IN THE HIGH COURT OF BOMBAY AT GOA

**MISCELLANEOUS CIVIL APPLICATION NO.743 OF 2018
AND
MISCELLANEOUS CIVIL APPLICATION NO.742 OF 2018
IN
FIRST APPEAL NO.72 OF 2016**

Smt. Parvati Madeva Gaonkar & Ors. ... Applicants

Versus

Smt. Asha Maharudra Naik Gaonkar & Ors. ... Respondents

Shri Shambhu Sinai Kakodkar, Advocate for the Applicants.

Shri Vishwadh Sardessai, Additional Government Advocate for the Respondent no.3.
Shri Ryan Menezes, Advocate for the Respondent No.4.
Ms. A. Fernandes, Advocate for the Respondents No.5(a) to 5(d).

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 25th February, 2019
Pronounced on : 22nd March, 2019

ORDER :

By the first application the applicants seek for the condonation of delay of 13 years and 115 days in bringing the legal representatives of the deceased respondent no.5(c) on record. It was their case that the applicants were the plaintiffs alongwith the respondents no.6,7 & 8 in the Civil Suit No.54/2013. While serving the respondent no.5(c) with the summons of the Court, the bailiff reported that the respondent no.5(c) expired about 12 years back and the applicants learnt about it when it was notified on the Registrar's Board dated 09/07/2018 that the respondent no.5(c) had expired. The applicant no.2 had been looking after the case since the time of filing and started making inquiries after getting information on or about 13/07/2018 from his advocate in the vicinity of the residence of the respondent no.5(c) at Chinchinim to ascertain if the respondent no.5(c) was dead or alive and if dead to know about the legal representatives but could not get any information. The applicant no.2 also approached the Church of Chinchinim which did not cooperate in giving any information intimating that only the relatives of any person can provide such information. The applicant no.2 then approached the Village Panchayat of Chinchinim in the first week of August to make inquiries and the Panchayat Authorities particularly the Secretary informed the applicant no.2 that the records would have to be searched, and called the applicant no.2 after ten days when he was informed that the respondent no.5(c) had expired on 05/02/2005.

2. The applicant no.2 was also furnished with a copy of the Death Certificate only on 24/08/2018 but could not get any information about the legal representatives of the deceased

respondent no.5(c) from the Panchayat Authorities. The applicant no.2 finally got the names of the legal representatives only on 30/08/2018 and furnished the same to their advocate. The applicants had no knowledge of the death of the respondent no.5(c) until it was notified on the Registrar's Board on 09/07/2018. The respondent no.5(c) had not filed any written statement and was not represented before the subordinate Court by any advocate nor was the suit contested which was proceeding ex-parte. The respondent no.5 was a partnership firm and 5(c) was one of the partners and was impleaded in that capacity. The other partners 5(a) and 5(d) had filed their written statement, led evidence and contested the suit, but they did not inform the applicants about the death of the respondent no.5(c). The interest of the respondent no.5(c) as a partner of the respondent no.5 stood duly represented by the remaining partners. The partners of the respondent no.5 who had knowledge of the death of the respondent no.5(c) did not bring this fact to the notice of the Court or the advocate for the applicants. As such, there was a delay of 13 years and 115 days in bringing the legal representatives on record which was not intentional. The applicants' suit was dismissed and they had preferred an appeal against the impugned judgment and no harm would be caused much less any prejudice to the respondents if the delay was condoned.

3. The application was opposed by the legal heir of the respondent no.5(c) on the premise that it was misconceived, frivolous and bad in law. The applicants had willfully and negligently failed to bring the legal heirs on record within the time limit as prescribed under the Limitation Act and as such the proceedings against the respondent no.5(c) and/or against the proposed heirs had abated. The present application was malafide and an attempt to gain a back door entry in the proceedings. The approach of the applicants was completely negligent and malafide in prosecuting the matter. There was no sufficient reason and/or no bonafide grounds made out in the application to condone the delay of 13 years and 7 months and therefore the application had to be dismissed. No reply was filed on behalf of the other respondents.

4. By the second application i.e. Miscellaneous Civil Application No.742/2018, the applicants sought to bring on record the legal representatives of the deceased respondent no.5(c) being the children of the deceased as the right to sue

continued surviving in them and therefore they were required to be brought on record.

5. This application was opposed by the legal heir of the respondent no.5(c) on the premise that it was misconceived, frivolous and bad in law and that all the legal representatives had not been brought on record in the application under reply. No right to sue survived and the same had abated as there was a gross delay of 13 years and 7 months and therefore the application had to be dismissed with costs.

