

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 742 OF 2016.

Mrs. Lily Coelho,
57 years of age,
Wife of Anthony Coelho,
Resident of H. No.12,
Velsao, Mormugao-Goa.

.... Petitioner

V e r s u s

1. Lumilino Gomes Costa
(since deceased through his
Legal representatives)
- (a) Dr. Bossuet Afonso,
Major of age,
1st floor, Campal Trade Centre,
Behind Military Hospital,
Campal, Panaji Goa.
- (b) Ms. Ana Afonso,
Major of age,
Jeevan Vishwas,
3rd floor, Plot no. 2,
E.D.C. Complex,
Patto, Panaji, Goa.
- (c) Mr. Paulo Afonso,
Major of age,
Resident of next to Hotel Campal,
Campal, Panaji, Goa.
- (d) Mr. Celestin Afonso,
Major of age,
Resident of next to Hotel Campal,
Campal, Panaji, Goa.
- (e) Ms. Nelly Afonso,
Major of age,

Resident of next to Hotel Campal,
Campal, Panaji, Goa.
(through POA
Ms. Ana Afonso,
Major of age,
Jeevan Vishwas,
3rd floor, Plot no. 2,
E.D.C. Complex,
Patto, Panaji-Goa.

... Respondents

Shri A. D. Bhole, Advocate for the Petitioner.

Shri Gaurish Agni with Advocate E. Usapkar, Advocate for
the Respondents.

Coram : C. V. BHADANG, J.

Reserved on : 19th September, 2016.

Pronounced on : 23rd September, 2016.

JUDGMENT:

Rule. The learned counsel for the respondents
waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated
9/6/2016 passed by the learned Adhoc District Judge-1, FTC,
South Goa at Margao in Civil Misc. Application No.171/2015,
by which a delay of 802 days in filing an appeal has been
condoned.

3. The brief facts are that the petitioner filed an application under section 7 of the Goa, Daman and Diu Agricultural Tenancy Act 1964 for a declaration that the petitioner is a tenant of the property bearing survey no. 28/0 of village Velsao. Now deceased, Lumilino Gomes Costa was the respondent in the said application. The respondents nos.1(a) to 1 (e) are the legal representatives of Mr. Lumilino Costa. Lumilino Gomes Costa, who has since expired. It appears that by an order dated 24/11/2009, the respondents were brought on record before the Mamlatdar and notices were issued to them on 25/11/2009.

4. The respondents wanted to engage Advocate M. Salkar to represent them, who informed the respondents that on account of his preoccupation before the High Court the matters before the lower court were generally conducted by his chamber colleague, Advocate Shri S. Mangueshkar, who was associated with the chamber of Advocate Salkar since 2008. Advocate Mangueshkar apart from being associated with the chamber of Advocate Salkar was also having an

independent chamber and practice. Accordingly, Advocate Mangueshkar filed vakalatnama on behalf of the respondents and he was to conduct the matter under the general supervision and guidance of Advocate Salkar. The appearance was filed on 16/12/2009. It is contended that till April 2011 the respondents were diligently represented by their advocate. In or about February 2015, the respondents learnt that Advocate Mangueshker had branched out from the office of Advocate Salkar and started an independent practice in or about May 2011. Advocate Mangueshkar had returned the brief to the office of Advocate Salkar. It is contended that there was some mis-communication between the chamber of Advocate Salkar and the respondents were not kept informed about the developments. Advocate Mangueshkar also did not bonafidely issue any notice to the respondent for withdrawal of his vaklatnama as he believed that the matter would be conducted by Advocate Salkar and the respondents would be kept informed of the development, as the matter was conducted under the supervision and guidance of Advocate Salkar. In short, on account of such mis-communication, the respondent remained unrepresented

between June 2011 to the date of the impugned order i.e 23/3/2013, on which date, the petitioner was declared as a tenant of the subject field.

5. It is contended that there is another litigation between the parties being Panchayat Appeal No.15/2014 in which the respondents had intervened on 5/2/2015 and during the course of the said panchayat proceedings they came to know about the petitioner having been declared as a tenant of the subject field.

6. Thereafter, the respondents made inquiry by visiting the office of their advocate. The case papers were not traceable in the office of Advocate Salkar and the respondents were requested to allow for some time to locate the case papers. They were advised to apply for certified copies.

