

IN THE HIGH COURT OF BOMBAY AT GOA

***SECOND APPEAL NO.50 OF 2017
WITH
CIVIL APPLICATION NO.78 OF 2017***

1. Agnelo Caetano Colaco,
aged 38 Sayers, mason, son of
Caetano Colaco and Rosa Maria Colaco,
and his wife,

2. Lucy Agnelo Colaco,
aged 30 years, housewife,
wife of Agnelo Colaco,

3. Smt. Emelia Noronha,
wife of late Custodio Noronha,
(since deceased) through her legal heirs :

3(a) Tina Noronha,
aged 34 years, daughter of late
Custodio Noronha, married,

3(b) Grasmila Noronha,
aged 41, daughter of late
Custodio Noronha,

3(c) Celina Noronha,
aged 33 years, daughter of late
Custodio Noronha,

3(d) Pobrina Noronha,
aged 38 years, daughter of late
Custodio Noronha,

3(e) Natalina Noronha, aged 39 years,
daughter of late Custodio Noronha,
All resident of H.No.438(New) &
76(old), Nagvaddo, Betalbatim,
Salcete, Goa.

..... Appellants.

Versus

1. Ernestina Pereira, (since deceased)
through her legal heirs,

2. Antonio Salvador Pereira, (since
deceased) through his legal heirs,

3. Francisco Pereira,
major in age, son of
Ernestina Pereira, and his wife;

4. Vera Lelissa Viegas Pereira,
major in age, wife of Francisco Pereira,
All residents of H.No.221/A,
Fatorda, Margao, Goa.

5. Thelma Conceicao Pereira e Salema,
major in age, daughter of late
Ernestina Pereira, and her husband,

6. Joseph Salema,
major in age, both residents of
Gonsoi, Maina, Curtorim,
Salcete, Goa.

7. Wilma Pereira e Rebello,
major in age, daughter of
late Ernestina Pereira,

and her husband,

8. Rosario Rebello,
major in age, both resident of
H.No.385, Miram, 1st Palvem,
Chinchinim, Salcete, Goa,

9. Joanita Pereira,
aged 41 years, wife of Antonio
Salvador Pereira,

10. Siana Pereira, major in age,
daughter of late Antonio Rosario
Salvador Pereira,

11. Sohail Pereira,
major in age, son of late
Antonio Rosario Salvador Pereira,

12. Salomi Pereira, major in age,
of late Antonio Rosario
Salvador Pereira,
All resident of Belsulwaddo,
St. Mathias, Divar Island, Goa.

13. Santana Noronha,
aged 40 years, service,
resident of H.No.438 (New) &
76 (old), Nagvaddo,
Betalbatim, Salcete, Goa.

..... Respondents.

Ms. A. Menezes, Advocate for the Appellants.

Mr. Shivan Desai, & Ms. Ketki Pednekar, Advocate for the Respondents No.3 & 4.

Coram : N.M. Jamdar, J.

Date : 9 November 2017.

ORAL JUDGMENT :

Notice was issued in this Appeal on 4 May 2017. The Registry has placed an endorsement on 6 November 2017 that the service is complete. Mr. Shivan Dessai appears on behalf of the Respondents No.3 and 4, the original Plaintiffs.

2. The Appeal is admitted on the following substantial question of law :

Whether the District Court was right in dismissing the First Appeal, as a consequence of dismissal of the application for condonation of delay, considering the legal position as regards Section 5 of the Limitation Act?

3. The Appeal is taken up for hearing forthwith. Filing of paper book is dispensed with.

4. The Respondents Plaintiffs filed Regular Civil Suit No. 157/2005 for recovery of possession from the Appellants Defendants. It was the case of the Respondents Plaintiffs that they are the owners of the property known as “Vatabhat/Vadabhat” surveyed under Survey No.70/0 (old), 70/1 (new), and an ancestral house bearing House No.438(New), 76 (old) bearing Survey No.70/1 (Part-A) situated at Nagwaddo, Betalbatim, Salcete, Goa. It was their case that the Appellants Defendants were allowed to occupy the suit premises graciously and since they started creating obstructions, the Respondents Plaintiffs had to seek possession of the suit premises from the Appellants Defendants. The learned Civil Judge, Junior Division, Margao accepted the contention of the Respondents Plaintiffs and by Judgment, Decree and Order dated 15 December 2014, decreed the Suit.

5. The Appellants thereafter filed a First Appeal, in the Court of Additional District Judge, Margao, along with Civil Misc. Application No. 63/2015 for condonation of delay in filing the Appeal. In the application for condonation of delay, it was stated by the Appellants that the delay is of 5 days in filing the Appeal. The Application was filed on 26 March 2015. The learned District Judge held that the delay was not 5 days, but for 51 days and no explanation was given by the Appellants, which showed negligence.

Accordingly, the learned District Judge, by an Order dated 8 December 2016 dismissed the application for condonation of delay, as a consequence the Appeal stood dismissed. Hence the Second Appeal is filed.

6. I have heard Ms. A. Menezes, learned Counsel for the Appellants and Mr. Shivan Desai, learned Counsel for the Respondents No.3 and 4.

7. The learned Counsel for the Appellants submitted that the delay is not of one month and 27 days, but it is only of 5 days and the learned District Judge has not properly appreciated the provisions of Section 5 of the Limitation Act and if the Appeal is dismissed, the Decree would be executed and grave prejudice will be caused to the Appellants. It was submitted that sufficient cause was shown. The learned Counsel for the Respondents No.3 and 4 supported the impugned order.

8. Even assuming that the delay is of 51 days, it cannot be said to be the delay of inordinate nature. The Apex Court has made a distinction between the delay of small duration and the delay of inordinate nature and has emphasized that these two types of delay warrant different approaches. If the Court finds that the delay is of

inordinate nature and thereby rights have accrued to the Respondent, then the Court is entitled to take a strict view. However, the same view is not warranted when the delay is of short duration.

9. In the present case, the Appellants were facing an eviction decree and by not condoning the delay of 51 days, even assuming it was of 51 days, right of first appeal of the Appellants was lost. It is not that in the application there was no reason given at all. I find the reason sufficient. When the delay of such a duration is under consideration, dismissing the application or allowing it without conditions, are not the only options available in law and the Court can balance equities by imposing conditions. Not considering this position has resulted in the impugned order suffering from perversity. The question of law will thus have to be answered in favour of the Appellants.

10. However, it will be appropriate that the Appellants are put to certain conditions and disposal of the Appeal is expedited.

11. Accordingly, the Second Appeal is disposed of as under :

(I) Impugned Order dated 8 December 2016 in Civil Misc. Application No.62/2015 is set aside and the Appeal filed by the

Appellants restored to file of the learned District Judge.

(II) The Appellants will pay costs of ₹ 10000/- to the Respondents No.1 and 2 within a period of two weeks from today.

(III) The learned District Judge will dispose of the Appeal within a period of three months from date the order reaches it.

(IV) If the Appeal is not disposed of within the period of three month, the learned District Judge will consider directing the Appellants to deposit a reasonable monthly sum as a compensation in the Court, subject to outcome of the Appeal.

12. The Registry to communicate this order to the learned District Judge, South Goa, Margao, at the earliest.

13. In view of the disposal of the Appeal, the Civil Application does not survive and is disposed of.

N.M. Jamdar, J.