

IN THE HIGH COURT OF BOMBAY AT GOA**Writ Petition No.83/2013**

Mr. MINGUEL CAETANO LOBO,
(Since Deceased through his legal heirs)

1. Mrs. Maria Aspulqueta Lobo,
Widow of late Mr. Minguel Caetano Lobo,
71 years of age, Indian National,
Agriculturist, R/o House No.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.
2. Mr. Diogo Joao Lobo,
Son of late Shri.Minguel C.Lobo,
Agriculturist,
Age 46 years, Married, Indian National,
and his wife;
3. Mrs. Maria Loretta Lobo,
Age 40 years, wife of Mr. Diogo Lobo,
Indian National, Agriculturist,
Both residing at House no.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.
4. Mr. Xavir Lobo,
Son of late Shri. Minguel C.Lobo,
Age 40 years, Married, Indian National,
Agriculturist, and his wife;
5. Mrs. Jennifer Glafia Lobo,
Age 38 years, wife of Mr. Xavier Lobo,
Indian National, Agriculturist,
Both residing at House no.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.
6. Mr. Saito Lobo,
Son of late Shri.Minguel C.Lobo,
Agriculturist, Age 37 years,
Married, Indian National, and his wife;
7. Mrs. Luisa Selvistina Lobo,
Age 28 years, wife of Mr. Sunny Lobo,

Indian National, Agriculturist,
Both residing at House no.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.

PETITIONERS

(Petitioner No.1,2,3,5,6,7 are
represented by duly constituted Attorney
Mr. Xavier Lobo Petitioner no.4.)

VERSUS

Mr. LUIS RUDOLF FIALHO,
(Since deceased, through his Legal Heirs)

1. Wing Commander Desmond Desiderio Fialho,
2. Francies Ruth Fialho,
3. Melville Joseph Fialho,
4. Marian Mathilda Fialho,
5. Pamela Catherine Kenyon,
6. Malcom Joseph Fialho

(All above are major in Age)

The Respondent No.2 to 6 are represented
By their duly constituted Attorney
Mr. Desmond Fialho,
R/o 235, Defence Colony,
Alto-Porvorium, Bardez-Goa.

7. Mr. Smogling Lobo,
Son of late Mr. Minguel Caetano Lobo,
43 years of age, Married, Indian National,
R/o Tokyo Japan;
8. Mrs. Christalina Lobo,
Wife of Mr. Smogling Lobo,
37 years of age, Indian National,
R/o Tokyo Japan.
9. Mrs. Rosaline Lobo,

Wife of late Mr. Nery Lobo,
46 years of age, Indian National,
R/o House no.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.

10. Miss Rubecca Lobo,
Daughter of late Mr. Nery Lobo,
23 years of age, Indian National,
R/o House no.7/175/A,
Sauntawaddo, Calangute,
Bardez-Goa.

RESPONDENTS

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Mr. R.J. Pinto, Advocate for the Petitioners.
None for the respondents.

CORAM : PRITHVIRAJ K.CHAVAN, J.
JUDGMENT RESERVED ON :05/01/2018.
JUDGMENT PRONOUNCED ON :08/02/2018.

JUDGMENT :

1. The petitioners, who are the original defendants, in Special Civil Suit No.70/1997/B have invoked jurisdiction of this Court under Article 227 of the Constitution of India challenging an order dated 14.12.2011 passed by the Civil Judge, Senior Division, Mapusa by which the trial Court had rejected an application for condonation of delay vis-a-vis an application for setting aside an ex parte decree passed by the said Court.

2. The respondents-plaintiffs have filed suit for

demolition, possession, injunction and mesne profits against the petitioners in respect of the suit property described in the plaint. The petitioners are the legal heirs of deceased Minguel Caetano Lobo, who was the original defendant. Respondents no.1 to 6 are the original plaintiffs and the respondents no.7 to 10 are the legal heirs of deceased Minguel Caetano Lobo.

