

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.125 of 2017**

India Maria Matildes De Souza
daughter of the late Mr. Vincent
Machado, aged about 50 years,
Married, housewife, Indian
National, Residing at A-47,
Ambhekhan, Reis Magos,
Verem, Bardez, Goa- 403 114. .. Appellant

V/s

1. Agnelo Gustavo De Souza
Son of the late Mr. Jose Caridade
de Souza, Aged about 52 years,
Married, business, Indian
National, Residing at A-47,
Ambhekhan Reis Magos,
Verem, Bardez Goa - 403 114;
(Deceased)
- 1(a) Brandon Gustavo De Souza
Son of late Agnelo Gustavo de
Souza, Aged 18 years, Indian,
R/o A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114;
- 1(b) Megan Aramita De Souza
Daughter of late Agnelo Gustavo
de Souza, Aged 16 years, Indian,
Through her legal guardian & mother,
Mrs. India Maria Matildes De Souza,
R/o A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114.
(Amendment carried out in terms
Order dt. 28/03/2018 in MCA
No.11 of 2018)
- 1(b) Megan Aramita De Souza
Daughter of late Agnelo Gustavo
de Souza, Aged 16 years, Indian,
Through her guardian ad litem,
Brandon Gustavo De Souza,
R/o A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114.

(Corrected cause title in view of
Order dated 25/04/18 passed in
MCA No.338 of 2018.)

2. Luis Bernardo de Souza
Son of the late Mr. Caridade
de Souza,
Aged about 53 years, married,
service, Indian National, Residing
at A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114;
3. Zarina Maggie D'Souza
Wife of Luis Bernardo de Souza
Aged about 46 years, married,
Indian National, Residing
at A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114;
4. Joyce D'Souza E Sequeira
Daughter of late Jose Caridade
de Souza, Aged about 49 years,
married, Indian National, Residing
at A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114;
5. Julius Benedict Sequeira
Aged about 58 years, married,
Indian National, Residing
at A-47, Ambhekhan Reis Magos,
Verem, Bardez, Goa - 403 114;
6. Sheela Fernandes,
Daughter of the late Jose Caridade
De Souza, Aged 44 years, married,
Indian national, 384, Taunt Vaddo,
Reis Magos, Verem, Bardez
Goa- 403 114
7. Lawrence Fernandes,
Aged 52 years, married, Indian
National, residing at 384,
Taunt Vaddo, Reis Magos,
Verem, Bardez Goa- 403 114. .. Respondents

Shri Raunaq Rao, Advocate for the appellant.

Shri A. F. Diniz and Shri Ryan Menezes, Advocates for the respondent no.6.

CORAM :- C. V. BHADANG, J.

Reserved on : 6th July, 2018

Pronounced on : 9th July, 2018

JUDGMENT :

The appellant is the original interested party no.1 before the Inventory Court, in Regular Inventory Proceedings No.68/2015, which were decided by the Inventory Court on 12/04/2017. According to the appellant, she could not apply for the certified copy of the judgment, as it was informed that the Trial Court has not yet drawn the decree in terms of the provisions of Section 442 of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 (the Act, for short). Ultimately, the applicant applied for a certified copy of the judgment on 22/06/2017. The date given by the Trial Court to collect the copy was 27/06/2017. However, the appellant was issued with a certified copy of the judgment on 23/06/2017 itself. On 27/06/2017, the appellant filed an application for obtaining certified copy of the decree, however, the appellant was again told that the decree is not drawn. The appellant, therefore, filed an appeal, before the learned District Judge on 28/06/2017. The

appeal was accompanied by an application for condonation of delay of 69 days.

2. According to the appellant, the application for condonation of delay was filed “out of abundant caution”. It was also contended that due to financial difficulties, the appellant could not visit the office of the Trial Court repeatedly to check as to whether the decree was drawn or not and delay, if any, was unintentional and on account of financial constraints. The appellant, therefore, sought condonation of delay in filing the appeal.

3. The application was opposed on behalf of the respondents on the ground that no sufficient cause is shown for condoning the delay.

4. The learned District Judge, by the impugned order dated 22/09/2017, has dismissed the application for condonation of delay on the ground that the applicant has not made out sufficient cause for condoning the same. As dismissal of the application for condonation of delay, in effect amounts to the confirmation of the judgment and order, passed by the Inventory Court on merits, the appellant has approached this Court in the present Second Appeal.