6. Heard Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants who submitted that the applicants who were the original plaintiffs had executed the Lease Deed with the respondent no.1 which contained a clause providing for a sub-lease. The respondent no.1 had executed a sub-lease in 1982 with the respondent no.5 in respect of the same property which was a partnership firm represented by its partners 'a' to 'd'. The respondent no.5 mortgaged the property with the respondent no.2 in the year 2002 or thereabout and which came to be attached by the respondent no.3 and sold in a Sale in favour of the respondent no.4. The applicants were not a party to the

Sale Deed. The Trial Court had dismissed the suit when the applicants were not a party to the Sale. It was the contention of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants further that in terms of Section 4 of the Partnership Act, one partner acted for another and there could be no abatement of the suit or proceeding on the death of one partner in that context.

7. Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants placed reliance in **State of Punjab V/s. Nathu Ram [AIR 1962 SC 89]**, **Ramagya Prasad Gupta & Ors. V/s. Murli Prasad & Ors. [AIR 1972 SC 1181]** and **Moreshwar N.P. Navelcar & Ors. V/s. Rukmini Pandurang Vernekar & Ors. [1989 (1) Goa Law Times 316]**. He placed further reliance in **Mithailal Dalsangar Singh & Ors. V/s. Annabai Devram Kini & Ors. [(2003) 10 SCC 691]**, **Bhagmal & Ors. V/s. Kunwar Lal & Ors. [(2010) 12 SCC 159]**, **Collector, Land Acquisition Anantnag & Anr. V/s. Mst. Katiji & Ors. [AIR 1987 SC 1353]**, **Esha Bhattacharjee V/s. Managing Committee of Raghunathpur Nafar Academy & Ors. [(2013) 12 SCC 649]**, **Mrs. Ana Vitoria Vieira Dalgado & Ors. V/s. Geraldo Lobo & Ors. [2011 (2) Goa L.R. 365]**,

GMG Engineering Industries & Ors. V/s. ISSA Green Power Solution & Ors. [(2015) 15 SCC 659], **Shankar s/o. Deoji Sonwane (D) through LR's V/s. Sheku s/o. Kondaji Kale [2019 (1) ALL MR 896]**.

8. It was further the contention of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants that there was no necessity to bring the spouses of the deceased legal representatives on record by virtue of Article 1117 of the Family Laws. The property of the applicants was leased to the respondent no.1 who had subleased to the respondent no.5 and being a sub-lessee, it was not the property of the communion and therefore no necessity arose to bring the legal heir of the spouse on record. He placed further reliance in **Mrs. Mary Martinha De Monte Furtado w/o. Shri Oster A. Jose De Monte Furtado V/s. Shri Bosco Largos Cotta s/o. late Lucio Largos Cotta (Advocate) & Ors. [2010 (5) ALL MR 84]**, **Mohd. Hussain (dead) by LR's & Anr. V/s. Gopibai & Ors. [(2008) 3 SCC 233]** and otherwise submitted by inviting attention to Order XXII Rule 10A CPC that it was the duty of the respondents to inform about the death of the respondent no.5(c). He next contended that the evidence of Maharudhra

Gaonkar in the suit on 17/12/2008 indicated that the respondent no.5(c) was surviving and similar was the position in the evidence of Ramalal Vernekar as late as January 2015. The applicants had no knowledge that the respondent no.5(c) was dead. The impugned order in the cause title also indicated that 5(a) and 5(c) were absent. He placed further reliance in **Ashish Rajendra Malara V/s. Narayan Sonu Wani & Ors. [2015 (5) ALL MR 596]**, **Anokhe Lal V/s. Radhamohan Bansal & Ors. [AIR 1997 SC 257]** and submitted that the application for the condonation of delay had to be allowed.

9. Shri Ryan Menezes, learned Advocate for the respondent no.4 invited attention to the scheme of Order XXII Rule 1,2 & 3 qua the death of the parties and submitted that in terms of Rule 10A CPC, there was an obligation cast on the pleader and not on the party to report about the death and which was only pursuant to the amendment in 1977. There was no obligation on the other parties to report about the death of the deceased. In any event, it was his contention that the representation of the partners was to be in consonance with Order XXX CPC. He next contended that the respondent no.1 and the partner of the respondent no.5(a) were one and the

same and in that context invited attention to the finding of the learned Trial Judge on the issue no.11 in the impugned judgment to contend that it was unbelievable that the applicants had no nexus with the respondent no.1/5(a) when the Trial Court had given clear findings on the collusion between them. The suit was instituted in 1999, re-registered afresh and transferred to the District Court in 2013. At every stage, the Court had issued notices to the parties and it was unbelievable that the applicants had no knowledge of the death in the face of collusion and with clear findings against the plaintiff. The applicants had failed to make out a sufficient cause to condone the delay and therefore the application had to be dismissed.

