

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 781 OF 2014

1. Shri Kishor T. Naik Salgaokar,
Indian National,
Major in age, Senior Citizen,
and POA Holder of:

2. Smt. Usha Kishor Naik Salgaokar,
Indian National,
Major in age, Senior Citizen.

Both Partners of M/s Laxmi Motor Service,
Resident of:

Laxmi Sadan,
Mapusa Housing Board Colony,
Plot No. 33, Mapusa, Bardez-Goa.

... Petitioners

Versus

1. Shri Ashok Tukaram Naik Salgaokar,
Indian National, Major in age.
2. Smt. Pushpalata Ashok Naik Salgaokar,
Indian National, Major in age.

Both Partners of M/s Laxmi Motor Service,
Resident of:

Laxmi Sadan,
Housing Board Colony,
Mapusa, Bardez-Goa.

... Respondents

Shri Ganesh Naik, Advocate for the Petitioners.

Shri Ashwin D. Bhobe, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATE:- 28th AUGUST, 2015.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. Shri Bhobe, learned Counsel waives service on behalf of the respondents. Heard finally with the consent of the parties.

2. By this petition, the petitioners are challenging the order dated 20.09.2014 passed by the Principal District Judge, Panaji, in Civil Miscellaneous Application No. 124/2012. By the impugned order, the learned District Judge has refused to condone delay of about two years and six months, in filing an application for restoration of Civil Miscellaneous Application No. 73/2003, which was dismissed on default on 07.09.2009.

3. The brief facts are that, the dispute between the parties was referred to the learned Arbitrator, who passed an interim award on 29.01.2003. That award was challenged by the petitioners in an application under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act, for short) before the learned District Judge, Panaji, in

Arbitration Application No. 73/2003. It appears that the petitioners, who were earlier represented by another Advocate had changed their Advocate on 10.06.2003 and had appointed Advocate Shri Vinod Karpe to look after the matter on their behalf. According to the petitioner no. 1, he remained out of station and was also frequenting abroad and due to his business commitment, he was unable to attend in the matter personally. The petitioners were under impression that their Advocate is looking after the matter. It is contended that the Manager of the petitioner no. 1 took away one set of the entire file from Advocate Shri Karpe for the purpose of record, which Advocate Shri Karpe, misconstrued as an intention of the petitioners, as withdrawing his services. As there was no appearance on behalf of the petitioners, the Civil Miscellaneous Application No. 73/2003 came to be dismissed on 07.09.2009.

4. It is further contended that in the month of January, 2012 the petitioner no. 1 approached Advocate Shri Karpe to find out the status of the matter and at that time, he found that his Advocate had stopped appearing for him. Immediately thereafter, inspection of the file was taken and it was found that the matter was already

dismissed. It is contended that on account of this, there is a delay of 2 years and 6 months in filing the restoration application.

5. The respondents filed reply opposing the prayer. It is contended that the petitioners have been grossly negligent in pursuing the matter and on account of dismissal of civil miscellaneous application, a valuable right has accrued to the respondents, which cannot be interfered with.

6. The learned District Judge by impugned order has found that the petitioners have no sufficient cause for condonation of delay and in such circumstances, the application came to be rejected.

7. I have heard Shri Naik, the learned Counsel for the petitioners and Shri Bhobe, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have perused the impugned order and the record.

8. It is submitted by Shri Naik, the learned Counsel for the petitioners that the petitioner no. 1 is a senior citizen, aged about 71

years. It is submitted that the wife and the son of the petitioner no. 1 are staying in Australia. It is submitted that the petitioner no. 1 was required to travel to Australia and during that period could not personally attend the matter before the District Judge. He submitted that the petitioner no. 1 had asked the Manager to collect a set of the papers only for the purpose of record. It is submitted that when, the Manager took the file from Advocate Shri Karpe, there was misunderstanding and the Counsel thought that the petitioners, no longer intend engaging his services in the matter. Hence, on account of pure misconception, the petitioners as well as the Counsel on behalf of the petitioners have failed to remain present in the matter. The learned Counsel has placed reliance on the decision of the Delhi High Court in the case of **Munjula Krippendorf Pathak Vs. Vijay Dixit**, LAWS(DLH)-2007-11-43 in support of the prayer for condonation.

