

IN THE HIGH COURT OF BOMBAY AT GOA.**WRIT PETITION NO.829 OF 2016.**

1. Shri Vivekanand Shiva Raut
Dessai, s/o late Shiva Raut
Dessai, 65 years of age,
Resident of H. No.143, Mordy,
Asolda, Quepem-Goa.
2. Smt. Vidhyarasika Vivekanand
Raut Dessai, Wife of Shri
Vivekanand Raut Dessai, 59
years of age, Resident of H.
No. 143, Mordy, Asolda,
Quepem-Goa.
3. Shri Shrikant Shiva Raut
Dessai, Son of late Shiva Raut
Dessai, 62 years of age,
Resident of H. No. 143, Mordy,
Asolda, Quepem-Goa.
4. Mrs. Shubhangui Srikant Raut
Dessai, Wife of Shri Shrikant
Shiva Raut Dessai, 56 years of
age, Resident of H. No. 143,
Mordy, Asolda, Quepem-Goa.
5. Mr. Martinho Fernandes,
s/o Sanatano Fernandes, 51
years of age, Resident of H.
No. 357, Copremoddi, Asolda,
Quepem-Goa.
6. Mr. Lawrence Gonsalves, Son
of Mr. Minguel Gonsalves, 61
years of age, Resident of
Copremoddi, Asolda, Quepem-
Goa.

7. Mrs. Martha Mascarenhas,
Wife of Diogo Mascarenhas,
46 years of age, Resident of H.
No. 473, Cana Pulvaddo,
Benaullim, Salcete-Goa.
..... Petitioners.

V/S

1. Mr. Xavier Mascarenhas,
major of age, r/o H. No384,
Dacutolem, Assolda, Quepem-
Goa.
2. Mr. Pedro Santana
Mascarenhas alias Peter
Mascarenhas, major of age,
Resident of H. No. 378
Copremoddi, Assolda,
Quepem-Goa.
..... Respondents.

Shri A. D. Bhobe, Advocate for the petitioners.
Shri Nigel Costa Frias, Advocate for the respondents.

CORAM : F.M. REIS, J.

DATE : 28th November, 2016.

ORAL JUDGMENT

Heard Shri A. D. Bhobe, learned Counsel appearing for
the petitioners and Shri Nigel Costa Frias, learned Advocate for
the respondents.

2. Rule.

3. Heard forthwith with the consent of the learned counsel appearing for the respective parties. The learned counsel appearing for the respondents waives notice.

4. The short grievance which comes for consideration in the above petition is to the manner in which the Lower Appellate Court allowed the review petition filed by the respondent by judgment dated 21.7.2016 whereby a judgment passed on 19.1.2016 was recalled and the matter was posted for rehearing the appeal preferred by the petitioners.

5. Briefly the facts of the case to the extent required to decide the above petition are that in a suit filed by the respondents an application for temporary injunction was moved by the respondents which came to be granted by an order dated 24.4.2015. The petitioners preferred an appeal against the said order before the Lower Appellate Court which was partly heard on 31.10.2015 and the matter was thereafter posted for further arguments on 30.11.2015. Roznama records suggest that on 30.11.2015 arguments of the petitioners were concluded and in view of the absence of the learned counsel appearing for the

respondent, the matter was fixed for judgment on 19.1.2016 though giving an opportunity to the respondents to file written submissions within 15 days thereof. On 19.1.2016 the learned Counsel appearing for the respondents was present and the learned Judge proceeded to pronounce the judgment allowing the appeal preferred by the petitioners. The respondents immediately filed an application to recall the said order and sought review of the judgment on the ground that there was lapse on the part of the counsel in not examining the recordings in the roznama which led to the respondents not filing written arguments. The learned Judge by the impugned order allowed the review petition and placed the matter for hearing afresh to decide the appeal preferred by the petitioners.

6. Being aggrieved by the said order, the petitioners have preferred the above Writ Petition.

7. Mr. Bhobe, learned Counsel appearing for the petitioners submits that in the application filed by the respondents on 19.1.2016, it clearly shows that the learned Counsel appearing for the respondents had in fact taken note of the fact that the matter was fixed on 19.1.2016 after examining

the roznama entries in the file. The learned Counsel has thereafter taken me through the affidavit filed by the concerned Advocate to point out that there is a contradiction in the affidavit, as according to him, the affidavit suggest that in view of the ailment of the advocate in the afternoon session she was unable to remain present for arguments on 30.11.2015 which led to the advocate having no knowledge that the learned Judge directed that written submissions be filed within 15 days. The learned Counsel further pointed out that considering the grounds raised in the affidavit, the learned Judge is not justified to exercise discretion in favour of the respondents herein. The learned Counsel, as such, submits that the impugned order be quashed and set aside.

8. On the other hand, Shri Nigel Costa Frias, learned Counsel appearing for the respondents submits that on account of the sickness of the Advocate, which is supported by an affidavit of the concerned Advocate, it clearly shows that the absence of the Advocate on 30.11.2015 has been duly explained. The learned Counsel further points out that on account of the lapse on the part of the Advocate in examining the directions issued by the learned Judge to file written arguments, the

learned Judge proceeded to disposed off the appeal preferred by the petitioners without hearing the arguments of the respondents. The learned Counsel further points out that the order impugned is within the discretion of the Court which would not call for interference of this Court in the present Writ Petition.

9. I have duly considered the submissions of the learned Counsel and I have also gone through the records.

10. The order impugned in the present petition is in exercise of discretion by the learned Judge to advance the case of justice. The learned Judge was as such justified that the respondents had sufficient reasons to explain their absence on 30.11.2015.

11. In such circumstances, it cannot be said that the learned Lower Appellate Court has erroneously exercised discretion affecting its jurisdiction while passing the impugned order which would call for interference of this Court under Article 227 of the Constitution of India. But however, taking note of the default on the part of the respondents to remain

present on 30.11.2015 and requesting the learned Judge to adjourned the matter on the ground of the illness of the Advocate, I find that the petitioners are entitled to be compensated with costs for such lapse whilst exercising discretion in their favour. Costs are quantified at Rs.5000/- to be paid by the respondents to the petitioners within one week from today.

12. In view of the above, the petition stands disposed off by directing the respondents to pay costs of Rs.5000/- to the petitioners as condition precedent.

13. Rule stands disposed off accordingly.

F.M. REIS, J.

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