

IN THE HIGH COURT OF BOMBAY AT GOA**MISC. CIVIL APPLICATION NO.313 OF 2011****IN****STAMP NUMBER MAIN NO.192 OF 2011**

Shri Paulo Pereira (since dec.) through LR's Applicants
V/s

Shri Joao Francisco dos
Milagres Rodrigues & Ors.Respondents

Shri Rohit Bras De Sa with Ms. V. Shet, Advocate for the
Applicants.

Shri Sudesh Usgaonkar with Ms. R. Pereira, Advocate for the
Respondents No.5(a) to 5(f) & 6.

CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved on : 19th September, 2019

Pronounced on : 20th September, 2019

ORDER :

By this application under Section 5 of the Indian Limitation Act, the appellant who was original plaintiff seeks condonation of delay of about 7 years which has occurred in preferring the Second Appeal mainly on the ground of his old age and sufferings from mental disease.

2. Facts germane for decision of the present application are as follows:

The District Judge, South Goa, Margao in Regular Civil Appeal No.79/2002 passed the impugned judgment and decree dated 06/03/2004 against a judgment and decree dated 06/03/2002 passed by Civil Judge Junior Division, Margao in Regular Civil Suit No.217/89.

3. The applicant contends that during the course of hearing of Regular Civil Appeal No.79/2002 and sometime thereafter he suffered mental illness and it was found that he was of unsound mind. In view of his mental infirmity the applicant became incapable of protecting his interest and suing and being sued. The Second Appeal came to be filed by his daughter and next friend Mrs. Pedrina D'Mello, whose affidavit is also annexed herein. It is submitted that Mrs. Pedrina D'Mello, though daughter of the applicant, has no interest in the matter in controversy in the suit adverse to that of the applicant and that she is fit to be appointed as his next friend.

4. It is the contention of the applicant that he was aged

about 75 years at the time of the impugned judgment and decree passed by the District Court. Because of unsoundness of his mind, he could not contact his advocate for preferring a Second Appeal before this Court. Apart from mental disease, it is contended that the applicant had also suffered from other serious ailments such as right shoulder dislocation, parietal SDH chronic, H/o vomiting, H/o fall, H/o dislocation of shoulder, etc. He was under the treatment of Directorate of Health Services, ODP, Goa Medical College, Bambolim and also Grace Intensive Cardiac Care Centre and General Hospital. Undisputably, the applicant died on 15/06/2012.

5. For the reasons aforesaid, it is submitted that such a long delay had occurred which was unintentional and bonafide. It is, therefore, prayed that the said delay be condoned, which had occasioned on account of the unfortunate facts as stated in the application. The applicant has tendered certain documents on record in order to substantiate his contention in support of condoning the delay.

6. The contesting respondent no.5(a), in his reply, strongly objected to condone the delay by stating that it is an inordinate, inexcusable and negligent delay of 7 years under the pretext of the false ground of unsoundness of mind for which there is no authentic evidence on record. It is stated that a false ground of alleged unsoundness of mind has been raised by filing a false application of appointment of a guardian with the false hope that if that succeeds then the application for condonation of delay based on the same grounds is bound to succeed.

7. It is stated that applicant was a person of sound mind, though old in age, as is evident from the impugned judgment, wherein there is an observation that he attended all the hearings before the Trial Court. He was habituated in pretending to be sick to avoid stepping into the witness box at the time of evidence before the Trial Court.

8. The respondent has denied all the averments in the application as regards the unsoundness of mind as well as the

mental disease of the applicant. The respondent has, therefore, prayed for dismissal of the application.

9. Shri Rohit Bras De Sa, the learned Counsel for the applicant, at the outset, submits that there is no dispute about the medical certificates produced on record indicating the mental state or the ailments of the applicant. He submits that along with the memo of appeal an application under Order 32 Rule 15 of the Code of Civil Procedure has also been filed to protect the interest of the applicant. Though the learned Counsel for the applicant fairly concedes about the long and inordinate delay, yet, it is vehemently urged to condone the same as the applicants' valuable rights with respect to the suit property are required to be adjudicated upon in view of the substantial questions of law which are involved in the present dispute.

10. Per contra, Shri Usgaonkar, the learned Counsel for the respondent, reiterated the fact that false pretext of 'unsound mind' and mental illness as well as application under Order 32 Rule 15

have been raised only to come out of the bar of limitation. The learned Counsel has also raised objections as to the genuineness of the medical certificates tendered on record in support of the ailments of the applicant.

11. It is brought to my notice that the impugned judgment came to be delivered on 06/03/2004. An application for obtaining certified copy was made on 21/01/2009 i.e. almost after 5 years. Even after receiving the certified copy on 31/01/2009, the appeal came to be filed in the month of January, 2011 i.e. almost after two years. It is also brought to my notice that the medical certificate dated 14/11/2005 is after one and half years after the period of limitation.

12. Shri Usgaonkar has further submitted that none of the medical certificates indicate mental incapacity of the applicant or about his mental health, so as to say that there was a memory loss or he was suffering from Parkinson disease or that he was in a state of coma. Therefore, the reasons put forth by the applicant

cannot be said to be a genuine and cannot be construed as 'sufficient cause' for condoning the delay.

