

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 396 OF 2017**

Mrs. Karen Mc Gregor, 57 years of age,
British National, R/o The Don Inn, St. Helier
Jersey, U.K.

Presently residing at St. Paul Apartments,
Candolim, Bardez-Goa.

.... Petitioner

Versus

Mr. Jeronimo Simoes, major, R/o H. No. 904,
Camoti Vaddo, Candolim, Bardez-Goa.

.... Respondent

Shri Nigel Da Costa Frias with Ms. Laxmi Sawant, Advocates
for the Petitioner.

Shri Jaganath J. Mulgaonkar, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

Reserved on : 27th September 2017

Pronounced on : 2nd November, 2017

JUDGMENT:

Rule returnable forthwith. The learned Counsel for the respondent waives service. Heard finally by consent of parties.

2. The challenge in this petition, under Article 227 of the Constitution of India, is to order dated 14.10.2016 passed by the Executing Court in Execution Application No. 43/2009/B.

By the impugned order, the Executing Court has refused to condone delay of 715 days in filing an application for review of order dated 29.11.2013.

3. The brief facts are that the petitioner has a money decree in her favour, under which the respondent is directed to pay a sum of Rs.20,72,870/- to the petitioner. The petitioner is seeking enforcement of the said decree in the aforesaid execution proceedings. The petitioner had obtained an order 07.03.2012 for attachment of two motor boats belonging to the respondent namely 'Jaya' and 'Jerry Josephine'. In the order dated 07.03.2012, the Executing Court had *prima facie* found that the boats belong to the respondent. Subsequently, the petitioner sought sale of the two motor boats, which the learned Executing Court has refused by order dated 29.11.2013, on the ground that petitioner has not established that the motor boats belong to the respondent. It is this order of which the petitioner is seeking review of, on the ground that it is contrary to the earlier order dated 07.03.2012. There is a delay of 715 days, in filing application for review.

4. It is contended on behalf of the petitioner that the execution application was dismissed in default on 16.04.2014

and has been subsequently restored on 21.08.2015. The petitioner was then advised to seek review of order dated 29.11.2013. The petitioner accordingly filed an application for review on 16.12.2015. The application for condonation of delay came to be filed subsequently on 29.01.2016. The petitioner contended that the order dated 29.11.2013 is patently erroneous. It is contended that there are no laches or negligence on the part of the petitioner and the delay needs to be condoned.

5. The respondent opposed the application on the ground that review is not a matter of right and the petitioner has not made out “any grounds disclosing exceptional circumstances”.

6. The learned Executing Court found that it cannot go into the merits of the application for review, unless delay is condoned. It further found that the delay is not properly explained and consequently, dismissed the application.

7. I have heard Shri Costa Frias, the learned Counsel for the petitioner and Shri Mulgaonkar, the learned Counsel for the respondent. Perused record.

8. It is contended by the learned Counsel for the petitioner that the delay is occasioned, mainly due to the fact that in the interregnum the execution application was dismissed in default. It is submitted that it was restored only on 21.08.2015. The application for review was filed on 16.12.2015. As there was a delay, the application for condonation of delay was filed shortly thereafter on 29.01.2016. It is thus submitted that there is no intentional delay or laches on the part of the petitioner in seeking review of the order.

9. On the contrary, it is submitted by the learned Counsel for the respondent that there is inordinate delay in seeking review and the delay has not been properly explained. It is submitted that the manner in which the execution application has been pursued and the failure to challenge the order dated 29.11.2013, clearly demonstrates negligence and the prayer for condonation has been rightly refused.

10. I have considered the circumstances and the submissions made. In the present case, although on mathematical calculation, the delay can be said to be of 715

days, the record discloses that the execution application was dismissed in default on 16.04.2014 and was restored only on 21.08.2015. The fact that the execution application was restored would indicate that the Court had accepted the reason for failure of the petitioner to remain present on 16.04.2014 and hence, the application was restored. Undoubtedly, this pertains to the application for execution and not the review application, however it is relevant to the extent that after the execution application was dismissed in default, the petitioner cannot be said to be in a position to file the application for review till it was restored on 21.08.2015. The application for review was filed on 16.12.2015. Thus, the effective delay in filing the application for review cannot strictly be said to be 715 days, but would be much less. Be that as it may, the fact remains that for a substantial period, (out of the total period of delay), the execution application was not pending, in as much as, it was dismissed in default. It is now well settled that the Court is required to take a pragmatic view of the matter while considering the question whether, the party has made out sufficient cause for condonation of delay. Normally the Court would take a liberal view where the delay is of a short duration. As noticed earlier, the delay in the present case cannot strictly be said to be of 715 days. I find that the application for review

was filed within four months of the restoration of the execution application. It is well settled that no party stands to gain by approaching the Court late and there is no presumption that the delay is intentional. The Court would normally prefer a decision on merits than on technicality (see the case of **Collector, Land Acquisition, Anantnag & Another Vs. Mst. Katiji, (1987) 2 SCC 107**). For this reason and considering the overall circumstances of the case, in my considered view, the delay needs to be condoned. The Executing Court has not considered the fact that in the interregnum, the application for execution was dismissed in default and was restored only on 21.08.2015.

11. In the result, the following order is passed:

ORDER

- (a) The petition is allowed.
- (b) The impugned order is set aside.
- (c) The application for condonation of delay in filing the application for review is allowed.
- (d) The Executing Court shall hear and decide the application for review, on its own merits and in accordance with law.

- (e) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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