3. In the said suit, an application for temporary injunction was filed bearing no.CMA/119/97/SR/I. Minguel Caetano Lobo through his power of attorney namely petitioner no.1 resisted the suit and the application for temporary injunction on various grounds by filing written statement, inter alia, raising an issue of jurisdiction, as a stand was taken by Minguel Caetano Lobo that he being a Mundkar of the suit house and an agricultural tenant of the suit property, the Civil Court has no jurisdiction. While rejecting the application for temporary injunction on 30.11.2001, it was inter alia observed by the trial Court that the plaintiffs failed to make out a prima facie case and since the deceased therein raised an issue of Mundkarial, the application came to be rejected.

4. It is the contention of the petitioners that their Advocate had wrongly advised petitioner no.1, who was the power of attorney holder of Minguel Caetano Lobo that the proceedings before the Court of Civil Judge, Senior Division has come to an end and she shall not bother to attend the Court further. As such, petitioner no.1 was, therefore, unaware of further proceedings which were in progress in Special Civil Suit No.70/1997/B, as there was no communication with the Advocate on record. Since an Advocate appearing for Minguel Caetano Lobo had stopped appearing before the trial Court and even did not withdrew her Vakalatnama, the trial Court decreed the suit ex parte on 15.5.2003 instead of making referral to the Mamlatdar in the light of the fact that the petitioners had raised an issue of Mundkar in the light of Section 58 (2) read with Sections 16 and 18 of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 and Section 32 read with Section 19 of Goa Mundkars (Protection from Eviction) Act, 1975.

5. The respondents thereafter filed an Execution Application on 1.8.2008 for execution of ex parte judgment and decree dated 15.5.2003. It is stated that

the defendant was attempted to be served on the address where he does not reside and for that reason the notice issued to the defendant/judgment-debtor returned unserved in Execution Application bearing no.18/2008/B. When the defendant came to know from a third person that a Court Official was looking out for a person having similar name as that of the defendant in the neighbouring ward of Sauntavaddo, Calangute-Bardez, Goa where the defendant actually resides in House no.7/175/A which is within the knowledge of the plaintiff, the defendant's power of attorney made necessary inquiries and located the file in the trial Court in the form of Execution Application No.18/2008/B.

6. When the defendant's power of attorney approached the Advocate on record, he retaliated and asked the power of attorney to get out from his office. The defendant was 79 years old and his power of attorney was 71 years old when they got the knowledge of the Execution Application. Both of them had several health problems. As the advocate appearing for the defendant's power of attorney did not respond or gave advise, the defendant's power of attorney approached Advocate

V.Foneseca on 1.7.2009. Thereafter she applied for certified copies of all the documents on 2.7.2009. As such, it was for the first time, the defendant came to know about the ex parte judgment and decree on 1.7.2009.

7. On 4.8.2009 the trial court had passed an order directing the defendants-petitioners to vacate and handover the possession of the suit structure and suit property to the plaintiffs-respondents by demolishing the suit structure. On 18.8.2009 an application under Order IX Rule 13 of the Code of Civil Procedure was filed by the petitioners along with an application for condonation of delay. By the impugned order dated 14.12.2011 the learned Civil Judge Senior Division dismissed the application for condonation of delay as well as the application for setting aside ex parte judgment and decree.

8. I have heard Shri Pinto, learned counsel for the petitioners.

9. While exercising jurisdiction under Article 227

of the Constitution of India, the object of superintendence under the said Article, both administrative and judicial is to be kept in mind, in the sense, to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. It has been a settled position of law that in exercise of jurisdiction under Article 227 of the Constitution of India, the High Court can set aside or reverse finding of inferior Court or Tribunal only in a case where there is no evidence or where no reasonable person could possibly have come to the conclusion which the Court or Tribunal has come to. Except to this, "limited extent" the High Court has no jurisdiction to interfere with the findings of fact exercised under this Article which must be restricted to grave dereliction of duty and flagrant abuse of fundamental principles of law and justice.

10. After going through the record and hearing the learned counsel for the petitioners, I do not find any such grave dereliction of duty and flagrant abuse of fundamental principles of law and justice in the order impugned. Moreover, an equally efficacious remedy was available to the petitioners under Order 43 Rule 1 (d) of

the Code of Civil Procedure by which an order under Rule 13 of Order IX CPC rejecting an application for an order to set aside a decree passed *ex parte* was available.

11. It can be seen from the application under Order IX Rule 13 of CPC dated 18.8.2009 that the petitioners appeared and filed written statement on 5.10.1998 itself. The plaintiffs' application therein bearing CMA no.119/1997/SR/I came to be rejected, which was also within the knowledge of the petitioners. It appears that the petitioners presumed that by virtue of the order dated 30.11.2001 passed by the trial Court in CMA No.119/1997/SR/I that the matter had been fully and finally decided. It is not the contention of the petitioners that their Advocate informed them about the said fact. The application further reveals that the petitioners or their attorney were unaware about further proceedings and there was no further communication between the petitioners and their Advocate. The petitioners presumed that the Advocate on record ceased to attend further hearings. This itself shows that the petitioners were not at all diligent and consequently there was no sufficient cause for their non-appearance when the matter

proceeded ex parte against them. The petitioners had sufficient notice about pendency of the suit and they had sufficient time also to appear before the trial Court. The application also does not disclose as to when and on what date the petitioners or their attorney become aware about the proceedings of the Special Civil Suit in their absence and even there is no mention as to by whom they were informed that a Court Official was looking out for a person having the same name as that of petitioners in another ward of *Maddowaddo, Calangute*. The learned trial Court has correctly observed that the petitioners had failed to establish sufficient cause, more particularly in the light of the fact that the decree was passed on 15.3.2003 and the application for setting aside was filed after a long period of six years. The plea of ignorance or negligence on the part of the Advocate, would not stand to reason in view of the fact, as stated above, that it were the petitioners who themselves presumed that the matter has been finally concluded and did not bother to establish contact with the Advocate.

12. As already stated above, this is not an Appellate or Revisional Court to go into the factual aspects as

regards the alleged improper service upon the petitioners as to whether he is a resident of *Sauntavaddo* or *Cobrawado*.

13. The learned counsel for the petitioners has placed reliance on the following authorities :

(i) In the case of **N.Balakrishnan V. Krishnamurthy (AIR 1998 SC 3222)** while disposing of the appeals, the Hon'ble Supreme Court condoned the delay under Section 5 of Limitation Act by stating that there was sufficient cause. There was 883 days in filing application for condonation of delay. It was caused due to failure of an Advocate to inform the appellant as well as failure to take action.

(ii) **Bhagmal and Ors. Vs. Kunwar Lal and Ors (AIR 2010 SC 2991)**. In the said appeal also the delay was condoned because the appellant bonafidely believed the assurance given in the compromise panchanama that respondent/plaintiff would get his suit withdrawn or dismissed and the appellant did not appear in the Court for further proceedings. An application under Order IX Rule 13 CPC was moved within 30 days from the knowledge of decree.

(iii) Similar is the ratio laid down by the Hon'ble Supreme Court in the case of **Rafiq and another Vs. Munshilal and another [AIR 1981 SC 1400 (1)]** .

14. There can be no dispute as regards the ratio laid down by the Hon'ble Supreme Court in the authorities cited supra. However, in the present case, as already stated hereinabove, in view of limited jurisdiction of this Court under Article 227 of Constitution of India and also in the light of the fact that equally efficacious remedy was available to the petitioners, I do not find any reason to interfere with the impugned order.

15. Consequently, the petition stands dismissed.

PRITHVIRAJ K.CHAVAN, J.

16. The learned counsel for the petitioners, at this stage, prays for extending stay to the Execution Application No.18/2008/B pending on the file of Civil Judge Senior Division, Mapusa, as the petitioners seek to challenge the order before the Supreme Court.

17. In the interest of justice, execution proceedings which were stayed by order dated 27.11.2013 by this Court stands extended for a period of seven weeks.

PRITHVIRAJ K.CHAVAN, J.

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