

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 540 OF 2017**

1. M/s. Mahalsa Ora Carriers,
A Partnership concern through their
Partner Shri Ramnath Mahalsekar,
Having address at Raza Plaza "B",
3rd floor, Sirvoddem,
Margao, Goa.

2. Shri Ramnath Mahalsekar,
51 years of age,
C/o M/s. Mahalsa Ore Carriers,
Sirvodem, Margao, Goa.

..... Petitioners

V e r s u s

1. Shri Sanjay Kumar Bagla,
Major of age, married, Businessman,
Proprietor of concern M/s. Raadhas,
having address at B2/F2, Milroc Woods,
Corlim, Ilhas, Goa.

2. M/s. Ratna Engineering work,
Represented by Shri Avadhut Naik,
Major of age, having their office at
MHN, 21 Orulem,
Vasco da Gama, Goa.
(As above are registered address)

..... Respondents

Mr. Ravi Gawas, Advocate for the Petitioners.
Ms. A. Kantak, Advocate for the Respondents.

Coram:- C. V. BHADANG, J.
Date:- 5th July, 2017.

ORAL JUDGMENT:

Rule made returnable forthwith. The learned counsel for the

respondents waives service. Heard finally by consent of parties.

2. By the impugned order dated 9/11/2016 the learned trial court has refused to condone the delay in filing the written statement. According to the petitioner the delay is of 38 days.

3. The learned counsel for the petitioner states that the time period as fixed in Order 8 Rule 1 is not mandatory and in the given case, the Court can condone the delay which is beyond a period of 90 days. The learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of **R.N Jadi & Brothers Vs. Subhashchandra (2007) 6 SCC 420** and the decision of this Court in the case of **Pandurang G. Naik Gaunekar & anr. Vs. Nilkant Parshuram Marathe & anr. 2014 (4) Bom. C.R. 386.**

4. The learned counsel for the respondent has strenuously urged that the delay is not of 38 days but the delay is of about 120 days. In this case the suit filed by the respondent/plaintiff was dismissed in default. In the application for condonation of delay the petitioner claimed that the suit was restored on 8/9/2015. However, the learned counsel for the respondent points out that the suit was restored on 2/7/2015. Secondly, it is submitted that the written

statement was signed and verified on 6/1/2016 although it was filed in the court only on 4/2/2016 and there is no explanation for this part of the delay. On behalf of the respondent reliance is placed on the decision of this Court in the case of **Sharma B. V. Coutinho Vs. Andre L. Fernandes and others, CDJ 2015 BHC 2447**. The learned counsel however submits that in the event this Court is inclined to condone the delay, it may be subject to costs.

5. The learned counsel for the respondent places reliance on the decision of the Hon'ble Supreme Court in the case of **Continental Transport P. Ltd Vs. ICIC Lombard General Insurance Company Ltd. CDJ 2010 SC 1348** in order to submit that it is only, in exceptional circumstances that such a delay which is beyond 90 days can be condoned. It is submitted that in the present case the delay has not been satisfactorily explained, more particularly, the delay from 6/1/2016 to 4/2/2016.

6. I have carefully considered the rival circumstances and the submissions made. In this case according to the petitioner a copy of the plaint along with the documents were supplied to the petitioner on 29/9/2015 and the written statement along with the application for condonation of delay is filed on 4/2/2016. If we calculate the period of 90 days from 29/9/2015 it would expire around 28/12/2015 and in that event, the delay may be a little over

than 30 days.

7. The Hon'ble Apex Court in the case of **Subashchandra (supra)** has held thus in paras 14 and 15 of the judgment :

“14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words “shall not be later than ninety days” but the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exception. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provisions came to be enacted, hold the same to be directory though worded in the negative form.”

It can thus be seen that as held by the Hon'ble Apex Court although power of the Court under the proviso to Rule 1 of Order 8 is couched in a mandatory form, looking to the consequences flowing from

non-extension of time the provision has to be read as directions by necessary implication. It has been held that merely, because a provision of law is couched in a negative language, implying mandatory character, the same is not without exception. The Hon'ble Supreme Court in a later decision in the case of **Continental Transport Organization P. Ltd. (supra)** and after taking a note of the decision in the case of **Subashchandra (supra)** has held that compliance with the time schedule under Order 8 Rule 1 of C.P.C. will be a rule and departure can be made for satisfactory reasons. Now, the question whether the delay has been satisfactorily explained and/or whether there are exceptional circumstances would be peculiar to the facts and circumstances of each case. In my considered view while addressing the question of condonation of delay in such a case, the well established principles for condonation of delay under section 5 of the Limitation Act, can also be called into aid. The Hon'ble Supreme Court in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & others (2013) 12 SCC 649** has inter alia held that a Court can take a liberal view in respect of delay of a short duration although a stricter approach may be required in respect of delay which is of substantial nature. In the present case as noticed earlier, if counted from the date on which the petitioner claims that the copy of the plaint and the documents were supplied, the delay would be a little over one month.

8. Taking a overall view I find that in the given circumstances the delay can be condoned subject to the condition of payment of costs. In the result, the petition is allowed. The impugned order is hereby set aside. The application for condonation of delay is hereby allowed subject to payment of costs of Rs.8000/- (Rupees Eight thousand only) to be paid to the respondent within two weeks from today. The payment of the costs is condition precedent for the delay being condoned. Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

ap/-