

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.635 of 2013**

1. Mr. Mohan Yeshwant Sinai Barad,
s/o. Late Shri. Yeshwant Sinai Barad,
r/o St. Lawrence, Agasaim,
Ilhas-Goa .. Petitioner

Versus

1. M/s. Dempo Properties and
Investment Pvt. Ltd. A Company
incorporated under the Companies
Act, 1956, having its registered
office at Rua Afonso Albuquerque
Road, Panaji-Goa. Represented by
its Director Shri Laxminarayan
Dempo, r/o. St. Cruz, Ilhas, Goa.
2. Sitabai Shantaram Kerkar,
(since deceased represented by)
- 2(a) Vinay Kerkar
s/o Shantaram Kerkar
age about 46 years,
Indian National,
- 2(b) Rajendra (Raju) Kerkar
s/o Shantaram Kerkar
aged about 42 years,
Indian National,
- 2(c) Prashant Kerkar
s/o Shantaram Kerkar
aged about 31 years,
Indian National,
All r/o. H.No.267,
Near Market, Agassaim,
Ilhas, Goa
- 2(d) Anandi Shinde
Widow, major of age,
Indian National,
R/o. H.No.311, Shindoli,
Sankavall, Cortalim, Goa
- 2(e) Shalini Sawant,
Major of age, Indian National,

r/o. Moira, near Sateri Temple,
Mapusa, Bardez Goa.

- 2(f) Pornima Dhamoskar,
Major of age, Indian National,
r/o. Behind Vallankini Chapel,
Village Thane, Cortalim, Goa.
- 2(g) Mr. Mohan Sawant,
Major of age, Indian National,
r/o. Moira, near Club, Moira,
Bardez Goa.
- 2(g)(i) Mrs. Shalini Mohan Sawant,
Major of age, widow,
- 2(g)(ii) Mr. Shailesh Mohan Sawant,
s/o. Mohan Sawant,
major of age, married, Indian national,
- 2(g)(iii) Mrs. Pooja Shailesh Sawant,
w/o. Shailesh Sawant
major of age, married, Indian national
All r/o. Moira, Nera Club, Moira,
Bardez, Goa.
- 2(g)(iv) Mr. Deepak Krishnanath Sawant,
major of age, married, Indian National,
- 2(g)(v) Mrs. Dixya Deepak Sawant,
major of age, married, Indian National,
both r/o. Takabandh, Cuncolim, Goa.
- 2(h) Mrs. Raghuvir Dhamoskar
Major of age, Indian National,
r/o Behind Vallankini Chapel,
Village Thane, Cortalim, Goa.
- 2(i) Mr. Shantaram Kerkar (deceased)
Major of age, Indian National
r/o. H.No.267, near Market,
Agassaim, Ilhas Goa
(Amendment carried out as per
Order dtd 19/11/15 of the
Registrar in MCA 301/14)
- 2(j) Mrs. Hema Ramesh Kerkar
w/o. Ramesh Shantaram Kerkar,
Major of age, Indian National
- 2(k) Mrs. Chaya Vinay Kerkar
w/o. Vinay Kerkar
Major of age, Indian National

2(l) Mrs. Archana Rajendra Kerkar
w/o. Rajendra Kerkar
Major of age, Indian National

2(m) Mrs. Deepa Prashant Kerkar,
w/o. Prashant Kerkar
Major of age, Indian National

2(n) Shri Vishant Shrikant Shinde,
s/o. Shrikant Shinde,
Major of age, Indian National

2(o) Shri Sameer Shrikant Shinde
s/o. Shrikant Shinde
Major of age, Indian National

2(p) Shri Sagar Shrikant Shinde
s/o Shrikant Shinde
Major of age, Indian National

2(q) Shri Sushant Vishant Shinde
s/o. Vishant Shinde
Major of age, Indian National
All r/o. Shinoli, Cortalim Goa.

3. Mr. Ramesh Shantaram Kerkar
s/o Shantaram Kerkar,
major of age, occupation
r/o. House No.267, Agasaim,
near Market, Ilhas-Goa. .. Respondents

Mr. S. Taleigaonkar, Advocate for the petitioner.

Mr. K. Padgaonkar, Advocate for the respondent No.1.

Mr. J. Simoes, Advocate for the respondent nos.2a to 2q and
respondent no.3.

CORAM :- C. V. BHADANG, J.

DATE : 16th March, 2016.

ORAL JUDGMENT :

Rule. Rule, made returnable forthwith. The learned Counsel for the respective respondents waive service of rule. Heard finally by consent of the parties.