10. Ms. A. Fernandes, learned Advocate for the respondent no.5(c) contended at the outset that the suit had abated against the respondent no.5(c) on the death and as the applicants had failed to bring the legal heirs on record in time. The applicants had initially filed the suit before the Court of the Senior Civil Judge, Quepem in 1999 which was transferred to the Court of the Civil Judge Junior Division, Sanguem in 2010 and then to the District Court, Margao in 2013. The respondent no.5(c) had expired in February, 2005 and there was ample opportunity for

the applicants to know both in 2010 and in 2013 at the time of service that the respondent no.5(c) had expired. It was further her contention that the partnership of the respondent no.5 was comprised of four partners, 5(a) to 5(d) and the respondent no.1 being the same person, 5(b) was dropped from the proceedings while 5(d) chose to remain absent.

11. It was further the contention of Ms. A. Fernandes, learned Advocate for the respondent no.5(c) that the respondent no.5(a) was in collusion with the applicants and in such circumstances the applicants could not expect any of the respondents to inform them about the death of the respondent no.5(c). She adverted to para 46 of the impugned judgment and invited attention to the Lease Deed of 1975 which was sublet in 1977. She further invited attention to paragraph 61 of the impugned judgment where there was a clear finding of the Trial Court that the husband of the defendant no.1 had deposed in favour of the applicants and it was a clear case of collusion between the plaintiffs/applicants with the defendant no.1 and 5(a) who had filed the written statement in favour of the applicants. She next invited attention to the application where the applicants had failed to set out the source of information of

knowing the details of the legal representatives of the deceased. The delay of 13 years and 115 days was unsubstantiated and therefore the application had to be dismissed and also that for bringing the legal heirs on record.

12. Shri Vishwadh Sardessai, learned Additional Government Advocate for the respondent no.3 submitted that the applicants had to show a sufficient cause for condoning the delay. There was no averment in the application that they had shown sufficient cause to condone the delay of 13 years and 115 days and their entire approach was casual and therefore no leniency had to be shown. On his part, he placed reliance in **Balwant Singh (dead) V/s. Jagdish Singh [(2010) 8 SCR 597]** and pressed for the dismissal of the application.

13. i have considered the submissions of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants, Shri Vishwadh Sardessai, learned Additional Government Advocate for the respondent no.3, Shri Ryan Menezes, learned Advocate for the respondent no.4 and Ms. A. Fernandes, learned Advocate for the respondent no.5(c)(i), considered the relevant provisions of CPC and the judgments relied upon and hence decide the

application appropriately.

14. A cursory perusal of the application would reveal that the applicants claimed that it is only while serving the respondent no.5(c) with the summons of this Court that the bailiff reported that the respondent no.5(c) had expired about 12 years back and he learnt about it when it was notified on the Registrar's Board dated 09/07/2018 notifying the unserved respondent and that the respondent no.5(c) had expired. They had made all the attempts to locate the legal heir of the respondent no.5(c) through the Church, the Sarpanch of the Village Panchayat of Chinchinim and only sometime on 30/10/2018 the applicants learnt of the names of the legal representatives of the deceased and provided the same to their advocate. Further, it was nowhere spelt out by the applicants what was the source of the information through whom they had learnt about the legal heir of the deceased respondent no.5(c) and only thereupon were they constrained to take steps to bring the heirs on record. The tenor of the application too only indicates that the delay was not intentional and that no loss, harm or prejudice would be caused to the respondents in case the delay was condoned and nowhere spelling out that the

applicants had made out a sufficient cause for condoning the delay if a hyper-technical view is taken of the matter. It was imperative for the applicants to spell out who or what was the source of their information indicating to them that the respondent no.5(c) was survived by 'n' number of legal representatives and giving their particulars so as to facilitate them being brought on record. In that regard, the application is totally silent.

15. Since a point was canvassed on behalf of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants that there was no necessity to bring the spouses of the deceased respondents on record, i would be constrained to advert to Article 1117 and Article 1108 of the Family Laws. Article 1117 reads thus:

> "The ownership and possession of the common properties vest in both the spouses during the subsistence of the marriage; however, the administration of the properties of the couple without exclusion of the exclusive properties of the wife belongs to the husband."

Article 1108 reads thus:

> "The marriage as per the custom of the country

> consists in the communion between the spouses of all their properties, present and future, not excluded by law.”

It is therefore to be seen in the light of these Articles and the judgments whether there was no necessity to bring the spouses of the deceased legal heir on record.

16. **State of Punjab** (supra), with respect does not advance the case of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants that there is no abatement of the proceedings on the death of one partner.