7. The applicants applied for the certified copies on 8/4/2015 which were delivered on 6/5/2015. The respondents were required to wait till the re-opening of the

Court on 8/6/2015 after summer vacation. In the second week of June 2015, the respondents approached their earlier advocate, who expressed his inability to pursue the matter and advised the respondents to engage another lawyer. The respondents then contacted Advocate Menezes in the third week of June 2015 who also stated that he is not in position to take up the matter. The respondents thereafter contacted Advocate Agni who was busy with the filing of Writ Petition (Civil) no.529/2015 before the Hon'ble Supreme Court and as such was not available from 6/8/2015 to 10/8/2015. It is contended that the dispute pertaining to the proceedings before the Hon'ble Supreme Court was then required to be agitated before the High Court at Bombay by filing W.P. No.8306/2015. In short, the Advocate Agni could not take steps to finalize draft and file the appeal till 27/8/2015 on account of his preoccupation with the said matter at Bombay. Ultimately the appeal along with the application for condonation of the delay came to be filed on 1/9/2015, by which time it was delayed by 802 days. It is contended that the delay is neither intentional nor willful or deliberate. The application is supported by the Affidavit of Advocate S.

Magueshker.

8. The petitioner opposed the application. It is contended that the respondent had exhibited a careless attitude and had acted irresponsibly with deliberate gross inaction in filing the appeal within time. It is contended that valuable rights have accrued to the petitioner which cannot be disturbed lightly. The respondents have not shown sufficient cause for condonation of the delay.

9. The learned District Judge framed a solidarity point, as to whether the respondents have shown sufficient cause for condoning the delay and has answered the same in the affirmative. The learned trial Court has noticed the decision of the Supreme court in the case of **N. Balkrishan Vs. M. Krishnamurthy**, AIR (1998) 7 SC 123. The learned District Judge has found that the explanation given by the respondents does not smack of malafides or deliberate inaction. It is found that it was "due to genuine difficulties of the circumstances and the other side may be compensated with costs". Lastly it has been found that refusal to condone

'well explained delay' may result in meritorious matter being thrown out and the cause of justice being defeated.

10. I have heard Shri Bhobe, the learned counsel for the petitioner and Shri Agni, the learned counsel appearing for the respondents.

11. It is strenuously urged on behalf of the petitioner that the impugned order does not disclose any reason worth the name for condoning the delay. The learned counsel was at pains to point out that the entire reasoning is contained in para 24 of the impugned order and the same does not show that the matter has been dealt with in a judicious manner. The learned counsel submits that up to para 23 the learned District Judge has merely noticed the cases cited and the reasoning on the facts of the present case is only contained in para 24.

12. The learned counsel has placed reliance on the decision of the Supreme Court in the case of **Oil And Natural Gas Corporation Ltd. Vs. Western Geco**

International Ltd. (2014) 9 SCC 263 and a Division Bench decision of this Court on the case of **Municipal Council, Dist. Wardha & Anr. Vs. Sudhirkumar Krushnakumar Sahani** (2010) (2) ALL MR 733, in order to submit that recording of reason is the basic essential of any judicial order and in the absence of that the order would stand vitiated. Reliance is placed on the decision of this Court in the case of **Mr. Bolu Bandodkar Vs. Diana Zita Agnela D'Souza e Martyres**, in order to submit that the establishment of the sufficient cause is the *sine qua non* for condoning the delay.

13. On the contrary, the learned counsel for the respondents has placed reliance on the decision of this Court in the case of **Ashok Govind Naik Vs. Village Panchayat at Marcaim and anr.** Reliance is placed on the decision of **N. Balkrishnan (supra)**, in order to submit that where a court condones delay in positive exercise of discretion, superior court should not normally disturb the same. He submits that the respondents were unaware of the passing of the impugned order till February 2015 and had learnt about the passing of the order only during the course of the

proceedings in Panchayat Appeal No.15/2014. He submits that thereafter the respondents have taken prompt steps for filing the appeal, however on account of preoccupation of the counsel and the intervening summer vacation and the necessity of obtaining certified copies, the appeal could not be filed till 1/9/2015. It is submitted that the respondents do not stand to gain by coming late and thus the negligence cannot be said to be deliberate in nature. He submits that once the District Court has exercised the discretion in condoning the delay, this Court in the exercise of the supervisory jurisdiction may not interfere in the same.

14. I have given my anxious consideration to the rival circumstances and the submissions made. The period and the explanation for delay can be split up as under:

- (i) The petitioners had entered appearance through Advocate Mangueshker on 16/12/2009. According to the petitioners they were diligently represented in the proceedings till April 2011, as Advocate Mangeshker started an independent practice

in or about May 2011 disassociating himself from the chamber of Advocate Salkar.

(ii) From June 2011 till passing of the order by the Mamlatdar on 23/3/2013 the petitioner remained unrepresented on account of the fact that Advocate Mangueshkar had returned the brief to the chamber of Advocate Salkar and that none of these developments were informed either by Advocate Mangueshkar or Advocate Salkar to the petitioner. This part of the delay is tried to be explained on the ground of Advocate Mangueshkar having started independent practice and some communication gap.

(iii) The petitioner thus was not aware of the passing of the impugned order till February 2015 when they learnt about the same in the course of the proceedings of Panchayat Appeal No.15/2014.

