. The learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpr Nafar Academy and others***, reported in (2013)12 SCC 649, in order to submit that no case for condonation of delay is made out.

9. I have considered the rival circumstances and the submissions made.

10. In the case of ***Esha Bhattachrjee*** (supra), the Hon'ble Apex Court, after taking a survey of the decisions holding the field, has culled out the principles, which are relevant, in para 21 of the judgment. Some additional principles have been laid down in para 22 of the judgment. In para 21.5 of the judgment, it has been *inter alia* held that lack of bonafides imputable to a party seeking condonation of delay would be significant and relevant fact and in para 21.10 of the judgment, it has been held that, when the explanation offered is found to be concocted or the grounds urged in the application are fanciful, the Court should be vigilant not to expose the other side unnecessarily to face such a litigation.

11. It is well settled that the quantum of the delay cannot be strictly relevant. The Court has to look to the explanation for delay. Unless and until it is shown that the party had 'sufficient cause', for not approaching the Court within time, the delay cannot be condoned. Thus, it has to be shown that the party had acted with due expedition and without any negligence or that the party was prevented from a cause beyond its control from approaching the Court within time. The finding as to 'sufficient cause' is a *sine qua non*, for passing the order of condonation of delay.

12. Turning to the present case, the learned District Judge has found that the petitioner could well have approached the office of the Counsel, which is not done. The party cannot stay content with the fact that the Counsel was instructed and has assured to file the appeal. It has to be shown that the party was vigilant enough to see that indeed the appeal is filed. Even so far as the ground about the Counsel being appointed as the President of Administrative Tribunal is concerned, the learned District Judge has found and to my mind rightly so, that the petitioner cannot get away with the said contention, merely by saying that it was an inadvertent mistake. Although it may not be necessary to record a finding that it was intentional or otherwise, the fact remains that the said ground is not found to be correct.

13. A perusal of the impugned order does not show exercise of discretion with material irregularity, calling for interference. In the result, the writ petition is dismissed. Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

SMA