9. On the contrary, it is submitted by Shri Bhole, the learned Counsel for the respondents that the petitioners have produced the affidavit of the Manager, as well as that of Advocate Shri Karpe on record before this Court. It is submitted that the same were not

produced before the learned District Judge. It is submitted that once the Manager of the petitioner no. 1 has collected the papers from the Advocate of the petitioners, the petitioners cannot now rely upon the ground of the alleged lapse on the part of their Advocate, in support of prayer for condonation of delay. It is submitted that even, the Manager has stated in the affidavit that, on instructions of the petitioner no. 1, he collected the papers from Advocate Shri Karpe. In either case, there is gross delay in approaching the Court for restoration. He therefore, submitted that no sufficient cause has been made out and the learned District has rightly rejected the application.

10. A perusal of the impugned order would show that the learned District Judge has found that after the petitioners had engaged the services of Advocate Shri Karpe, there were no efforts made to find out as to what happened to the matter. It is found that even considering that the petitioner no. 1 was busy with some business commitments, it was not claimed that for the entire period of two years and six months, the petitioner no. 1 was out of Goa. It has also been found that as disclosed in para 12 of the application that

the applicant had once called up his Advocate, but there was no response. It was found that the applicant should have personally approached the Court to find out the status of the matter. The learned District Judge has also found that affidavit of Advocate Shri Karpe and the Manager was not filed. The petitioners have tried to cure that defect now and the affidavits of Advocate Shri Karpe, as well as the Manager are now produced on record. The perusal of the affidavit of Advocate Shri Karpe would show that the Manager of the petitioners had taken away the file and as such, Advocate Shri Karpe was under impression that his appearance stood withdrawn. If that be so, the ground of alleged lapse on the part of Advocate Shri Karpe, in my considered view would not be available to the petitioners. Shri Premanand Shirodkar, the Manager states that on instructions from the petitioner no. 1, he took the file from Advocate Shri Karpe, only for record purpose. However, he never informed the same to Advocate Shri Karpe. In such circumstances, it is difficult to accept that the file was collected from Advocate Shri Karpe only for the purpose of keeping record and not otherwise. In either case, the Manager states that the Advocate was not so informed that the file was collected only for the purpose of keeping record. In such circumstances, in my

considered view, the petitioners cannot justifiably rely upon the alleged lapse on the part of their Advocate or the ground of some misunderstanding/misconception.

11. Even so far as the ground that the petitioner no. 1 had to frequently go abroad, it is not the case that for the entire period, the petitioner no. 1 was abroad. The leaned Counsel for the petitioners did not dispute that the petitioner no. 1 was frequenting to Australia and in the meantime, visited India for the purpose of business. If that be so, the ground of visits abroad, preventing the petitioner no. 1 from looking after the matter cannot be accepted.

12. In the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others**, reported in **(2013) 12 SCC 649**, the Hon'ble Apex Court after taking a survey of decisions holding the field has culled out the relevant principles, which are as under:

"(i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for

the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bonafides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free

play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is

founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

(Emphasis supplied)

13. In para 22, the Hon'ble Apex Court has further added some more guidelines, taking into account the present day scenario, which are as under:

"(a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory

system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

(Emphasis supplied)

14. It can thus be seen, that no precise or a straight jacket formula can be laid down while considering the prayer for condonation of delay. It has been also held that although, the delay of short duration may receive liberal consideration, the cases of gross delay, call for more stricter approach. Applying the principles as stated above to the facts and circumstances of the case, I find that the learned District Judge was not in error in refusing to condone the delay.

15. One of the grounds in support of the prayer for condonation of delay is that the petitioner no. 1 was required to go abroad frequently. In the case of **Munjula Krippendorf Pathak** (supra), the Court has found that during the entire period, the

appellant was away from India. In the present case, admittedly, the petitioner no. 1 was not continuously staying abroad and was coming back to India.

16. In the overall circumstances, I find that no case for interference is made out. In the result, the petition is dismissed.

Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

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