(iv) The delay from February 2015 to

1/9/2015 is on account of the following:

(1) The file being not traceable in the office of Advocate Salkar

(2) The period from 8/4/2015 to 6/5/2015 being spent on account of obtaining of the certified copy.

(3) The ensuing summer vacation and the reopening of the Court on 8/6/2015.

(4) From 8.6.2015 to 1/9/2015 the petitioner having been asked by their earlier advocate and thereafter by Advocate Menezes to engage some other counsel and

(5) From 6/8/2015 to 7/8/2015 on account of preoccupation of Advocate Agni with a matter of Hon'ble Supreme Court of India and the principal seat of this Court at Bombay.

15. The principles to be followed in the matter of condonation of delay have been subject matter of several decisions and are too well settled to be restated. The real

difficulty arises in the application of these principles to the individual facts obtaining in a case. The question whether a party has made out "sufficient cause", essentially depends upon the facts and circumstances of each case. The Hon'ble Apex Court in the case of **Esha Bhattacharjee (supra)** after taking a survey of several decisions holding the field has culled out the broad principles while considering an application for condonation of the delay which have been set out by the learned Trial Court in para 23 of the impugned order. Broadly stated the Courts have to take a pragmatic and a justice oriented approach in considering the prayer for condonation of delay as the Courts are not supposed to legalize injustice but are obliged to remove injustice. There is no presumption that delay is either deliberate or negligent or out of negligence. There is a distinction between inordinate delay and delay of short duration and to the former the doctrine of prejudice would apply whereas in the case of later a more liberal approach would be warranted.

16. Coming back to the present case, the delay in the this case cannot be said to be of a short duration and thus

may not entail a liberal approach. However, that does not mean that the delay cannot be condoned at all. The question is whether the respondents have established sufficient cause for not filing the appeal within time or they have been prevented for reasons beyond their own control from filing the appeal within time. In the adversarial system which we follow, parties are represented and rely upon the advocates who represent them. The personal appearance of the parties is not necessary on all the dates of the hearing where the counsel can represent the party. In the present case, the major part of the delay is from February 2015 to 1/9/2015, when the respondents are said to have learnt about passing of the impugned order. The subsequent time taken in my considered view has been reasonably explained, namely, on account of the obtaining of the certified copy, an attempt to find a counsel who would be ready to accept the brief and lastly the preoccupation of the present counsel with some other matter from third week of July till 27/8/2015. The major part with which we should be concerned is from the passing of the order till February 2015. Here the only reason is about Advocate Magueshkar having started independent

practice and having returned the brief to the chamber of Advocate Salkar and the consequent communication gap. The application is supported by affidavit of Advocate Magueshkar. There is no reason to discard the said affidavit. The petitioner would not stand to gain by approaching the Court late and thus the delay cannot be said to be deliberate. The Hon'ble Supreme Court in the case of **Esha Bhattacharjee (supra)** has held that in the matter where the delay is of gross duration, the question of prejudice would indeed arise. In the present case the petitioner has secured an order about declaration of tenancy way back in the year 2011. Therefore the prejudice so caused has to be appropriately compensated. The prejudice on condonation of delay being granted cannot be said to be an absolute one as the petitioner would still get an opportunity to prosecute the application and establish her claim. On the contrary the respondents would be foreclosed from contesting the matter. Thus, I find that the petitioner can be adequately compensated. The costs of Rs.3000/- imposed by the learned District Judge in the circumstances would be inadequate. I find that the respondents can be made to pay

costs of Rs.20,000/- (Twenty thousand only), as condition precedent for condonation of delay.

17. It is true that reasoning is the heart and soul of any judicial order. The learned District Judge would have done well to consider the rival contentions in greater details in arriving at the conclusion. However, having regard to the discussion as above, I am not inclined to interfere with the order only on account of the absence of detailed reasoning in the impugned order. Before concluding it would be worthwhile to reproduce the observations of the Hon'ble Supreme Court in paras 9, 10 and 12 of the judgment in the case of **N. Balkrishan (supra)**.

9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain

other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and 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. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide **Shakuntala Devi Jain V. Kuntal Kumari and State of W.B v. Administrator, Howrah Municipality.**
(Emphasis supplied)

18 It can thus be seen that where the challenge is to an order by which the learned trial Court in positive exercise of discretion has condoned the delay normally the superior Court should not disturb such finding, much less in revisional or supervisory jurisdiction.

19. In the result, I am not inclined to interfere with the impugned order passed. The petition is accordingly dismissed, however, subject to the condition that the respondents shall pay costs of Rs.20,000/- to the petitioner

within a period of four weeks, as condition precedent for condonation of delay.

20. Rule is made absolute in the aforesaid terms.

C. V. BHADANG, J.

Ap/