

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.592 of 2018**

Mr. Mariano Mesquita,
son of Marcal alias Joao Paulo
Mesquita, aged 63 years,
resident of House No.105,
Naquelim, Chicalim-Goa.

.. Petitioner

Vs.

1. Mr. Selva Raju Nadar,
son of Madaswamy Nadar,
age 55 years, resident of
C/o Prabhakar Raikar, Flat
No.F-1, Solitaire Apts., Gawli
Waddo, Opp. PWD, Fatorda,
Goa and his wife,
2. Smt. Pushpa Nadar,
w/o Mr. Selva Raju Nadar,
aged 51 years, resident of
C/o Prabhakar Raikar,
Flat No.F-1, Solitaire Apts.,
Gawli Waddo, Opp. PWD,
Fatorda, Goa
3. Shri Mahesh Vinayak Nadar,
s/o Selva Raju Nadar,
aged 30 years, resident of
C/o Prabhakar Raikar,
Flat No.F-1, Solitaire Apts.,
Gawli Waddo, Opp. PWD,
Fatorda, Goa
4. Mr. Dinesh Nadar,
s/o Selva Raju Nadar,
aged 30 years, resident of
C/o Prabhakar Raikar,
Flat No.F-1, Solitaire Apts.,
Gawli Waddo, Opp. PWD,
Fatorda, Goa
5. Shri Mohammed Shaikh,
s/o Shaikh Abdul Rehman,

aged 50 years, resident of
82/3, Indona, Davorlim,
Salcete- Goa.

6. Mrs. Aurora Fenandes e Mesquita,
wife of Mariano Mesquita,
aged 52 years, resident of House
No.105, Naquelim, Chicalim-Goa.
7. Mr. Andrew Mesquita,
son of Marcel alias Joao Paulo
Mesquita, aged 65 years,
resident of House No.121/1,
Naquelim, Chicalim-Goa.
8. Mrs. Angelica Mesquita,
Wife of Andrew Mesquita,
aged 60 years, resident of House
No.121/1, Naquelim, Chicalim-Goa
9. Mr. Jose Caetan Mesquita,
son of Marcal alias Joao Paulo Mesquita,
aged 58 years, resident of House
No.105/B, Naquelim, Chicalim-Goa.
10. Mrs. Bela Mesquita,
wife of Mr. Jose Caetan Mesquita,
aged 47 years, resident of House No.105/B
Naquelim, Chicalim-Goa.
11. Mr. Manuel Mesquita,
Son of Marcal alias Joao Paulo Mesquita,
aged 56 years, resident of House
No.112/B, Naquelim, Chicalim-Goa.
12. Mrs. Idalina Mesquita,
wife of Mr. Manuel Mesquita,
aged 51 years, resident of House No.
112/B, Naquelim, Chicalim-Goa.
13. Mrs. Joana Mesquita,
daughter of Marcal alias Joao
Paulo Mesquita, aged 68 years,
resident of House No.164/A,
Penta, Chicalim, Goa and her husband,

14. Mr. Alber Fernandes,
Son of Domingos Fernandes,
Aged 75 years, resident of House
No.164/A, Penta, Chicalim, Goa
 15. Mrs. Leonara Costa,
daughter of Marcal alias Joao Paulo
Mesquita, aged 52 years, resident
of House No.118/1, Naquelim,
Chicalim-Goa
 16. Mr. Rosario Costa,
son of Sebasiao Costa,
aged 54 years, resident of House
No.118/1, Naquelim,
Chicalim-Goa.
 17. Mrs. Lourdina Mesquita,
daughter of Marcal alias Joao Paulo
Mesquita, aged 60 years, resident
of House No.112/A, Chicalim,
Goa.
 18. Smt. Joaquina Mesquita,
wife of late Marcl alias Joao Paulo
Mesquita, aged 87 years, resident
of House No.105, Naquelim,
Chicalim-Goa.
- .. Respondents

Shri S. G. Dessai, Senior Advocate with Ms. Shalaka Shelke,
Advocate for the petitioner.

Shri Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar,
Advocate for the respondent nos.1 to 5.

CORAM :- C. V. BHADANG, J.

Date : 31st July, 2018

ORAL JUDGMENT :

Rule, made returnable forthwith. Ms. Palyekar, the
learned Counsel for the respondent nos.1 to 5 waives service.

Heard finally by consent of parties.

2. The petitioner, who is defendant no.1 in Regular Civil Suit no.23/2017/A, in the Court of Senior Civil Judge, Vasco, is challenging a common order dated 23/02/2018 below Exhibits D-14 and D-15, by which the learned Trial Court has refused to condone the delay in filing the Written Statement, as a result of which, the Written Statement has not been taken on record.

