

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.767 of 2016**

1. Carolina D'Souza
deceased through her heirs
2. Jose Maria D'Souza, major in age,
3. Mr. Joe D'Souza, major in age
4. Smt. Piedade D'Souza, major in age
5. Smt. Rita D'Souza, major in age
All r/o Pale, Dando
Velsao, Salcete, Goa
Represented by their POA
Holder Matilda D Souza, major in age,
Resident of Velsao, Cansaulim,
Mormugao Taluka, Goa .. Petitioners

Vs.

1. Smt. Catharina Fernandes
Since deceased through their heirs
2. Smt. Paulina Fernandes, major in age
3. Andrew Fernandes, major in age
4. Mr. Vincent Fernandes, major in age
5. Mr. Emeliano Fernandes, major in age
6. Smt. Jesmina Fernandes, major in age
All residing at H. No.1187
Mazilwaddo, Benaulim,
Salcete Goa
7. Mr. Philip Fernandes, major in age
8. Smt. Luisina Fernandes, major in age
Both r/o Near Fr. Agnel Ashram,
Opposite Marcus House Matol,
Verna Salcete Goa .. Respondents.

Mr. Menino Pereira, Advocate for the petitioner.

Mr. Mahesh Amonkar, Advocate for the respondent no.6.

CORAM :- C. V. BHADANG, J.

Reserved on : 24th March, 2017

Pronounced on: 10th August, 2017

ORDER :

The challenge in this petition is to the concurrent finding of the Courts below, condoning the delay of almost 3 years 8 months and the consequent restoration of the proceedings before the Mamlatdar.

2. The brief facts are that now deceased Catherina Fernandes filed an application under Section 8A of the Goa, Daman and Diu Mundkar (Protection from Eviction) Act (Mundkar Act, for short) before the learned Joint Mamlatdar, Marmugao, for declaration as a Mundkar. That application was filed against now deceased Caroline D'Souza. The petitioners are the legal representatives of late Carolina D'Souza. The respondents are the legal representatives of original applicant Catherina. After the death of Catherina, the legal representatives were brought on record, somewhere in the year 2001. It appears that the application filed by Catherina was dismissed for non-attendance on 26/10/2004. The respondents

filed an application for condonation of delay and for restoration of the application somewhere on 19/06/2008. It was contended on behalf of the respondents that after the death of Catherina, the legal representatives were brought on record on 19/02/2001. The petitioners challenged the order bringing the LRs on record, in appeal before the learned Deputy Collector, which appeal was dismissed and the matter was to proceed further before the learned Mamlatdar. The respondents had engaged Advocate S. Bhembre from Margao, who was conducting the matter on their behalf. Further, according to the respondents, the roznama prior to 30/01/2004 shows that after receipt of the record and proceedings, the Mamlatdar issued notices. However, notice was issued in the name of the deceased respondent Catherina Fernandes and the present respondents were not aware of the proceedings. After coming to know of the dismissal of the application and after obtaining the certified copy and engaging another Counsel, the application for restoration was filed along with an application for condonation of delay. It was contended that the delay is not intentional nor out of any deliberate inaction. It was contended that the respondent nos.3 to 5, who were alone the male members in the family, were working abroad and the respondent nos.2 and 6 being ladies, could not

take steps to restore the application.

3. The application was opposed on behalf of the petitioners contending that there is gross delay in filing the application for restoration and the respondents have not made out any sufficient cause. It was contended that there is gross negligence in filing the application for restoration. It was also contended that the mundkarial house was demolished several years ago, which will show that even on merits, there is no case made out.

4. The learned Joint Mamlatdar, by an order dated 16/03/2011, condoned the delay, which is confirmed by the learned Deputy Collector and by the Administrative Tribunal. Hence, this petition.

5. I have heard Shri Menino Pereira, the learned Counsel for the petitioners and Shri Amonkar, the learned Counsel for the respondent no.6. With the assistance of the learned Counsel for the parties, I have gone through the impugned orders passed.

6. It is submitted by Shri Menino Pereira, the learned Counsel for the petitioners that there is gross and inordinate delay in seeking restoration of the proceedings and no sufficient cause is shown for condonation of delay. It is submitted that the Courts below have been swayed by the fact that the Mundkar Act is a piece of beneficial legislation. It is submitted that this cannot be the reason to condone the delay. The learned Counsel points out that where there is gross delay of the present nature, the Courts have to take a strict view and liberal view is not permissible. For this, reliance is placed on the decision of the Supreme Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others***; (2013) 12 SCC 649. Further, reliance is placed on yet another decision of the Supreme Court in the case of ***Balwant Singh Vs. Jagdish Singh and other***; (2010)8 SCC 685. It is submitted that delay cannot be condoned on equitable grounds, unless and until sufficient cause is established.

