

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.103 OF 2020**

Shri Cornelio Colaco & Ors.

... Petitioners

Versus

Smt. Sofia Ana Rita Fernandes & Ors.

... Respondents

Shri John Abreau Lobo, Advocate for the Petitioner.

Shri Anthony D'Silva, Advocate for the Respondents No.2 & 3.

Coram : DAMA SESHADRI NAIDU, J.**Date: 21 December 2020****ORAL ORDER:**

The petitioners are original defendant nos.1 to 4 in Special Civil Suit No.56/2001, re-registered as Regular Civil Suit No.377/2010/III/I. The respondents 2 & 3 are the original plaintiffs. This suit apart, respondents 2 & 3 have also filed another civil suit: Regular Civil Suit No.174/98/F.

2. These two suits have involved the same parties with substantially the same issues. Therefore, in June 2012, the petitioners wanted the trial Court to decide the RCS No.174/98/F along with RCS No.377/2010/I. Through an order, dated 26.07.2012, the trial Court clubbed both the suits. In fact, even in RCS No.377/2010/I, a similar application was filed; that was also allowed in November 2013. Though the trial Court tried both the suits together, it delivered separate judgments. It dismissed both the suits: RCS No.377/2010/I on 30th April 2014; RCS No.174/1998/F on 17th March 2015.

3. Aggrieved, the respondents 2 & 3, as the losing plaintiffs in RCS No.377/2010/I, filed Regular Civil Appeal No.109/2014 before the

District Court, Margao. Similarly, against the judgment and decree in RCS No. 174/1998/F, they filed Regular Civil Appeal No.36/2015.

4. As both the appeals arose out of a common trial in two suits, even the appellate Court is said to have taken them up together for disposal. At that stage, in February 2015, respondents 2 & 3 filed an application in RCA No.109/2014. It was for the appellate Court's leave to produce a notarized copy of the land registration certificate along with translation. The application was under Order 41 Rule 27 of CPC. And the justification was that respondents 2 & 3 did not possess those documents when they had been prosecuting the suit or that they could not locate them then.

5. When notice was served, the petitioners left the issue to the appellate Court's discretion. That was how their counsel endorsed on the copy of the application. Then, on 18.06.2015, the appellate Court allowed that application. Here, too, though the appellate Court initially wanted to consider both the appeals together, it did not do so. Perhaps, because of the respondents' application under Order 41 Rule 27 of CPC for additional evidence, the appellate Court heard RCA No.109/2014 first and disposed it of on 16.10.2019.

6. Later, in July 2019, the appellate Court took up the other appeal: RCA No.36/2015. As we have noted earlier, this appeal arose out of RCS No.174/98/F. When the Appellate Court was hearing the appeal, the petitioners realised that the additional evidence the respondents produced in the other appeal had already been placed on record in RCS No.174/98/F along with the affidavit in evidence way back in 2014. In other words, the petitioners contend that they got the additional evidence application allowed in the other appeal on the premise that it was unavailable for them when the suits were pending, but that plea was false. In fact, they filed those documents in the other suit (RCS No.174/98/F), when that was pending.

7. Thus, contending that respondents 2 & 3 had played a fraud on the Appellate Court and misled it into allowing the application for additional evidence in the other appeal, the petitioners filed a review petition under Order 47 Rule 1 of CPC against the judgment and decree dated 16.10.2018 in RCA No.109/2014. As there was a delay, the petitioners have also applied under Section 5 of the Limitation Act for its condonation.

8. Eventually, through an order dated 19.09.2019, the District Judge, Margao, dismissed the Civil Miscellaneous Application No.90/2019; that is, the delay condonation petition. Aggrieved, the petitioners have filed this Writ Petition.

9. In the above backdrop of convoluted facts, Shri J.A. Lobo, the learned counsel for the petitioners, has strenuously argued that fraud vitiates even the most solemn judicial acts. Here, the fraud respondents 2 & 3 have played has been writ large on the face of the judicial proceedings. To elaborate, Shri Lobo has submitted that only because respondents 2 & 3 had suppressed the fact about the documents did the trial Court grant the relief to them in the appeal.

