

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITIONS NO.253 & 526 OF 2015****WRIT PETITION NO.253 OF 2015**

MR. MANOHAR SHIVRAM KARBOTKAR
GAONKAR AND 11 ORS.

...PETITIONERS

V/S

SHIVA YESHWANT PARAB GAUNKAR
(SINCE DECEASED) THROUGH LEGAL
REPRESENTATIVES AND 4 ORS.

...RESPONDENTS

Shri Nitin Sardessai, Senior Advocate with Shri
Vibhav R. Amonkar, Advocate for the Petitioners.
Shri A.D. Bhobe, Advocate for Respondent No.2.

AND

WRIT PETITION NO.526 OF 2015

RAJESH NAMDEV PRABHU GAONKAR
@ PARAB GAUNKAR.

...PETITIONERS

V/S

MANOHAR SHIVRAM KARBOTKAR
GAONKAR AND 21 ORS.

...RESPONDENTS

Shri A.D. Bhobe and Ms. S. Bhobe, Advocates for
the Petitioners.

Shri Nitin Sardessai, Senior Advocate with Shri
Vibhav R. Amonkar, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 29th JUNE, 2016

ORAL ORDER :

Both these petitions can be conveniently
disposed off by this common judgment.

2. The brief facts necessary for the disposal
of the petitions may be stated thus:

That there exists an old temple known as Maya Kelbai and its affiliate temples at Village Mayem. It appears that the Government of Goa by notification dated 16/07/1959 had constituted a committee consisting of four members, to frame the bye laws for the governance of the said temples. The Committee eventually prepared a list of Mahajans comprising of the members from Sinai Mayenkars and Porob Gaonkars families which was notified by the Government on 18/11/1965. The petitioners in Writ Petition No.253/2015 being members of the Karbotkar Gaonkar, families having been excluded from the said list had filed Regular Civil Suit No.55/1968. Some other families also being aggrieved by their exclusion filed Regular Civil Suit Nos.56/1968, 60/1968, 61/1968 for declaration that the plaintiffs therein are Mahajans of the said temple. It appears that the aforesaid four suits were decreed on 23/04/1984 granting a declaration that plaintiffs in the said suits were members/

Mahajans of the said temples. Indisputably, the said judgment and decree has attained finality as it was unsuccessfully challenged initially before the District Court and before this Court and, thereafter, before the Hon'ble Apex Court.

3. It appears that one Shiva Yeshwant Parab Gaunkar (now deceased) and Rajesh Namdev Prabhu Gaonkar @ Parab Gaunkar (petitioner in Writ Petition No.526/2015) filed Regular Civil Suit No.54/2001/A which was styled as a representative suit under Order 1 Rule 8 of the Code of Civil Procedure (CPC). In the said suit, the Managing Committee of the said temple was defendant no.1 while Mazania Temple of Shree Devi Kelbai and its affiliate temples is shown as defendant no.2. The defendant no.3 in the said suit is described as under :

'And all the persons benefited by the decree dated 23/04/1984 in Suit Nos.55,56,60 & 61 of 1968.'

In the said Civil Suit the plaintiff Shiva Parab Gaunkar and Rajesh Prabhu Gaonkar, claimed

the following reliefs:

(a) This Hon'ble Court may please declare the Judgment, Order and Decree passed in the suit nos.56/68, 55/68, 60/68 and 61/68 be declared as null and void and illegal; alternatively/and

(b) This Hon'ble Court may declare that the Judgment, Order and Decree passed in the Reg. Civil Suit Nos. 56/68, 55/68, 60/68 and 61/68 are not binding on the plaintiffs and their families and on the true original and real Mahajans of the Temple who were not parties to the suits;

(c) The defendant nos.1 and 2 be restrained permanently from allowing the persons other than the real Mahajans i.e. other than the groups of Sinai (Shenvi) Mayenkars and Porob Gaonkars, in the election of Managing Committee and from enrolling the plaintiffs in the above suits viz. Reg. Civil Suit Nos. 56/68, 55/68, 60/68 and 61/68 or their heirs in the Catalogue/bye laws;

(d) Cost be awarded to the plaintiffs;

(e) Such other reliefs this Hon'ble Court think fit and proper in the circumstances.

4. It appears that the said suit was decreed on 31/07/2006 granting a declaration that the

judgment and decree passed in Regular Civil Suit No. 55/68, 56/68, 60/68 and 61/68 is null and void and the same is not binding on the plaintiffs and their families.

5. According to the petitioner Mr. Manohar Shivram Karbotkar Gaonkar (in Writ Petition No.253/2015) they were neither parties nor were aware of the filing of the Regular Civil Suit No.54/2001/A and they came to know of the passing of the decree dated 31/07/2016 in an execution proceedings for execution of the decree passed in Regular Civil Suit No.55/1968, 56/1968, 60/1968 and 61/1968. Thereafter, the petitioners Manohar Shivram Karnotkar Gaonkar & others obtained the certified copy of the decree in Regular Civil Suit No.54/2001/A and sought to file an appeal against the same as third parties. The petitioners filed Civil Misc. Application No.187/2010 before the learned District Judge, Mapusa, purportedly under Order 41 Rule 1 of Civil Procedure Code. The learned

District Judge by an order dated 5/12/2014 dismissed the said application, holding that the said application was not maintainable as the applicants were parties in Regular Civil Suit No.54/2001/A before the Bicholim Court. After this order was passed the petitioners filed another application being Civil Misc. Application No.184/2010 for condonation of delay in filing appeal. The learned District Judge by an order dated 13/03/2015 has allowed the said application holding that the petitioners/applicants were not knowing about pendency of the Civil Suit No.54/2001 and they came to know of the said decree only on 27/08/2010. The delay has accordingly been condoned.

6. In pursuance the appeal is registered being Regular Civil Appeal No.41/2015 and is pending before the learned District Judge at Mapusa.

7. Writ petition No.526/2015 is filed by the respondents in Civil Misc. Application

No.184/2010, being aggrieved by the condonation of delay and the registration of the appeal while Writ Petition No.253/2015 is filed by the petitioners, being aggrieved by the refusal of leave to file the appeal as third parties.

8. I have heard Shri Sardessai, the learned Senior Counsel appearing for the petitioners in Writ Petition No.253/2015 and Shri A.D. Bhobe, the learned Counsel appearing for respondent no.2, who is the contesting respondent. In so far as the Writ Petition No.526/2015 is concerned the respondents no.19(a) to 19(i) are the legal representatives of the original plaintiff Shiva Yeshwant Parab Gaunkar whose interest is not adverse to the petitioner Rajesh Namdev Prabhu Gaonkar. As such, the service of notice to respondents no.19(a) to 19(i) is dispensed with and the petitions are being finally disposed off.

9. It is submitted by Shri Sardessai, the

learned Senior Counsel for the petitioners that the manner in which the defendant no.3 is described in Regular Civil Suit No.54/2001/A would clearly show that the petitioners cannot be said to be parties to the said suit, even in a representative capacity. He submits that the judgment and decree passed in Regular Civil Suit No.55/1968, 56/1968, 60/1968 and 61/1968 has been confirmed upto the Hon'ble Apex Court and, as such, could not have been declared to be null and void. It is submitted that the factum of passing of the said decree, came to the knowledge of the petitioners only on 27/08/2010 and, as such, the learned District Judge ought to have allowed the application filed under Order 41 Rule 1 CPC thereby granting leave to file appeal as third parties.

10. On the contrary, it is submitted by Shri Bhobe, the learned Counsel appearing for the respondent no.2 that Regular Civil Suit No.54/2001/A was filed and was entertained as a

representative suit. It is submitted that there are innumerable persons who may be interested and, therefore, the only recourse was to file a suit in a representative capacity. He submits that the defendant no.3 as described in the said suit, clearly included all persons who were benefited by the decree passed in the four suits and, as such, the application seeking leave to appeal as third parties was rightly dismissed. The learned Counsel further has taken exception to the order by which an application for condonation of delay came to be granted. It is submitted that once the learned District Judge had come to the conclusion that the petitioners (in Writ Petition No.253/2015) are parties to the suit, it cannot be held that they were not aware of the passing of the decree. It is submitted that such contrary findings cannot be allowed to stand and the application for condonation of delay also deserves to be dismissed.