2. The petitioner, who is the original plaintiff in Regular Civil Suit No.360/2008/A pending before the learned Civil Judge, Senior Division, Panaji, Goa had earlier approached this Court in Writ Petition No.393/2008 seeking quashing of the order of dismissal of the said suit, which was passed under Order IX, Rule 5 of C.P.C. on 09/01/2008. It appears that by an order dated 17/07/2009, the petition was allowed granting an opportunity to the petitioner to bring to the notice of the Trial Court the reasons for his failure to take steps for service of the unserved defendants against whom, the suit was dismissed. This Court also directed the petitioner to move an application before the Trial Court for issuance of fresh summons as per Order IX, Rule 5 of C.P.C.

3. It is, thereafter, that the petitioner approached the Trial Court by filing an application Exh.32, praying for issuance of fresh summons to the unserved defendants. The learned Trial Court, by an order dated 10/10/2012, has dismissed the application. The petitioner sought to file an application for review of the said order, in which there was a delay of 46 days. In such circumstances, the petitioner had prayed for

condonation of delay by filing an application at Exh.41. The learned Trial Court, by an order dated 25/06/2013, has dismissed the said application. Feeling aggrieved, the petitioner is before this Court.

4. According to the petitioner, after passing of the order dated 10/10/2012, he had approached his Advocate, who had advised and instructed him to challenge the same before this Court for which the period of limitation is 90 days. The petitioner further claimed that his advocate was under a bonafide impression that the order is required to be challenged before this Court. However, on account of prior engagement of the advocate, he could not prepare the writ petition. Some time at the end of December, 2012, the learned Advocate after going through the order dated 10/10/2012, found that an application for review could be filed, instead, as according to the learned Counsel for the petitioner, there was an error apparent on the face of record while passing the order dated 10/10/2012.

5. It is submitted that on account these circumstances, the application for review could not be filed within time and was delayed by a period of 46 days.

6. The respondent no.1, who is the only contesting party, had opposed the prayer on the ground that the application is

vague and does not make out a case for condonation of delay.

7. I have heard the learned Counsel for the petitioner and the respondent no.1 as also the learned Counsel for the respondent nos.2a to 2q and respondent no.3.

8. The learned Counsel appearing for the respondent nos.2a to 2q and respondent no.3 has submitted that the Court may pass appropriate order in the matter.

9. It is submitted by the learned Counsel for the petitioner that the application was supported by an affidavit of the concerned Counsel, which was produced before the Trial Court. It is submitted that considering the extent of delay, the same ought to have been condoned.

10. The learned Counsel for the respondent no.1 has supported the impugned order stating that no particulars of the dates, on which the petitioner was initially advised to challenge the order before this Court and subsequently, to file an application for review, are mentioned in the application. It is submitted that the learned Trial Court has rightly come to the conclusion that, in the absence of these particulars, the delay could not be condoned.

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

12. The sole ground on the basis of which the condonation of delay is sought for is that the petitioner was initially advised to challenge the order before this Court and the learned Counsel, after going through the order and the record, was of the opinion that instead, a review application could be filed as according to the learned Counsel for the petitioner, there was an error apparent on the face of the record. The application was supported by an affidavit of the concerned Counsel. The learned Trial Court has found it difficult to believe the said fact as according to the learned Trial Court, admittedly, the petitioner was earlier advised to challenge the order before this Court. The learned Trial Court has also found the decision of this Court in the case of ***Martin Kerr Roberts & Anr. Vs. Macario Antonio Francis de Cunha & Anr.***, reported in 2006(3) ALL MR 178 to be distinguishable on facts.

13. On behalf of the petitioner, reliance is placed on the decision of this Court in ***Nazmuddin Sayed Vs. Sourabha Co-op. Hsg. Society Ltd. and another***, reported in 2006(5) LJSOFT 18 and ***Mrs. Azra Akhtar Rizvi Vs. Iqbal Ahmed Sayed*** reported in 2015(8) LJSOFT 40. It is submitted that in the decision in the case of ***Nazmuddin Sayed*** (supra), this

Court had relied upon the affidavit of the Counsel appearing for the plaintiff. That was a case wherein there was delay in carrying out amendment and the Counsel had filed his own affidavit pointing out that because of pressure of work and due to inadvertence and mistake on his part, he did not inform the plaintiff that amendment is granted and has to be carried out.

14. On hearing the learned Counsel for the parties and on perusal of the record and after considering the extent of delay, I find that in the larger interest of justice, the delay deserves to be condoned.

15. In the result, rule is made absolute in terms of prayer clauses (a) and (b), with no order as to costs. It is made clear that the rival contentions of the parties in Review Application are expressly kept open.

C. V. BHADANG, J.

SMA