10. In other words, had it not been for the suppression and misrepresentation by respondents 2 & 3, the appellate Court would not have remanded the matter. In conclusion, Shri Lobo wants this Court to interdict the appellate Court's order, dated 19.09.2019, in CMA No.90/2019 and condone the delay so that the appellate Court can decide the review petition on the merits. To support his contentions, Shri Lobo has relied on *National Buildings Construction Corporation Ltd. v. Regional Labour Commissioner (Central)*¹, *Centre For Individual and Corporate Action (Cica) v. Assistant Commissioner of Income tax*², and *Mathuradas Mohta College of Science, Nagpur v. R.T. Borkar*³

¹ (2006) 1 MLJ 669

² (2015) ITR 370 page 35

³ (1997) 2 MLJ 168

11. On the other hand, Shri Anthony D'Silva, the learned counsel for respondents 2 & 3, has submitted that the respondents have neither suppressed any facts nor misled the Court. That apart, he has also submitted that when the decree was set aside in the appeal, and the matter was remanded to the trial Court, the petitioners, in fact, participated in the trial, cross-examined the witnesses of the respondents 2 & 3, and have even led their own evidence. When the matter was posted for arguments, they belatedly chose to file the review petition. According to him, the petitioners have been estopped from questioning the appellate Court's order, on which both the parties have already acted.

12. Heard Shri John Abreau Lobo, the learned counsel for the Petitioner and Shri Anthony D'Silva, the learned counsel for the respondents No.2 & 3

Discussion:

13. There is no quarrel with the proposition that fraud vitiates even the most solemn judicial act. This doctrine applies with more vigour vis-a-vis the acts of a suitor who would have got no judicial redress but for that fraud. Had the petitioners brought to the appellate Court's notice at the earliest what they termed fraud, it might have taken a different view. But much water has flowed under the judicial bridges ever since the appellate Court allowed the application under Order 41, Rule 27 CPC.

14. First, the petitioners have not opposed the application. Agreed, they have not consented to it, either. They have left the issue of additional evidence to the appellate Court's discretion. The Court exercised the discretion and allowed the application. With the additional evidence on record, the appellate Court has felt that the matter requires re-trial for much depends on the documents that had been produced in the appeal.

15. Second, the petitioners are parties to both the suits. They ought to have been aware of what documents their adversaries had produced in one suit or the other. The petitioners being oblivious of the documents

they themselves contested in one suit only betrays the petitioners' flippant approach to the litigation. I, however, hasten to add that their laidback approach or their forgetfulness would give no licence to respondents 2 & 3 to suppress the fact or play fraud on court.

16. That said, even when the appellate Court remanded the matter, the petitioners did not join the issue. That is, they did not challenge the appellate Court's judgment of remand. Instead, they went back to the trial Court, and they participated in the trial. When both parties were about to advance their original arguments in the matter, the petitioners filed the review petition. It is not the petitioners' case that when they were participating in the trial, they were unaware that respondents 2 & 3 had already filed those documents in the other suit before the trial Court. Despite their being aware, they raised no issue for whatever reason. On the contrary, they did participate in the trial after the remand. Under these circumstances, the appellate Court has refused to condone the delay. I may, here, note that this Court is called upon to decide whether the appellate Court was right in refusing to condone the delay in a review petition. Nothing more.

17. First, the condonation of delay is a matter of discretion. Unless the court below has perversely exercised its discretion, this Court will not be employing its supervisory power under Section 227 of the Constitution of India. After all, this extraordinary power on the judicial side is not for the mere asking; nor is it an appellate power in disguise. It only concerns itself with patent jurisdictional errors.

18. That apart, I must also take note of the subsequent developments. Here, the authenticity of the documents respondents 2 & 3 produced in the appeals has not been questioned. For its belated production, they gave a specious—and false—reason. They should take the blame for that. But the petitioners have compounded the issue with their indolent or insouciant attitude. For their failure to be vigilant, this

Court would not turn the clock back and nullify all the judicial developments after the appellate Court had remanded the matter. Ultimately, every Court's endeavour is to do justice.

19. In *National Buildings Construction Corporation Ltd.*, under the Minimum Wages Act, the statutory authority condoned the delay and also allowed the matter on merits—both on the same day. This Court has faulted that approach. *Centre For Individual and Corporate Action (Cica)* and *R.T. Borkar*, too, deal with the delay. And they do not support the petitioners' cause.

20. It is not merely a case of fraud versus forgetfulness. It has more. It is a case of equity and estoppel, too. Delay defeats equity. And equity assists only those that are vigilant: *Vigilantibus non dormientibus aequitas subvenit*. Besides, with their willing participation in the trial until the end, the petitioners have been estopped by their conduct, too.

Under these circumstances, I am constrained to negate the petitioners' plea. As a result, I dismiss this Writ Petition.

DAMA SESHADRI NAIDU, J.

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NITI K
HALDANKAR

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NITI K HALDANKAR
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