11. In a counter reply, the learned Senior Counsel appearing for the petitioners has supported the order condoning the delay in filing appeal. He submits that passing of the decree was brought to the notice of the petitioners in execution proceedings arising out of Regular Civil Suit No.55/1968, 56/1968, 60/1968 and 61/1968 and thus the delay is rightly condoned.

12. I have given my anxious consideration to the rival circumstances and the submissions made. These petitions are a classic case where the rules of procedure which are normally supposed to be handmaid of justice, at times take precedence, over the merits of the matter.

13. The learned District Court has recorded two findings (i) that the petitioners (in WP no.253/2015) were parties to the Regular Civil Suit No.54/2001/A and (ii) however they were not aware of the judgment and decree passed

therein which they learnt only on 27/08/2016. The first finding has led to dismissal of the application under Order 41 Rule 1 of CPC, while the later has led the District Judge to condone the delay. The fact remains that an appeal filed by the petitioners (in Writ Petition No.253/2015) is already registered and is pending before the learned District Judge. It is evident that there cannot be another appeal challenging the same judgment and decree, on the premise that the petitioners were not parties to the suit and should have been allowed to file the appeal as third parties. The submission however on behalf of the petitioners is that the finding recorded by the learned District Judge that they were parties to the suit being Regular Civil Suit No.54/2001/A, would come in their way in the appeal before the learned District Judge. He submits that it is one of the principal grounds of challenge by these petitioners before the learned District Judge, namely that they were not parties to Regular Civil Suit

No.54/2001/A.

I propose to deal with aspect a little later. It is first necessary to consider the challenge on behalf of the petitioners (in Writ Petition No.526/2015) to the order condoning the delay. I have carefully gone through the said order. In para 10 of the order the learned District Judge has noticed that it was the case of the applicants (petitioners in Writ Petition No.253/2015) who were seeking condonation, that in the course of the execution proceedings before before the Administrative Tribunal, a reply was filed, wherein there was a reference to the Regular Civil Suit No.54/2001/A and the decree passed therein. The learned District Judge has thereafter considered that the application for condonation of delay was supported by an affidavit and in the absence of the reply being supported by an affidavit the allegations have gone unchallenged. The learned District Judge has also considered the effect of earlier order whereby leave was refused and it

has been held that the said order was passed only on the ground that the applicants were parties to the Regular Civil Suit No.54/2001/A in a representative capacity. It has lastly been held that they came to know of the judgment and decree in the suit only on 27/08/2010 after which the certified copy was applied on 1/09/2010 and the same was delivered on 1/09/2010. The learned District Judge has found that the appeal came to be filed within 20 days from the date of the knowledge. It can thus be seen that the the learned District Judge has exercised discretion in allowing the condonation of delay on the basis of the facts and circumstances, as borne out on record. In the absence of the said exercise of discretion being shown to be perverse or the order being shown to be suffering from any jurisdictional error, in my considered view no interference, is called for. I thus find that Writ Petition No.526/2015 is without any merit and will have to be dismissed.

14. Coming back to the finding recorded by the learned District Judge, while disallowing the leave to file appeal in the capacity of third parties, I find that this aspect can be left open to be argued by the parties and which can be decided by the learned District Judge when Regular Civil Suit No.54/2001/A is taken up for disposal. This will not only safeguard the interest of both the parties, but it will also avoid any prejudice to the parties at this stage. I have already reproduced the manner in which the defendant no.3 was described in the cause title of Regular Civil Suit no.54/2001/A and having regard to the same, I find that an arguable question, arises on the issue as to whether the petitioners in Writ Petition No.253/2015 can be said to be parties in a representative capacity in the said suit. Any finding recorded one way or the other may cause prejudice to the parties so far as merits of the appeal are concerned. In my considered view, it

would be appropriate that this is left open to be decided by the learned District Judge in accordance with law.

15. In the result, the petitions are dismissed with no order as to costs. The question whether the petitioners in Writ Petition No.253/2015 were parties to Regular Civil Suit No.54/2001/A is left open to be decided by the learned District Judge at the hearing of the appeal.

C.V. BHADANG, J.

NH