

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 647 OF 2016

M/s. Maberest Hotels Pvt. Ltd.
A company registered under the
Companies Act, 1956 and having
its registered office at Hotel Fidalgo,
18th June Road, Panaji, Goa,
represented in this Act by its director
Shri I. Sahadevsinh K. Zala,
son of Kiritsinh Zala,
major of age, Indian National,
residing at Mehboob Apartment,
Dr. Kesari Lane, Vodlle Bhat,
Taleigao Goa, The authorized
signatory of the Petitioner
duly authorised vide board resolution
dated 03-02-2015.

..... Petitioner

V e r s u s

Smt. Meena V. Kothari,
Adult, Indian National,
R/o 42-A, Saikrupa Forjet Street,
Gowalia Tank, Mumbai 400036.
(Registered Addresses)

..... Respondent

Shri J. E. Coelho Pereira, Senior Advocate with Advocate V.

Korgaonkar for the Petitioner.

Shri Amey Kakodkar, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.

DATE: 16th September, 2016.

ORDER:

The challenge in this petition, at the instance of the petitioner/original defendant, is to the order dated 8/1/2016 passed by the learned Civil Judge Junior Division at Panaji in Civil Miscellaneous Application no.11/2014/D. By the impugned order, the learned Trial Court has condoned the delay of 178 days in filing application for restoration of application bearing No.CMA No.33/2011.

2. The applicant has filed Regular Civil Suit NO.165/2010/D for recovery of an amount of Rs.10.00 lakhs against the respondent. The said suit along with the two other suits No.86/2009/A and No.166/2009/C were entrusted to Advocate Shri U.R. Timble. Advocate Shri Timble had withdrawn his appearance and the matters were entrusted to Advocate Shri T. George John, who informed the applicant that R.C.S No.165/2010 was dismissed in default on 19/11/2011. Advocate Shri John was asked to take steps

to restore the suit when some time around 25/9/2013 Advocate John informed the applicant that there is already an application for restoration filed by Advocate Timble which is registered as CMA No.33/2011, which has also been dismissed in default on 2/8/2013. It appears that subsequently Advocate John also expressed inability to represent the applicant. Hence the applicant engaged the services of Advocate Kakodkar, who filed CMA NO.11/2014/D for restoration of CMA No.33/2011, in which there is a delay of 178 days.

3. It is contended on behalf of the respondent that they were not aware of the dismissal of the suit or filing of CMA No.33/2011 and its subsequent dismissal in default. It is contended on behalf of respondent that the verification signed by the Power of Attorney holder Shri Dilip Kothari in CMA No.33/2011 is in respect of a different application. It is pointed out that there is interpolation of the date and there is a difference in the font and its size when compared with the said application.

4. The application for condonation of delay was opposed by the petitioner inter alia on the ground that the respondent was aware of the dismissal of the suit and also of the filing of CMA No.33/2011. It is contended that the respondent is now trying to put the blame on the advocate whose affidavit is not filed. It is contended that in any event the respondent cannot now seek to prosecute CMA No.33/2011, which according to the respondent has not been filed on their instructions.

5. The learned trial Court after considering the rival contentions and the decision of the Supreme Court in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy** [2013 (11) Scale 418] has come to the conclusion that the delay is not out of any negligence and there is no deliberate causation of delay or gross negligence on the part of the respondent or her power of attorney. The learned trial Court in para 35 of the impugned order has accepted that the respondent was not aware of the dismissal of the suit and the subsequent filing of the restoration application and in that view of the matter the

delay is condoned.

6. I have heard Shri Coelho Pereira, the learned Senior Counsel for the petitioner and Shri Kakodkar, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the impugned order.

7. It is submitted by the learned Senior Counsel for the petitioner that if the ground for condonation of delay is concocted or is a false ground the delay cannot be condoned. The learned counsel has taken exception to the contention on behalf of the respondent that they were not aware of the filing of CMA No.33/2011 or its dismissal. He, therefore, submits that the learned trial Court was in error in exercising the discretion to condone the delay.

8. On the contrary, it is submitted by the learned counsel for the respondent that the trial Court after properly appreciating the facts has rightly condoned the delay and the order does not call for any interference. The learned counsel

has placed reliance on the decision of the Supreme Court in the case of **N. Balakrishnan vs M. Krishnamurthy** 1998 (7) SCC 123 and the decision of the Supreme Court in the case of **Bhagmal Vs. M.P. Cooperative Marketing & Consumer Federation Ltd.** (2003) 11 SCC 727. He, therefore, submits that the petition be dismissed.

9. In the case of **Esha Bhattacharjee** (supra) the Hon'ble Supreme Court after taking a survey of several decisions holding the field has culled out the principles to be taken into consideration while deciding the prayer for condonation of delay. The principles are set out by the learned trial Court in its order. The learned Senior counsel for the petitioner has referred to para 15 (X) and (XI) in order to submit that if the explanation is concocted or false, the delay could not have been condoned. I do not find that the submission can be accepted. In this case, oral evidence was recorded by the learned trial Court. On behalf of the respondent, her Power of Attorney Dilip Kothari was examined. The learned trial Court after considering the evidence has come to the conclusion that in all probability

the respondent was not aware of the dismissal of the suit and the subsequent filing of the restoration application. I do not find any reason to interfere with the said finding of fact.

10. In the case of **N. Balakrishnan (supra)** the Hon'ble Apex Court has inter alia held, that where the court has accepted the explanation as sufficient and it is the result of positive exercise of discretion, normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. However, it is a different matter when the first Court refuses to condone the delay. In such a case, the superior court would be free to consider the cause shown for the delay and it is open to the superior court to come to its own finding, untrammelled by the conclusion of the lower court. The present case falls in the former category as the trial Court has accepted the explanation as sufficient, thereby condoning the delay. Thus the scope of the interference that too in a supervisory jurisdiction, would be quite limited. The learned trial Court has considered that the respondent/plaintiff would not stand

to gain or would not be benefited by the causation of the delay. Thus the delay cannot be said to be deliberate. In that view of the matter no case for interference is made out.

11. At this stage the learned Senior Counsel for the petitioner submitted that the finding recorded by the trial court may not come in its way while deciding the application for restoration being CMA NO.33/2011. In the result the following order is passed:

Order:

The petition is dismissed. It is made clear that the learned trial court shall decide the application being CMA NO.33/2011 for restoration on its own merits and in accordance with law. The rival contentions of the parties in so far as the application for restoration is concerned are left open. The petitioner shall be entitled to file a reply to the application for restoration on the next date i.e. 21/9/2016. In the circumstances, the parties are left to bear their own costs.

C. V. BHADANG, J.

Ap/

