

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1093 OF 2016**

1. Mr. Ian McIntosh, aged 65 years, son of Mr. Donald McIntosh, British National, holder of Passport bearing No.650335211. Last known to have resided at Flat 7, Longford Wharf, Stephenson Road, Stretford, Greater Manchester M320SS, United Kingdom and last known to be employed at Longford Ehart Management Ltd., Flat 8, Longford Wharf Stephenson Road, Stretford, Manchester, Greater Manchester, M 32 OSS, United Kingdom. Through duly constituted Power of Attorney, Shri Sushilkumar Mallik, major of age, resident of Sankwadi, Arpora, Bardez-Goa.

2. Surinder K. Khosla, aged 68 years, proprietor of Maizons Lakeview Resorts, 502/1, Sankwadi, Arpora, Bardez, Goa.

.... Petitioners

Versus

1. Mr. Santan Jovito Monteiro, son of late Mr. Tonio Lourdes Monteiro, aged about 61 years, married, service and his wife.
2. Mrs. Joy Monteiro, daughter of late Mr. Joseph Paes, aged about 61 years, married, housewife.
Both Indian Nationals and residents of Flat No. F-3, Shiv Smruti Apartments, Feira Alta, Mapusa, Bardez, Goa.

The Respondent No.1 is represented herein by his duly constituted attorney, the Respondent No.2, vide Power of Attorney dated 27/07/2002.

3. Mrs. Vervan Jane McIntosh, daughter of Mr. Ronaldo William Derrick, major of age, British National, holder of Passport bearing No.103494069. Last known to have resided at Flat 7, Longford Wharf, Stephenson Road, Stretford, Greater Manchester M320SS, United Kingdom and last known to be employed at Longford Ehart Management Ltd., Flat 8, Longford Wharf Stephenson Road, Stretford, Manchester, Greater Manchester, M 32 OSS, United Kingdom.

.... Respondents

Mrs. Anarkali Agni, Senior Advocate with Ms. Aditi Kamat, Advocate for the Petitioners.

Shri Valmiki Menezes with Shri Akshay Shirodkar, Advocates for Respondent Nos.1 and 2.

CORAM:- C. V. BHADANG, J.

DATE:- 1st FEBRUARY, 2017

ORAL JUDGMENT:

Rule made returnable forthwith. Mr. Menezes, the learned Counsel for respondent nos.1 and 2, waives service. Heard finally by consent of parties.

2. I have heard Mrs. Agni, the learned Senior Counsel for the petitioners and Shri Menezes, the learned Counsel for the contesting respondent nos.1 and 2. Respondent no.3, who is the wife of petitioner no.1, is not a contesting party. As such, service of notice on respondent no.3 is dispensed with.

3. The petitioners have suffered an ex-parte decree. The petitioners filed Civil Miscellaneous Application No. 123/2016/F, for condonation of delay in filing an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (CPC, for short). At this stage, it is necessary to note that although, the prayers in the application are not happily worded, the fact remains that, in substance, the petitioners are seeking condonation of delay in filing the application for setting aside the ex-parte decree.

4. The learned Senior Counsel for the petitioners, on instructions, states that Civil Miscellaneous Application No. 123/2016/F is accompanied by an application under Order IX, Rule 13 of CPC, which is filed on the same day. She pointed out that the grounds for condonation of delay and the grounds for setting

aside the ex-parte decree, are same. It is pointed out that Advocate Ms. Bakal had sought time, which the learned Trial Court had declined to grant and the learned Trial Court dismissed the application for condonation of delay.

5. Shri Menezes, the learned Counsel for respondent nos.1 and 2, in all fairness states that in the event, this Court is inclined to restore the application for condonation of delay back to the file, the Trial Court may be directed to hear both the applications together.

6. Normally, unless the application for condonation of delay is allowed, the application for setting aside the ex-parte decree cannot be taken up for consideration. However, the learned Counsel for the parties, in this case, point out that the grounds seeking condonation of delay and the grounds on which, the petitioner is seeking setting aside the ex-parte decree, are same and the finding, accepting or rejecting the ground in the application for condonation of delay, will have a bearing on the application for setting aside the ex-parte decree. In the peculiar

facts and circumstances of the case and on account of the concession, I find that the Trial Court may hear both the applications together. It is evident that the need to consider the application for setting aside the ex-parte decree, would arise only in the event, the Trial Court is inclined to condone the delay. It is made clear that this Court has not expressed any opinion on merits of either of the applications.

7. In such circumstances, the petition is disposed of by consent of parties, in the following terms:

- (a) The petition is allowed.
- (b) The impugned order is hereby set aside.
- (c) Civil Miscellaneous Application No. 123/2016/F, is restored back to the file.
- (d) The learned Trial Court shall decide the application for condonation of delay alongwith the application for setting aside the ex-parte decree, on their own merits and in accordance with law.
- (e) The learned Trial Court shall decide the application/s, within a period of six weeks from

today.

(f) Parties to appear before the Trial Court on 6th February, 2017 at 10:00 a.m.

(g) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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