

IN THE HIGH COURT OF BOMBAY AT GOA**Writ Petition No.849/2016**

MR.BHARAT NAIK AND ANR.

PETITIONERS

VERSUS

MR.SADANAND NAIK AND 24 OTHERS.

RESPONDENTS.

Mr.Prasheen Lotlikar, Advocate for the Petitioners.

Ms.S.G.Gracias, Advocate h/f.Mr. J.Godinho, Advocate for Respondent no.1.

Mr.Kisan Padgaonkar, Advocate for Respondent nos.14 to 21.

CORAM : PRITHVIRAJ K.CHAVAN, J.**ORDER RESERVED ON : 22.12.2017****ORDER PRONOUNCED ON :10/01/2018.****ORDER:**

1. The challenge in this petition is to the order dated 6.4.2016 passed by Civil Judge, Jr.Dn.Panaji Goa dismissing the application for condonation of delay in filing an application for restoration of suit, which came to be dismissed in default on 30.11.2011.

2. A suit for partition was filed by the petitioners bearing No.149/2010/D against the respondents in the Court of Civil Judge, Jr.Dn.Panaji. The suit was fixed for taking steps to serve defendant nos.24 and 25. The petitioners had engaged Mr. Vivek Rodrigues, as their

counsel and his junior Mr. Benedito Fernandes, Advocate was attending the hearing of the said case.

3. On 15.7.2011 junior Advocate of Mr. Rodrigues reached late in the Court and by that time, next date of hearing was already given. The junior Advocate thereafter left the office of Advocate Rodrigues. The matter thereafter came to be adjourned on 14.9.2011, 25.11.2011 and 30.11.2011. As such, on 30.11.2011 the matter was dismissed in default for non-appearance of the Advocate of the petitioners.

4. On 25.1.2012, petitioner no.1 who hails from Mumbai came to Goa to inquire about the status of his case and realised that his matter was dismissed in default due to non-appearance of the Advocate. The petitioners' counsel, therefore, applied for a certified copy of the order on 7.2.2012. In the same month, the counsel applied for restoration of the suit, *inter alia* moved an application for condonation of delay. However, the petitioners' affidavit could not be sworn, as the petitioners had to leave for Mumbai for some urgent work. In the month of February 2012 itself the affidavits were duly sworn at Mumbai and

were sent to Goa for filing in the Court. However, the copies of affidavits were misplaced in the office of the counsel for the petitioners. The petitioners came to know about it when he arrived at Goa in the month of December 2012. Thereafter on 11.12.2012 the petitioners through his counsel filed an application for restoration with application for condonation of delay.

5. Heard Shri Lotlikar, learned counsel for the petitioners.

6. The learned counsel appearing for respondent nos.14 to 21 has no objection in allowing the petition. None appeared on behalf of respondent nos.2 to 20 though duly served.

7. It is argued by the learned counsel for the petitioners that the impugned order dated 6.4.2016 is erroneous and has been passed without application of mind by the learned trial Court and without considering the various pronouncements of the Supreme Court and this Court wherein a very pragmatic and liberal approach needs to be taken while exercising discretion in

entertaining an application for condonation of delay. The learned counsel would submit that it was the negligence and carelessness of the counsel appearing for the petitioners for which a litigant should not suffer. There was a delay of 376 days, which the petitioners sought to condone. The learned counsel further submits that it being a suit for partition, there is always a recurring cause of action and, therefore, the impugned order needs to be set aside. In support, the learned counsel has placed reliance on ruling of this Court reported in **2015 (1) ALL MR 278 (Laxmanrao Mahadeo Nikose Vs. Narayan Mahadeo Nikose)**. The learned counsel submits that the petitioners are ready to pay costs.

8. On the other hand, the learned counsel for respondent no.1 drew my attention to the various dates from which, according to the learned counsel, it was not only the counsel but the petitioners were also negligent and careless in diligently attending the Court or moving an application for condonation of delay.

9. Undisputedly, the petitioners are residents of Dombiwali Maharashtra and, therefore, they were not

expected to attend the Court on each and every date in the State of Goa especially when the matter was entrusted by them to their Advocate Mr. Rodrigues. It appears that the junior Advocate had noted the next date of hearing on 14.9.2011. However, he could not communicate the same to the Advocate Rodrigues and left his office. Due to the said reasons, it appears that Advocate Rodrigues lost track of the suit and, therefore, the matter was adjourned to 25.11.2011 and again within a short span i.e. on 30.11.2011 when it came to be dismissed. It being a suit for partition, as rightly argued by the learned counsel that there is recurring cause of action and, therefore, the learned trial Court ought to have considered this aspect. Be that as it may.

10. It appears that when the petitioner no.1 came to Goa on 25.11.2012 and approached Advocate Rodrigues, he came to know about the dismissal of the suit on 30.11.2011. It is apparent from the record that the learned counsel for the petitioners had applied for certified copy on 7.2.2012 which was ready on 09.02.2012 and was collected on 13.2.2012. There is no substantial gap and, therefore, it cannot be said that the

learned counsel was negligent or careless in applying for certified copy and getting the same on 13.2.2012. After drafting an application for restoration and condonation of delay, the petitioners had to leave for Bombay for some urgent work and, therefore, he could not swear an affidavit. However, in the month of February 2012 itself copies of the affidavit were sent to the petitioners at his Mumbai address and were thereafter sent back to the Advocate after signing and making solemn affirmation.

11. It has been settled by a catena of decisions that the principles applicable to the application for condonation of delay needs to be adhered to, in view of the judgment of the Supreme Court reported in **2013 (12) SCC 649 (Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others)** wherein it is laid down thus:

"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.

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.

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

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.

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

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.

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

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.

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.

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”.

12. The learned trial Court, though has reiterated all these principles in the impugned order, has failed to take a liberal, pragmatic and justice oriented non-pedantic approach while dealing with the application for condonation of delay.

13. The discussion hereinabove clearly indicates “sufficient cause” shown by the petitioners for the delay. It being a suit for partition, it is necessary to see that substantial justice is required to be given due importance than technical consideration. Even otherwise, the petitioners themselves being plaintiffs would not derive any benefit in allowing the suit to be dismissed and, therefore, no malafides can be attributed to the petitioners.

14. Having taken into consideration the aforesaid principles laid down by the Supreme Court, the prayer of the Petitioners needs to be granted.

15. As such, the petition is allowed. The order dated 6.4.2016 passed by the Civil Judge, Jr. Dn. Panjai Goa bearing C.M.A.No.39/2012/D in R.C.S.NO.149/2010/D is set aside and the delay stands condoned. The learned trial Court shall decide the application for restoration of suit, on its own merits, uninfluenced by the observations made herein above. The parties shall appear before the trial Court on 22.1.2018 at 10.00 a.m. In the circumstances, there is no order as to costs.

PRITHVIRAJ K.CHAVAN, J.

mukund