5. I have heard Shri Rao, the learned Counsel for the appellant and Shri Diniz, the learned Counsel for the contesting respondent no.6. With the assistance of the learned Counsel for the parties, I have perused the record and gone through the impugned order passed by the learned District Judge.

6. The appellant had initially framed the following draft substantial questions of law in para 2 of the appeal memo :

I. Whether the approach of the First Appellate Court in dealing with the application of the Appellant under section 5 of the Limitation Act to seek condonation of delay in filing the said appeal was in accordance with law while construing whether or not the appellant had not disclosed sufficient cause to explain the delay in filing of the said first appeal ?

II. Whether the First Appellate Court erred in dismissing the appeal as barred by limitation, though the delay for sufficient cause was explained in terms of Section 5 of Limitation Act and the law laid down by the Hon'ble Supreme Court of India in that regard?

III. Whether the appeal against the Impugned Judgment dated 12/04/2017 was barred by limitation ?

IV. Whether the period of limitation would commence

from the date of drawing of the decree as mandated in terms of Section 442 of the Goa Succession, Special Notaries and Inventory Act, 2012?

V. Whether the findings reached by both the Courts below are perverse inasmuch as they are not germane or relevant or are extraneous to the fundamental issues?

VI. Any other substantial question of law that may be raised with the leave of the Court?"

7. On 21/06/2018, the appellant has furnished the following additional draft substantial questions of law :

"VII. Whether the Ld. Trial Court wrongly placed reliance on the ratio laid down by this Hon'ble High Court in the case of Ranjit Satardekar Vs. Clothildes Fernandes (A.O.18 of 2006) when the same was not at all applicable to the facts presented in the instant proceedings?

VIII. Whether Art. 1117 of the Portuguese Civil Code, 1867 cannot be said to remain in operation, so as to enable the husband to manage/ administer the wife/s rights to the property after such wife has been divorced by way of a judicial order?

IX. Whether Art. 1189 of the Portuguese Civil Code, 1867 can be said to remain in operation, so as to enable the

husband to manage/ administer the wife's rights to the property after such wife has been divorced by way of a judicial order?

X. Whether a divorced wife be compulsorily required to seek substitution of consent in terms of Art.1193 (Para Sole) notwithstanding a judicial divorce from such husband?

XI. Whether an exclusion can be carved out in the term "heir" contained in Art.1412 interpreting the same in a manner so as to exclude a divorced spouse. Moreover, when the estate *inter se* has not been partitioned in consequence of the divorce?

8. It may be mentioned that although the learned Counsel for the appellant had furnished the additional substantial questions of law, which impinge upon the merits of the order passed by the Inventory Court and had advanced some submissions on the same, at a later point. he submits that the submissions are restricted to the substantial questions of law as originally framed, which are on the point of condonation of delay alone.

9. In such circumstances, this Court is confining the consideration to the substantial questions of law as framed on the point of limitation.

10. It is submitted by the learned Counsel for the appellant that the Court is required to take a liberal view while condoning the delay in as much as the adjudication of the dispute on merits has to be preferred than one on technicality. It is submitted that the appellant is a divorced wife of one of the interested parties and looking to financial constraint and further having regard to the fact that the decree in the Inventory Proceedings was not drawn, she could not file an application for certified copy within time, as a result of which, there was a delay of 69 days in filing the appeal. It is submitted that the delay cannot be said to be of a gross nature, in which case, the Court has to take a liberal view while condoning the delay. The learned Counsel has referred to a Bombay Amendment to Rule 1 of Order XLI of CPC, in order to submit that the appeal has to be accompanied by a copy of the decree appealed from. It is, thus, submitted that the appellant was precluded from filing the appeal in the absence of the certified copy of the decree (which was not drawn by the Inventory Court). He, therefore, submits that there is sufficient cause made out for condoning the delay. On behalf of the appellant, reliance is placed on the decision of this Court in the case of **Sonerao Patil Vs. Godawaribai Laxmansingh Gahirewar and others**; AIR 1999 Bombay 235, **Suresh Ramnani Vs. Aurelia Ana da Piedade**

Miranada (W. P.No.381/2007, decided on 18/10/2010), **Suresh Ramnani Vs. Aurelia Ana da Piedade Miranada** (S. A. No.81/2011, decided on 02/03/2012) and **Smt. Shewantabai Vs. Purushottam** (S.A. No.128/2013, decided on 03/02/2014). Reliance is also placed on the decision of the Supreme Court in the case of **S. V. Matha Prasad Vs. Lalchand Meghraj and Ors**; AIR 2007 SC (Supp) 241, in order to submit that this is a fit case for condonation of delay.