13. Having considered the respective submissions at bar and after going through the application, affidavit and the documents on record, I am of the considered view that even if there is an inordinate delay of 7 years, it needs to be condoned in the interest of justice for the reasons to follow.

14. The law on the point of condonation of delay is no more res integra in view of the various pronouncements of the Hon'ble Supreme Court. The latest one can be referred from the judgment of the Hon'ble Supreme Court in case of *Ummer V/s. Pottengal Subida & Ors. (Civil Appeal Nos.2599-2600 of 2018)*. The Hon'ble Supreme Court has condoned the delay of 554 days. It would be apposite to refer paras 15 to 19 of the said judgment in order to consider the ratio laid down by the Supreme Court. Paras 15 to 19 read thus :

“15. It is not in dispute that the appellant is an old man and in his late sixties. It is also not in dispute

that he did suffer heart disease during the relevant period and later he was down with dengue fever. It is also not in dispute that he was hospitalized to get medical treatment for these two ailments for a long time during that period. It is also not in dispute that he was mentally disturbed due to disputes going on in his family and was not able to attend to his day-to-day duties due to his old age and prolonged ailments.

16. It is an admitted fact that the High Court did not dispute the genuineness of these facts and nor disputed the genuineness of the documents filed by the appellant in support of the cause pleaded. On the other hand, the High Court found as a fact that the appellant did suffer these ailments.

17. In the light of the aforementioned undisputed facts, in our opinion, the High Court should have taken liberal view in the matter and held the cause shown by the appellant as "sufficient cause" within the meaning of Section 5 of the Limitation Act and accordingly should have condoned the delay in filing the appeal.

18. One cannot now dispute the legal proposition that the earlier view of this Court that the appellant was required to explain the delay of each day till the date of filing the appeal has since been diluted by the later decisions of this Court and is, therefore, held as no longer good law.

19. In our considered opinion, having regard to the totality of the facts and circumstances of the case and the cause shown by the appellant, which is duly proved by the documents, we are inclined to hold that the cause shown by the appellant for condoning the delay in filing the appeal before the High Court was/is a sufficient cause within the meaning of Section 5 of the Limitation Act and, therefore, the application filed by the appellant for

condonation of delay of 554 days in filing the appeal deserves to be condoned. It is accordingly condoned but it is subject to the condition that the appellant shall pay cost of Rs.10,000/- to respondent No. 1.”

15. In the case at hand, it is not in dispute that the appellant was of 75 years age at the time of the impugned judgment and decree dated 06/03/2004. It is also not a disputed fact that medical certificate dated 14/11/2005 which came to be issued by a Radiologist, Victor Hospitals & Medical Services Pvt. Ltd., Margao, Goa, indicate that after having CT scanned the brain of the applicant, it was noticed that the right sided subdural hematoma as described above with mid line shifted to the left.

16. A certificate issued by Grace Intensive Cardiac Care Centre & General Hospital dated 14/11/2005, depicts the normal functioning of the gall bladder, spleen, pancreas and kidneys as well as bladder of the applicant, yet, it cannot be said that because these organs were functioning normally, the applicant was in a fit state of his mind, in view of the certificate dated 14/11/2005

issued by a radiologist.

17. The Director of Health Services, Department of Radiology, which is a Government hospital, has issued a certificate dated 23/08/2010. After conducting CT scan of the brain, the radiologist opined that there is a cerebral atrophy. It is apparent from the record that within a year or so after the impugned judgment and decree was passed by the District Judge, the applicant who was then aged about 75 years had suffered some serious ailment of brain which, per se, may not result in the unsoundness of his mind, yet it will have an impact on his overall health, which can definitely be said to be sufficient cause for condoning the delay. As per the medical science, at such an age the phenomena of atrophy commences which has its gradual impact upon the overall health. Such a state, indeed deprives a person to take a proper and well informed decision.

18. Since the applicant is no more and his daughter has filed the Second Appeal, it would always be better to let the lis be

adjudicated upon on merits instead of throwing away the claim of the applicant overboard. It would be difficult to construe that the applicant was capable of taking rational decision just within the period of limitation. It is pertinent to note that a CT scan report of the applicant issued by the Department of Radiology, Goa Medical College, Goa dated 14/12/2005 substantiated the fact that the applicant had suffered age related cortical atrophy. It cannot be said that it was a immediate or sudden eruption of a disease looking to the age of the applicant. It cannot be ruled out that even during the course of the appeal or after the impugned judgment the applicant might have been showing symptoms of the aforesaid ailments in view of the medical report on record.

19. No doubt, the delay needs to be condoned in the light of the aforesaid observations laid down by the Hon'ble Supreme Court vis-a-vis the grounds seeking condonation of delay. It cannot be lost site of the fact that the successful respondents had to undergo an ordeal for a considerable period for which they are also required to be compensated adequately. The respondents

cannot be blamed for the delay caused due to the aforesaid reasons. I, therefore, deem it necessary to impose costs of ₹15,000/- to be paid to the respondents within two weeks from the date of passing of this order.

20. After payment/deposit of the costs, the appeal shall be registered.

21. The application stands disposed of in the aforesaid terms.

PRITHVIRAJ K. CHAVAN, J.

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