7. On the contrary, it is submitted by Shri Amonkar, the learned Counsel for the respondent no.6 that the Courts below, on consideration of the facts and circumstances of the case, have rightly exercised the discretion, in condoning the delay. It is

submitted that in the absence of the exercise of discretion, being shown to be perverse or arbitrary, no interference is called for. It is submitted that Mamlatdar, after the matter came back, had issued notice in the name of deceased Catherina Fernandes and not the respondents and as such, there is sufficient cause made out for condonation of delay.

8. I have carefully considered the rival circumstances and the submissions made.

9. The principles governing the prayer for condonation of delay, are too well settled to be restated. The Supreme Court in the case of ***Esha Bhattacharjee*** (supra), after taking a survey of several decisions on the point, have culled out the following broad principles, which are applicable while considering a prayer for condonation of delay :

21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic

and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

21.12. (xii) *The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

21.13. (xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude."*

10. The Supreme Court has added four more principles in para 22 as under:

22.1. (a) *An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.*

22.2. (b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

22.3. (c) *Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.*

22.4. (d) *The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."*

11. These are the well established principles, which are

relevant and have to be kept in mind, while appreciating the facts in each case. It is common experience that notwithstanding the fact that the principles governing such issue are well settled, the real difficulty and test lies in application of these principles to the individual facts of each case. It is obvious that the question whether sufficient cause (which is *sine qua non* for condonation of delay), is made out or not, would depend upon the facts and circumstances of each case. The Supreme Court in the case of ***Esha Bhattacharjee*** (supra), has *inter alia* held that a distinction has to be drawn between inordinate delay and delay of short duration or few days. For the former, doctrine of prejudice is attracted, which will not be applicable to the later. That apart, the former warrants strict approach, whereas the latter calls for liberal delineation. It is now well settled that the quantum of delay is not material. The Court has to look to the cause and to decide, whether sufficient cause is made out or not.

12. Coming back to the present case, it is undisputed that after the respondents were brought on record, (on the death of Catherina,) the matter had travelled in appeal to the Deputy Collector, who dismissed the appeal. It is further a matter of record that after this, the learned Mamlatdar issued notices to

the parties and such a notice was issued in the name of deceased Catherina. The judgment dated 30/07/2015 of the Deputy Collector would show that the notices were returned with the endorsement that on enquiry, Catherina Fernandes was reported to be dead and her legal heirs were stated to be residing at Betalbatim, Salcete, Goa. The respondents have made out a case that the matter was entrusted to Advocate Mr. S. Bhembre, however, as nothing transpired for a long period, they contacted the Advocate somewhere in the second fortnight of September, 2007, when it was learnt that the matter was already dismissed on 26/10/2004. They obtained the certified copies and entrusted the matter to Shri Amonkar, who on account of his preoccupation with illness of his wife (and was away at Pune), returned to Goa only in June 2008 after which, an application for restoration along with an application for condonation of delay, was filed on 19/06/2008. While considering the case for condonation of delay, the Court is not expected to take a pedantic or dogmatic view, but a pragmatic one. The requirement that each day's delay should be explained, cannot be stretched beyond reasonable limits. Considering the overall circumstances and explanation offered, I find that a case for condonation of delay is made out. The Courts below have

concurrently found that the delay deserves to be condoned and in the absence of any perversity in the said order, no interference is called for.

13. In the case of **Balwant Singh** (supra), there was a delay of 778 days in bringing the LR's of the appellant on record. On facts, the Supreme Court found that the applicants were totally callous in pursuing the appeal and had acted irresponsibly and with negligence. The Supreme Court also found that the applicant had not approached the Court with clean hands and as such, were not entitled to the exercise of discretionary power for condonation of delay. It can, thus, be seen that the said case turned on its own facts.

14. There is one more reason why I am not inclined to interfere. It is now well settled that the extraordinary jurisdiction under Article 227 of the Constitution of India, is aimed at ensuring that the subordinate Courts and Tribunals act within bounds of their authority and the orders passed, do not result into manifest injustice. Thus, unless and until it is shown that the order challenged is perverse and which results into manifest injustice, no interference is called for. (See **Shalini**

Shyam Shetty Vs. Rajendra Shankar Patil; (2010)8 SCC 329). In the present case, the petitioners would get an opportunity to contest the application before the Mamlatdar, if the orders are maintained. Thus, it cannot be said that the impugned order results into manifest injustice.

15. The petition is without any merit and it is, accordingly, dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA