

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 862 OF 2015**

MAURICE CILANOVA DOMINGOS
BAPTISTA PINTO ANTONIO BAPTISTA
PINTO (DECEASED) AND 2 ORS., ... PETITIONERS
Versus
ASHLEY DEVELOPERS PVT. LTD.,
REPRESENTED ATTORNEY, PARTICIA
NORONHA., ... RESPONDENT

Shri Ashwin D. Bhobe, Advocate for the Petitioners.

CORAM : C.V. BHADANG, J.

Date : 26th MARCH 2018

ORAL ORDER:

The challenge in this petition is to the judgment and order dated 31.03.2015, passed by the learned Adhoc District Judge at Mapusa in Miscellaneous Civil Appeal No. 14/2012. By the impugned judgment, the learned District Judge, has set aside the order passed by the learned Trial Court, refusing to condone the delay in filing an application for restoration of the suit. The net result is that the suit filed by the respondent stands restored.

2. The brief facts are that the respondent-Ashley Developers Private Limited had filed Special Civil Suit No. 111/1999/B for specific performance of the contract and some other reliefs. That suit was filed before the learned Civil Judge Senior Division at Mapusa. The said suit came to be dismissed in default on 04.12.2004. The respondent filed an application for

restoration of the suit, along with an application for condonation of delay on 14.02.2006. The learned Trial Court dismissed the application for condonation of delay by order dated 23.06.2011. The respondent challenged the same before the learned District Judge and the learned District Judge by order dated 31.03.2015, has allowed the appeal, restoring the suit to file.

3. I have heard Shri Bhobe, the learned Counsel for the petitioners. None appears for the respondent.

4. It is submitted by Shri Bhobe, the learned Counsel for the petitioners that the Trial Court had rightly dismissed the application for condonation of delay, as sufficient cause was not shown by the respondent, for not filing the application for restoration, within time. It is submitted that the Appellate Court could not have interfered with the said order. The learned Counsel submitted that the ground about Mrs. Irene D'Souza being required to go through various unfortunate incidents, on the death of her husband, Mr. Ashley D'Souza are prior to the dismissal of the suit and thus, the learned District Judge was in error in holding that sufficient cause for not filing the application within time is made out. Secondly, it is submitted that an appeal before the learned District Judge was not maintainable. Except this, there are no other contentions raised.

5. I have considered the circumstances and the submissions made. I would first deal with the second contention about the maintainability of the appeal. Shri Bhobe, the learned Counsel for the petitioners, in all fairness, did not dispute that this ground was not raised before the learned Appellate Court. Be that as it may, an order dismissing a suit in default is a 'decree' within the meaning of Section 2(2) of the Code of Civil Procedure (CPC, for short). Such an order would be amenable to a regular appeal under Order XLI, Rule 1 of CPC. However, the order which was challenged before the learned District Judge was the one refusing to condone delay in filing an application for restoration. That application is relatable to the provisions of Order IX, Rule 9 of the Code. An appeal under Order XLIII, Rule 1(c) of the Code, lies against an order under Order IX, Rule 9 of the Code, rejecting an application (in a case open to appeal) to set aside the dismissal of the suit.

6. It can thus clearly be seen that an order rejecting an application for restoration of the suit, filed under Order IX, Rule 9 of the Code, is appealable under Order XLIII, Rule 1(c) of the Code. It is now well settled that where the Court refuses to condone the delay in filing any appeal or an application, the net result is dismissal of the appeal itself. Applying the said analogy, the order rejecting condonation of delay in filing an

application under Order IX, Rule 9 of the Code would in effect result into the dismissal of the said application, which would be amenable to an appeal. In that view of the matter, I do not find that the contention of non maintainability of the appeal can be accepted.

7. Coming to the merits, it was contended on behalf of the respondent that they came to know, for the first time, about the dismissal of the suit on 01.02.2006, when they came across the notice of Advocate B.D. Nazareth in daily 'Navhind Times' on 28.01.2006, mentioning that the clients of Advocate Nazareth were intending to purchase the property, which was subject matter of dispute. It has come on record that the respondent was represented by Advocate S. Braganza before the Trial Court. On 13.06.2003, the said Advocate had submitted that he would withdraw the Vakalatnama by issuing legal notice and thereafter did not remain present. The learned District Judge has noticed that the certificate as per Order V, Rule 17 of the Code shows that the Bailiff had affixed the notice on the main door of the house, however, there was no house number mentioned in the said report, nor there were any witnesses before whom such affixation was made. It can thus be seen that the service of the notice has not been established on record.

8. It has also not been shown, as to whether, the Trial Court had passed any formal order, permitting discharge of Advocate Braganza. Normally, a party cannot be made to suffer for the lapse on the part of the Counsel. For this reason alone, the respondent was entitled to an order for condonation of delay and the consequent restoration of the suit. In any event, in the absence of it being shown that the notice seeking withdrawal of appearance, issued by Advocate S. Braganza, was properly served on the respondent and that Advocate Braganza was discharged by a formal order, the absence of the respondent at the trial, cannot be said to be deliberate or out of any negligence.

9. For the aforesaid reasons, the discretion exercised by the learned District Judge in condoning the delay and directing restoration of the suit, cannot be said to be perverse, so as to require interference in the supervisory jurisdiction of this Court.

In the result, the petition is dismissed with no order as to costs.

C.V. BHADANG, J.

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