3. The respondent nos.1 to 5 have filed the aforesaid suit against the petitioner and the rest of the respondents, in which the petitioner filed an application Exh.D-9 for rejection of plaint under Order VII, Rule 11 of CPC. That application was filed on 05/06/2017 and it came to be dismissed on 27/10/2017. A perusal of the order sheet dated 27/10/2017 clearly shows that after dismissal of the application Exh.9, the suit was posted for filing of Written Statement on 15/11/2017. On that day, the petitioner filed an application Exh.D-14 for extension of time to file Written Statement by four weeks. After the application Exh.D-14 was filed, the record shows that the Trial Court had fixed the matter on 06/12/2017 for hearing on application at Exh.14, which was then adjourned to 10/01/2018. On 10/01/2018, the petitioner filed an application Exh.D-15 for condonation of delay in filing the Written

Statement. Both these applications were posted to 12/02/2018, on which day, the learned Trial Court heard the arguments and the matter was posted for orders on Exhibits D-14 and D-15 on 23/02/2018, on which date, both these applications came to be dismissed. Hence, this petition.

4. I have heard Shri Dessai, the learned Senior Counsel for the petitioner and Shri Usgaonkar, the learned Senior Counsel for the respondent nos.1 to 5. Perused record.

5. It is submitted by the learned Senior Counsel for the petitioner that after dismissal of the application Exh.D-9, the suit was in fact posted for filing of the Written Statement and as such, the period during which the application Exh.D-9 was pending, cannot be looked into to say that there was any delay on the part of the petitioner. The learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of **Kailash Vs. Nanhku and others**; (2005)4 SCC 480 and **R. N. Jadi and Brothers Vs. Subhashchandra**; (2007)6 SCC 420 and **Sandeep Thapar Vs. SME Technologies Private Ltd**; (2014)2 SCC 302, in order to submit that the provisions of Order VIII, Rule 1 of CPC have been held to be directory. It is submitted that the object of Order VIII, Rule 1 of CPC is to expedite the trial of the suit and in

an appropriate case, it does not prevent the Trial Court from condoning the delay and extending time to file the Written Statement.

6. On the contrary, it is submitted by Shri Usgaonkar, the learned Senior Counsel for the respondent nos.1 to 5 that the application Exh.D-9 under Order VII, Rule 11 of CPC, was itself filed after a period of 85 days of the receipt of the summons. It is further submitted that the petitioners have filed previous suit against the respondent nos.1 to 5. As such, the petitioners were aware of the nature of the dispute and the documents relied upon. It is submitted that the ground shown for seeking extension of time to the effect that there were voluminous documents to be looked into, thus, cannot be accepted. It is further submitted that even on the saying of the petitioner, the marriage of his son was fixed on 07/01/2018 and as such, could not have prevented the petitioner from filing the Written Statement in November, 2017.

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

8. It is now well settled that the provisions of Order VIII, Rule 1 of CPC are directory in nature and are part of processual

law and the said provision does not specifically take away the power of the Court to take the Written Statement on record, although filed beyond the time, as provided. (See para 27 of the judgment in the case of **Kailash** (supra)). A similar view has been expressed by the Hon'ble Supreme Court in the subsequent decisions in the case of **R. N. Jodi and Brothers** and **Sandeep Thapar** (supra). Thus, the provisions by itself do not impinge upon the power of the Court to extend the time in appropriate cases.

9. Coming to the present case, admittedly, the application for rejection of plaint was pending from 05/06/2017 to 27/10/2017. On 27/10/2017, the Trial Court had fixed the matter to 15/11/2017, for filing of the Written Statement. It is further apparent from the record that the application Exh.D-14, which was filed on 15/11/2017 and another application Exh.D-15, which was filed on 10/01/2018 were decided by the impugned order on 23/02/2018. The record further discloses that the application Exh.D-15 is accompanied by the Written Statement. Thus, considering the overall circumstances, I find it appropriate to allow the petitioner to produce the Written Statement on record. It is trite that the Court would normally prefer a decision on merits than on technicality. In my considered view, the applications Exhibits D-

14 and D-15 can be allowed, subject to costs of Rs.10,000/-. In the result, the following order is passed :

ORDER

- (i) The petition is allowed.
- (ii) The impugned order dated 23/02/2018 is hereby set aside.
- (iii) Applications Exhibits D-14 and D-15 are allowed, subject to costs of Rs.10,000/- to be paid/deposited before the Trial Court within two weeks from today.
- (iv) The payment/ deposit of the costs, before the Trial Court within two weeks, is the condition precedent for setting aside the impugned order. On deposit of the costs, the Written Statement shall be taken on record.
- (v) Rule is made absolute in the aforesaid terms.

C. V. BHADANG, J.

SMA