11. On the contrary, it is submitted by Shri Diniz, the learned Counsel for the respondent no.6 that the appellant has not acted diligently and has failed to establish sufficient cause, which is the condition precedent for condonation of delay. It is submitted that the application for certified copy itself was filed after a period of 75 days and thus, no case for condonation of delay is made out. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Ajit Singh Thakur Singh Vs. State of Gujarat**, 1981(1) SCC 495, in order to submit that when a party allows the limitation to expire, and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstances arising before the limitation period expired, the party was precluded from filing appeal within time. It is submitted that any event or the

circumstances arising after the expiry of the period of limitation can not be taken into consideration while condoning the delay. Reliance is also placed on the decision of the Supreme Court in the case of ***Pundlik Jalam Patil (D) by Lrs. Vs. Executive Engineer, Jalgaon Medium Project & Anr***; 2008(17)SCC 448 and the decision of this Court in the case of ***Shri Victor Albuquerque Vs. Saraswat Co-operative Bank Ltd and Ors***; 1998(3) BCR 93, ***Joao Fernandes Vs. Francisco Jacques*** (W.P. No.285/2013, decided on 20/06/2013), ***Tukaram P. Sawant Vs. Parvati V. Sawant and others***; (W.P. No.656/2017, decided on 20/11/2017), in order to submit that the appellant having failed to show sufficient cause for reasons, which have arisen during the period of limitation, is not entitled to condonation of delay. The learned Counsel has pointed out that under Rule 1 of Order XLI of CPC, as amended with effect from 01/07/2002 (Act 46 of 1999), the filing of the decree is not now the requirement. It is submitted that the said amendment is subsequent to the Bombay amendment, which is of the year 1987 and thus, the amendment with effect from 01/07/2002 would prevail. It is pointed out that the appellant in fact filed the appeal without a decree and thus, the contention that she was prevented from filing the appeal for want of certified copy of the decree, cannot be accepted.

12. I have given my anxious consideration to the rival circumstances and the submissions made.

13. The law relating to condonation of delay is too well settled to be restated. The difficulty arises in applying the principles, which are otherwise well settled to the individual facts and circumstances of each case. It is necessary to emphasize that the question whether the party seeking condonation has made out sufficient cause, has to be considered in the facts and circumstances of each case. Coming to the present case, the appellant has set out two grounds for not filing the appeal within time. Firstly, it is contended that as the decree was not ready and drawn by the Inventory Court, a certified copy of the same could not be applied for. Secondly, it is contended that on account of financial constraints, the appellant was prevented from filing the appeal within time. In fact, the second ground is connected with first ground in as much as it is contended that the appellant could not repeatedly visit the Inventory Court to ascertain whether the decree is drawn or not. There is a Bombay amendment to Order XLI, Rule 1, which is of the year 1987, which says that the appeal has to be accompanied by a copy of the decree appealed from (and unless the Appellate Court dispenses therewith of the judgment) on which it is founded. Subsequently, there is a central

amendment to Rule 1 of Order XLI of CPC, which says that the memorandum of appeal shall be accompanied by a copy of the judgment. Thus, by the central amendment, the requirement of the memorandum of appeal accompanying the copy of the decree, has been done away with. Without laying down any binding precedent or expressing a conclusive opinion, it does appear that the central amendment being subsequent to the amendment of the year 1987, would prevail and thus, there is no need that the memorandum of appeal shall be accompanied by a copy of the decree appealed from. Even assuming that the copy of the decree was required to be filed along with the memorandum of appeal, on facts, the case made out by the appellant, to my mind, cannot be accepted for more reasons than one. Firstly, even assuming that the appellant was apprised that the Inventory Court has not drawn a formal decree, nothing prevented the appellant from filing an application for the certified copy of the decree. After the judgment was passed in the Inventory Proceedings, drawing of the decree is a ministerial act, which is essentially to be performed by the office of the Inventory Court and that does not prevent a party from applying for the certified copy even of a decree. For the purposes of illustration, let's take a case, where the operative part of the judgment is pronounced. However, the signed copy is not ready. This would not prevent the party from applying for the