17. In **Ramagya Prasad Gupta** (supra), the Chapra Electric Supply Works Limited had a license from the Government of Bihar for the electrification of the Chapra town. The Company went into voluntary liquidation and the concern was put up for sale by public auction by the Liquidator. On 15/09/1944 one Murli Prasad gave the highest bid and with the consent of the State Government the concern was purchased by Murli Prasad, who became its sole licensee. Five persons, entered into a partnership on 11/07/1945 to carry on the business being Murli Prasad, Ajodhya Prasad, Parasnath Prasad, Gharbharan Sah and Nand Kishore Prasad. The partnership was

dissolved in August, 1950 which consisted of 10 partners and in the reconstituted partnership Nand Kishore Prasad was dropped and the remaining four partners of the old partnership were joined by Ramsaran Sah Gupta, Ramagya Prasad, Brahmdeo Prasad, Dharnidhar Prasad, Chandreshwar Prasad and Kamleshwar Prasad. On account of the reconstitution of the partnership the individual shares were also refixed and Ramagya Prasad was entrusted with the management of the concern.

18. In **Ramagya Prasad Gupta** (supra), Parasnath Prasad filed the suit on 22/05/1954 for the dissolution of the partnership and rendition of accounts to which the the remaining partners or their heirs were made parties. Parasnath claimed that in his own right under the partnership agreement he was entitled to one anna share and out of his share of one anna, a three pies share had been sold in a public auction and purchased by one Thakur Prasad who was made a party defendant no.10 to the suit. Proceedings for the appointment of Receiver, etc. were commenced during the pendency of the suit and seeing that the concern was not functioning in a proper manner the State Government stepped in, revoked the license

and took over the concern. The suit thereupon virtually became a suit for rendition of accounts till the date of deposit of the amount and for determining the share of each of the partners in the amount so deposited. The suit was vehemently contested and Murli Prasad who was the defendant no.8 claimed that he was the sole owner of the business and licensee from the Government and the rest of them had no lawful interest in the same in view of the provisions of the Electricity Act.

19. In **Ramagya Prasad Gupta** (supra), the Hon'ble Apex Court held at para 16 as below:

> "16. Under Rule 4 (3) r/w Rule 11 of Order XXII C.P.C. the appeal abates as against the deceased respondent where within the time limited by law no application is made to bring his heirs or legal representatives on record. As pointed out by this Court in The State of Punjab V/s. Nathu Ram [(1962) 2 SCR 636], it is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the procedural defect but because as Mulla has pointed out, it is part of the substantive law. (See Mulla C.P.C. Vol. 1 Thirteenth Edition p. 620 under note Non-joinder of Parties). No exhaustive statement can be made as to the-

circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in Sri Chand V/s. M/s. Jagdish Pershad Kishan Chand [(1966) 3 SCR 451] are not cumulative tests. Even if one of them is satisfied, the Court may dismiss the appeal."

20. In **Moreshwar Navelcar** (supra), a learned Single Judge of this Court held that where one of the several defendants being a necessary party dies and the suit abates as regards the said defendant, the suit as a whole should be

dismissed, as otherwise there would be contradictory and ineffective decrees. It followed the judgment in **Nathu Ram** (supra) and **Ramagya Gupta** (supra).

21. In **Mithailal Dalsangar Singh** (supra), a two Judge Bench held that the abatement of suit for failure to move an application for bringing the legal heirs on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. For a period of 90 days from the date of death of any party the suit remains in a state of suspended animation and then it abates. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal heirs of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal heirs on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for. The Apex Court further held at

paragraph 9 as below:

> "The courts have to adopt a justice oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of sub-rule (2) of Rule (9) of Order XXII and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

22. In **Bhagmal** (supra), a suit came to be filed by the respondents against his father namely Kallu, who died during the pendency of the suit and his legal heirs were brought on record. The suit was for declaration of title, possession and permanent injunction against the appellant-defendants in respect of the house in dispute. The Court proceeded ex-parte and the decree came to be passed. It is only when the execution proceedings started that the appellant-defendants allegedly came to know about the decree and moved an

application under Order IX Rule 13 read with Section 151 of the Civil Procedure Code for setting aside the ex-parte decree. According to the appellant-defendants, this application was moved within 30 days from the date of their knowledge of the ex-parte decree. They also pointed out that there was a compromise effected which was an out of Court settlement wherein it was agreed between the parties that the respondent no.1-plaintiff would withdraw the suit on account of the understanding having been arrived at between the parties. On that understanding they did not attend the further proceedings, which the respondent no.1-plaintiff continued surreptitiously and hence they did not even know about the ex-parte order and the decree passed against them.

23. In **Bhagmal** (supra), it was the case of the appellant-defendants that since the application had been moved within 30 days from the date of the knowledge, a separate application for the condoantion of delay was not required. The application under Order IX Rule 13 was dismissed by the Trial Court as being barred by limitation. A Miscellaneous Civil Appeal came to be filed in the Court of the District Judge, Bhopal with some delay and therefore an application under Section 5 of the

Limitation Act was also filed. The Appellate Court held that the application filed by the appellant-defendants deserved to be allowed and held that the Trial Court had erred in law in not allowing the application which allowed the appeal directing the Appellate Court to decide the case on merits of the case after hearing the parties. A Civil Revision came to be filed before the High Court which took a view that the application filed under Order IX Rule 13 was barred by limitation and the Appellate Court had not recorded any finding on the question as to whether the filing of the application under Section 5 of the Limitation Act was necessary or not and therefore exceeded its jurisdiction in allowing the application for condoning the delay.

24. In **Bhagmal** (supra), the Hon'ble Apex Court found on a consideration of the material before it that a well considered order of the Appellate Court came to be interfered with by the High Court solely on the ground that there was no application for the condonation of delay before the Trial Court in support of their application under Order IX Rule 13 CPC. In their opinion, the High Court was not justified in taking a hypertechnical view. It was quite clear from the Trial Court's order that the Trial Court had entertained the application on merits. The Trial Court

undoubtedly had referred to the reply of the respondents to the effect that the application for setting aside the ex-parte decree was beyond limitation. However, the view taken by the Trial Court was based more on merits. In fact, it went on to record the finding that there was no compromise and the theory of compromise and delay on account of that was not acceptable. The Trial Court had more or less based its findings regarding delay on the basis of the order-sheets, which was not right as the order-sheets did not bear the signatures of the parties and were mechanically written as "parties as before". Therefore, the Trial Court did not allow the application under Order IX Rule 13 CPC merely on the basis of the fact that no application for condonation of delay was made.

25. In **Bhagmal** (supra), the Apex Court further went on to observe at paragraph 12 that the question of delay was completely interlinked with the merits of the matter. The appellants-defendants had clearly pleaded that they did not earlier come to the Court on account of the fact that they did not know about the order passed by the Court proceeding ex-parte and also the ex-parte decree which was passed. It was further clearly pleaded that they came to know about the decree

when they were served with the execution notice. This was nothing but a justification made by the appellant-defendants for making an Order IX Rule 13 application at the time when it was actually made. The question of filing Order IX Rule 13 application was in their opinion rightly considered by the Appellate Court on merits and the Appellate Court was absolutely right in coming to the conclusion that the appellant-defendants were fully justified in filing the application under Order IX Order 13 CPC at the time when they actually filed it and the delay in filing the application was also fully explained on account of the fact that they never knew about the decree and the orders starting the ex-parte proceedings against them. Under such circumstances, the High Court should not have taken a hypertechnical view that no separate application was filed under Section 5. Furthermore, the application under Order IX Rule 13 had all the ingredients of the application for the condonation of delay in making that application. Procedure was after all the handmaid of justice. Here was a party which bonafide believed the assurance given in the compromise panchanama that the respondent no.1-plaintiff would get his suit withdrawn or dismissed which was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined and under such circumstances, the non-attendance of the appellant-defendants, which was proved in the further proceedings, was quite justifiable and when ultimately the appellant-defendants came to know about the decree, had moved the application within 30 days which was sufficient.

26. In **Collector, Land Acquisition, Anantnag** (supra), the Hon'ble Apex Court held at paragraph 3 as below:

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to inform with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned and the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.”

27. In **Esha Bhattacharjee** (supra), the Hon'ble Apex Court considering the other judgments culled out the principles broadly as follows:

> 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.
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> iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
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> 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.
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> v) Lack of bonafides imputable to a party seeking condonation of delay is a significant and relevant fact.
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> 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.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

28. In **Mrs. Ana Vitoria Vieira Dalgado** (supra), a learned Single Judge of this Court considered the Apex Court judgment in **N. Balakrishnan V/s. M. Krishnamurthy [(1998) 7 SCC 123]** where the Apex Court had held that the words 'sufficient cause' must be construed liberally and acceptability of explanation for delay being the sole criterion, and length of delay is not relevant. The Apex Court further held that in the absence of any malafide or deliberate delay as a dilatory tactic, the Court should normally condone the delay, but while doing so, the Court should keep in mind the consequent litigation expenses incurred by the opposite party and compensate him accordingly. The Apex Court further held that when the Court condones the delay in exercise of discretion, the Superior Court and more particularly, the revisional Court should not normally disturb the same, but where request of condonation of delay is refused, it would be open to the superior Court to come to its own finding on the basis of the explanation for delay given by the party. In this case, the Supreme Court set aside an order passed by the High Court by which the High Court had allowed revision application against the order passed by the trial Court condoning the delay of 883 days in approaching the Court by the defendant against the dismissal of

his application to set aside the ex-parte decree passed against him. It also considered the judgment in **Bhagmal** (supra), where the Apex Court condoned the delay in filing an application for setting aside the ex-parte decree which was filed within 30 days from the knowledge of the decree and set aside the order passed by the High Court by which the application was dismissed.

29. In **GMG Engineering Industries** (supra), the Hon'ble Apex Court held at paragraph 7 as below:

> "7. It is well settled that the expression 'sufficient cause' is to receive liberal construction so as to advance substantial justice. When there is no negligence, inaction or want of bonafide is imputable to the appellants, the delay has to be condoned. The discretion is to be exercised like any other judicial discretion with vigilance and circumspection. The discretion is not to be exercised in any arbitrary, vague or fanciful manner. The true test is to see whether the applicant has acted with due diligence."

30. In **Shankar s/o. Deoji Sonwane (D) through LR's** (supra), a learned Single Judge of this Court considered the judgment of the Apex Court in **Banwarilal V/s. Balbir Singh**

[2015 (6) ALL MR 403], where the Apex Court had held at paragraph 13 as below:

> "13. In **Banwarilal's case** (supra), the Apex Court observed as under :-
>
> This Court has held that where a respondent dies during the pendency of the appeal, at a time when the appeal has been pending for several years without being listed for hearing, the Court should take a lenient view in considering the application for condoning delay and setting aside the abatement. This is more so because the counsel for first respondent informed the court about the death of first respondent (which was on 28.05.1998) only on 1.8.2006 nearly eight years after the death. The material showed that the appellants had no knowledge about the death.
>
> In that case, the appellant had died on 30.01.2006 during the pendency of First Appeal. No steps were taken in the First Appeal to bring LRs. on record. In Second Appeal, application was filed under Order 1 Rule 10 of CPC. It was held that it was not proper as procedure under Order 22 cannot be circumvented. However, it would be unjust to non-suit merely on the ground of technicalities. It was held in **Sardar Amarjit Singh Karla Vs. Pramod Gupta (2003) 3 SCC 272**, by a five Judge Bench of

this Court as under :-

> "26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation in an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distant and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice."

In the ultimate, the Apex Court set aside the abatement and ordered the legal heirs to be brought on record subject to the payment of costs of ₹5,000/-.

31. **Mrs. Mary Martinha De Monte Furtado** (supra), was a petition at her instance challenging the order dated 18/02/2009 passed by the Senior Civil Judge, Margao by which the objections taken by her to the execution of the judgment/decree in Special Civil Suit had been dismissed. She was the wife of Osler Furtado, one of the judgment debtors in the execution proceedings being the respondent no.6 and the son of Antonio Oscar and his wife. According to the respondent no.1/Decree Holder, there was an agreement of sale dated 30/04/1984 between the Decree Holder and four siblings namely Antonio Oscar and his wife Antonio Blasco and his wife, Antonio Sergio and his wife and Helena and her husband. The said Helena and her husband had already executed the Sale Deed in favour of the Decree Holder and the suit against them was then withdrawn. The said Osler Furtado/respondent no.6 herein was brought on record upon the death of the said Antonio Oscar and his wife as their legal representatives but his wife the petitioner herein was not brought on record. The defendants i.e. the respondents no.2 to 14 did not contest the suit and as such the suit was decreed on 28/04/2000. Some of the other defendants in the said suit have conveyed their

undivided share in the suit property to the decree holder (respondent no.1) and thereafter they were deleted from the suit. These facts stated on behalf of the decree holder have not been disputed on behalf of the petitioner. It was her contention that being the lawful wedded wife of the respondent no.6/Osler Furtado and married to him under the regime of communion of assets and further contending that the decree passed against her husband was not binding on her as per the provisions of Articles 1108 and 1119 of the Civil Code, 1867 in force in the State of Goa, the petitioner filed the said application which came to be dismissed by the order under challenge.

32. In **Mrs. Mary Martinha De Monte Furtado** (supra), it was contended on her behalf that being the lawfully wedded wife of the respondent no.6/Osler Furtado and not being made a party to the suit nor a judgment debtor in the execution proceedings though as a moiety holder and co-sharer of the suit property, was required to be made a party and that the decree as against her was not executable and the application filed by her ought to have been considered by the Executing Court. It was contended on behalf of the respondent no.1/Decree Holder that the estate of Antonio Oscar and his wife was sufficiently

represented by the petitioners' husband Osler Furtado and therefore the decree was binding on the estate. The Executing Court could deny the execution or refuse to execute the decree only in case it was a nullity and not otherwise and which was not the case at hand. It was not the case of the petitioner that she was not joined in the suit or execution proceedings because of any fraud or collusion between the parties to the said suit.

33. In **Mrs. Mary Martinha De Monte Furtado** (supra), a learned Single Judge considered Article 1108 of the Civil Code which provides that the marriage as per the custom of the country consists in the communion between the spouses of all their properties, present and future, not excluded by law and also Article 1119 which provides that the immovable properties, whether common or exclusive of either spouse, shall not be alienated or charged in any manner without the consent and agreement of both and held at paragraph 11 that the submission on behalf of the petitioner could not be accepted. The respondent no.6 Osler Furtado, the husband of the petitioner in terms of law was required to administer the properties and protect them, belonging to the couple and he was brought on record as the legal representative of the said

Antonio Oscar and his wife. It was also not the case of the petitioner at any time that there was a fraud between the plaintiff/Decree Holder and her husband in not bringing her on record. Her interest in the estate was sufficiently represented by her husband and therefore the decree was binding on her and she could have no objection to the said execution on the specious ground that she was not made a party to the suit or execution proceedings and in that view of the proceedings dismissed the petition.

34. In **Mohd. Hussain (dead) by LR's** (supra), the Hon'ble Apex Court considered the judgment in **N.K. Mohd. Sulaiman Sahib V/s. N.C. Mohd. Ismail Saheb [7 AIR 1966 SC 792]** and observed at paragraph 13 as below:

> "13. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognized exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the

plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion." (emphasis supplied)

From a bare reading of the aforesaid observation of this Court in the above mentioned decision, it is clear that ordinarily the Court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this Court culled out some important exceptions:

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

(iii) The Court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

In that view of the matter, the Apex Court took a view that the two sons had sufficiently and in a bonafide manner represented the estate of the deceased Nandrem and therefore the suit could not be dismissed on that ground and that in that view the High Court had fallen in error by dismissing the suit on the ground of non-joinder of parties.

35. In **Ashish Malara** (supra), the plaintiff had preferred to implead the partnership firm as the defendant no.1 and had impleaded the partners of the said partnership firm as the defendants no.2 to 5. The deceased father of the petitioner was also said to be one of the partners of the defendant no.1 firm and was later on added as the sixth defendant who passed away on 19/01/2014. An application was moved by the petitioner for being added as a defendant in his capacity as a legal representative of the deceased sixth respondent Rajendra. Considering the objections of the defendants and after hearing the petitioner, the said application was rejected by the impugned order dated 08/10/2014 primarily on the ground that the dispute involved a partnership firm and in such circumstances, Order XXX Rule 4 CPC did not permit a legal heir to be added as a defendant only because he is the son of the deceased partner. It was the grievance of the petitioner that the result of the suit was likely to impact his rights on the premise that the property said to be in the possession of the partnership firm was in his possession and never in possession of the partnership firm. Yet, if the suit was allowed, the

petitioner was accordingly to be evicted therefrom. It was contended on his behalf that when the sixth respondent, father of the petitioner and the defendant no.6 in the suit had passed away, the petitioner got a right under Order XXIII CPC to apply for being impleaded in place of his deceased father and that the rigors to Order XXX Rule 4 CPC would therefore not be attracted and the petitioner's case would then fall under Order XXX Rule 4(2)(a) CPC.

36. In **Ashish Malara** (supra), a learned Single Judge considered Order XXX Rule 4 CPC which deals with the rights of suit on the death of a partner and observed at paragraph 11 that there was a distinction in a suit for eviction vis-a-vis any other suit, an eviction suit being aimed at evicting a tenant. In the case at large before him the tenant was a partnership firm which had a legal existence. Partners of the said firm were the defendants and the decree passed in the suit would therefore operate against the firm and through the partners. In paragraph 12 it considered Order XXX Rule 4(1) which deals with an eventuality of there being two or more persons, who are being sued in the name of the firm and if any one of such partners dies before the institution or during the pendency of

the suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. As such, though the petitioner may claim a right to file an application to be impleaded in the proceedings as a legal representative of the deceased, the same is required to be considered in the facts and circumstances of each case. In the facts of that case the suit brought by the plaintiff was filed against the defendant no.1 firm and the partners, the defendant no.2 Sagarmal being one of the partners of the firm. Under the circumstances, it was not necessary to bring the legal heirs of the defendant no.2 on record. The firm is the tenant and only because one of the partners is dead, the suit does not abate against the other partners. On giving a consideration to the submissions made across the bar, the learned Single Judge found that the defendant no.1 was a firm and the rest of the defendants were shown as its partners. Taking into consideration the title of the plaint, the learned Trial Judge had exercised its jurisdiction and rejected the application and no jurisdictional error was committed by the learned Trial Judge and in view thereof dismissed the Civil Revision Application.