certified copy of the judgment. In other words, once the judgment is delivered and pronounced, the party can always file an application for certified copy of the judgment as well as of the decree notwithstanding that the decree is not formally drawn. Secondly, the record shows that the appellant indeed filed the appeal along with an application for condonation of delay without annexing the copy of the decree. Thus, if the appellant could file the appeal on 28/06/2017 without a certified copy of the decree, it is difficult to accept that the appellant could not have done so within a period of limitation for want of certified copy of the decree.

14. The Hon'ble Supreme Court in the case of **Ajit Singh** (supra) has *inter alia*, held that a party is entitled to wait until the last date of filing of an appeal. However, when the party allows the limitation to expire and pleads sufficient cause for not filing the appeal earlier, sufficient cause must establish that because of some event or circumstances arising before the limitation expired, it was not possible for the party to file the appeal within time. In the present case, the appellant was interested party no.1 before the Inventory Court. It is not the case made out that the petitioner was unaware of the delivery of the judgment in the Inventory Proceedings on 12/04/2017. Thus, on the very date on which the

judgment was delivered, the appellant had knowledge about the disposal of the Inventory Proceedings. The application for certified copy of the judgment was filed on 22/06/2017 and for the certified copy of the decree on 27/06/2017. Even when the appellant filed an application on 22/06/2017, she only sought the certified copy of the judgment. It is evident that the said application could well have been filed within a period of limitation as the judgment was already delivered. Looking from any angle, it cannot be accepted that the appellant, on account of the fact that the decree was not drawn, was prevented from applying the certified copy of the decree or from filing the appeal as claimed.

15. In the case of **Victor Albuquerque** (supra), the condonation of delay was sought on the ground that talks of compromise were going on and only after they failed that the appeal was filed as per the advice of the Counsel. This Court found that the talks of compromise having been initiated after the limitation had expired, was not sufficient ground to condone the delay.

16. In the case of **Joao Fernandes** (supra), the impugned order was passed on 25/04/2011, nevertheless the certified copy was applied for on 25/07/2011. Thus, the application for certified copy was itself filed much beyond the period prescribed for filing

an appeal and there was no explanation for this part of the delay. In such circumstances, this Court found that the delay could not have been condoned and had set aside the order condoning the delay. It was contended on behalf of the appellant that the case of **Joao Fernandes** (supra) arose out of the application for condonation of delay in filing the appeal challenging the order of temporary injunction unlike in the present case, where the final judgment passed in Inventory Proceedings is sought to be challenged. I am afraid the decision cannot be distinguished on any such ground. The principles would not depend on, as to whether the appeal challenges the interim order or a final judgment and decree.

17. In the case of **Sonerao Patil** (supra), the original defendant nos.2 and 3 intended to challenge the ex-parte decree, in which there was delay of 104 days. The condonation of delay was sought on the basis of compromise between these defendants and the husband of one Godawaribai, which compromise was arrived at on 17/08/1984. Although the terms of the compromise were reduced into writing, they were not filed before the Court as the husband of Godawaribai did not take any steps and, therefore, the delay was occasioned. It is not very clear from the judgment whether the certified copy itself was applied for after the expiry of

the period of limitation as in the present case. Furthermore, as there was ex-parte decree, no knowledge could have been foisted on the defendant nos.2 and 3 about passing of the decree on the date of the passing of the same unlike in the present case.

18. There cannot be any manner of dispute that the prayer for condonation of delay has to be considered liberally. However, at the same time, the existence and the establishment of a sufficient cause is *sine qua non* for an order of condonation of delay. In my considered view, the cases relied upon on behalf of the appellant, turned on their own facts. Principally on the ground that the appellant had applied for certified copy after the period of limitation and reason for which it is claimed that the application was not made (on the ground that the decree was not prepared) not being acceptable, I do not find that any exception can be taken to the findings of the First Appellate Court. The second appeal does not raise any substantial question of law. Accordingly, the appeal is dismissed, with no order as to costs.

C. V. BHADANG, J.

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