37. Order XXII visualises the eventualities in case of death,

marriage and insolvency of parties. Rule 1 provides that there shall be no abatement by party's death, if right to sue survives and reads that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 2 deals with the procedure where one of the several plaintiffs or defendants dies and right to sue survives while Rule 3 prescribes the procedure in case of death of one of several plaintiffs or of sole plaintiff and correspondingly Rule 4 provides the procedure in case of death of one of several defendants or of sole defendant. In other words, as per the scheme of the order, where the right to sue survives, the death of the plaintiff or the defendant shall not cause the suit to abate. Where one of the plaintiffs or defendants dies and right to sue survives to the surviving plaintiff or against the surviving defendant, the Court shall cause an entry to that effect to be made on record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants.

38. Rule 10A which has been inserted by the amendment Act of 1976 cast a duty **on the pleader** to communicate to Court death of a party and till then the contract between the

pleader and the deceased party shall be deemed to subsist. In other words, on a reading of Rule 10A of Order XXII CPC, the duty is cast on the pleader and not on a party to communicate to the Court the death of a party. Order XXX provides for the suits by or against firms and persons carrying on business in names other than their own. Rule 1 provides for suing of partners in the name of the firm and reads that any two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may apply to the Court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

39. Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants invited attention to the evidence in the suit led by one Maharudhra Gaonkar who had deposed as on 17/12/2008 and had referred to the respondent no.5(c) as surviving and also to the evidence of one Ramlal as late as January, 2015 to substantiate his contention that till 2015, the applicants had no

knowledge of the death of the respondent no.5(c). However, this would not substantiate the case of the applicants inasmuch as it was shown from the impugned judgment at paragraph 61 that there were clear findings recorded by the learned Trial Court that there was collusion between the plaintiff with the defendant no.1 and the respondent no.5(a) and that the husband of the defendant no.1 had deposed in favour of the plaintiffs which further justified such conclusion on the collusion between the plaintiff and the defendant no.1/5(a). This finding too recorded by the learned Trial Court as late as April 2016 does not enure to the benefit of the applicants who could not claim want of knowledge of the death of the respondent no.5(c) when there was collusion between them and the defendant no.1 and 5(a).

40. Besides, i find favour with the contention of Shri Ryan Menezes, learned Advocate for the respondent no.4 that it was unbelievable that the applicants/plaintiffs had no nexus with the respondent no.1/5(a) and that they had no knowledge of the death in the face of the collusion between them. Moreover, Ms. A. Fernandes, learned Advocate for the respondent no.5(c)(i) had otherwise submitted and rightly so, that the suit was filed

before the Court of the Civil Judge Junior Division, Quepem in 1999 which was transferred to the Court of Civil Judge Junior Division, Sanguem in 2010 and thereafter to the District Court, Margao in 2013. The respondent no.5(c) had expired in February 2005 and there was ample opportunity to the applicants to know in 2010 and in 2013 at the time of service at each stage that the respondent no.5(c) had expired.

41. Moreover, the defendant no.1 and 5(a) were one and the same person, 5(b) was dropped from the proceedings while 5(d) was absent. Therefore, as rightly submitted by Ms. A. Fernandes, learned Advocate there was no question of any of the party defendants informing the applicant of the death of the respondent no.5(c). Furthermore, the applicants had not spelt out the source of information from which they had gathered the knowledge about the death of the respondent no.5(c). This is assuming for a moment that the estate of the respondent stood duly represented and there was no need to bring the spouse on record. The applicants had very vaguely stated at paragraph 6 of the application that they got the names of the legal representatives of the deceased only on 30/08/2018 without disclosing the source of their information. Besides, there was

not a word or whisper in the application that sufficient cause had been made out for the condonation of delay of not just a few days but 13 years and 115 days. The approach of the applicant has been absolutely lackadaisical and casual and no leniency is required to be shown. A mere statement that the delay was not intentional does not absolve the applicants from giving sufficient reasons and cause for the condonation of delay.

42. Having considered the various judgments, the relevant provisions of CPC including that under Order XXX CPC, there is no force in the contention of Shri Shambhu Sinai Kakodkar, learned Advocate for the applicants that the delay is required to be condoned. In view thereof, the application for the condonation of delay is dismissed. As a necessary corollary, the application to bring the legal heirs of the deceased respondent no.5(c) also stands dismissed.

NUTAN D. SARDESSAI, J.

NH