

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 107 OF 2011

Comunidade of Mapusa,
Near St. Jerome Church,
Mapusa, Bardez, Goa,
Through its attorney Antonio Braganza. Appellant.

Versus

1. Smt. Prabhavati Prabhakar Parob,
residing at House No. 75, (ILL) /2,
Dangui Colony, Mapusa, Goa.

2. The Administrator of the
Comunidade of Mapusa
near El Capitan House,
Mapusa, Goa Respondents.

Mr. Valmiki Menezes, with Ms. Shanti Narvekar, Advocates for the
Appellant.

Mr. Rohit Bras de Sa, with Ms. V. Shet, Advocates for Respondent
No.1.

Coram: M.S. Sonak, J.

Dated: 19th March 2021

ORAL JUDGMENT:

Heard Mr. Valmiki Menezes for the Appellant and Mr.
Rohit Bras de Sa for Respondent No.1.

2. This Second Appeal was admitted on 11th November 2011

on the following substantial questions of law :

1. Whether the finding of the Trial Court that the suit plot was lawfully allotted to the plaintiff was contrary to the Scheme of the Code of Comunidade and whether the Trial Court's total non consideration or application of the mandatory provisions of the said Code to the facts of the present case, vitiates the Decree passed by the Courts below ?

2. Whether in the absence of any evidence led by the plaintiff on compliance with the procedure laid under the Code of Comunidade for allotment of plots, and in the light of a total absence of evidence on statutory approvals and licences for the construction of the plaintiff, the Decrees of the Courts below are legally unsustainable ?

3. Whether the learned Lower Appellate Court has misconstrued the evidence on record with regard to the knowledge of the Appellant of the Judgment passed by the learned Trial Judge whilst deciding the application for condonation of delay ?

3. In this case, the Appellant was the original Defendant No.1, Respondent No.1 was the original Plaintiff and Respondent No.2 was the original Defendant No.2 in Regular Civil Suit No.76/98/B instituted in the Court of Civil Judge, Sr. Division, Mapusa. The Appellant had also raised a Counter-claim in the matter. Ultimately, the record indicates that the Suit was not contested or the Counter-claim was not pursued by the Appellant and the Suit came to be decreed by Judgment and Decree dated 19th November 2005. The Counter-claim claim was naturally dismissed.

4. The Appellant-Comunidade instituted an appeal before the District Court at Mapusa (First Appellate Court), after a delay of 1286 days. In the application for condonation of delay, the Appellant's main contention was that its Attorney and Clerk (which are statutory positions in terms of the Code of Comunidades) colluded with the Plaintiff (Respondent No.1) or, in any case, acted in excess of the authority conferred upon him by the Code of Comunidades. As a result, the Comunidade, not only suffered an *ex parte* decree but further, the Comunidade was not even aware of the Decree, until the neighboring plot owner/ allottee, pointed out this fact to the Managing Committee of the Comunidade after he received a notice from the Revenue Authorities on the Plaintiff's application for mutation based on the *ex parte* decree.

5. The Application for condonation of delay then refers to a three-member committee, constituted by the Managing Committee to look into this entire issue. This committee looked into the various aspects and submitted a report. The Committee also looked into various aspects, including documents, and thereafter resolved to institute an appeal against the *ex parte* decree.

6. Along with this application for condonation of delay, the Comunidade annexed this report of the three-member committee, as also the letter dated 7/8/2005 addressed by the Attorney to the legal adviser of the Comunidade, who was appearing on behalf of

the Comunidade in the Civil Suit, not to contest the Suit.

7. Mr. Menezes submitted that most of these aspects have not even been considered by the First Appellate Court whilst dismissing the application for condonation of delay. The First Appellate Court has reasoned that the knowledge of the erstwhile Attorney, was the knowledge of the Comunidade itself. If the erstwhile Attorney has colluded or acted in excess of the authority conferred upon him under the Code of Comunidades, then, it is a matter which will have to be separately pursued by the Comunidade with the said Attorney. However, that aspect is not relevant for the condonation of delay.

8. Mr. Rohit Bras de Sa, the learned Counsel for the Respondents points out that this Appeal raises no substantial question of law. He submitted that there is ample material on record that establishes that there was no infirmity in the allotment of the Comunidade plot. He submits that there is absolutely no evidence of a serious charge, like collusion. He submits that even the self-serving three-member committee report does not spell out any charge of collusion. He submits that the delay was quite inordinate and, since no sufficient cause was shown, there is no infirmity in the impugned order. He submits that no substantial questions of law arise in this appeal and, therefore, the appeal should be dismissed.

9. After hearing the arguments for some time and considering the rival contentions, according to me, this is a matter where the First Appellate Court has misconstrued the cause shown by the Comunidade. The approach that the knowledge of the erstwhile Attorney, amounts to the knowledge of the Comunidade, at least, *prima facie*, does not appear to be correct, since, the precise case of the Comunidade was that the erstwhile Attorney colluded with the original Plaintiff or, in any case, acted way beyond the authority conferred upon him by the Code of Comunidades. There has been no consideration of this aspect by the First Appellate Court. Even, the documents produced by the Appellant, along with the application seeking condonation of delay, have not at all been considered.

10. There were contentions raised that the Code of Comunidades prescribes a detailed procedure for allotment of plots. At least, *prima facie*, this contention may not be so relevant in deciding the issue of condonation of delay. However, there were contentions raised that the Attorney, in terms of the Code of Comunidades, had no authority to abandon the Counter-claim or desist defending the suit instituted against the Comunidade. At least, *prima facie*, the provisions of the Code of Comunidades require approval from the Administrative Tribunal before any such action is taken by the Comunidade itself, much less its Attorney. However, all these are only *prima facie* observations. The main issue is that the First Appellate Court has not considered all these aspects and to that

extent, there is a clear failure to exercise the jurisdiction in considering the case put up by the Appellant at the stage of seeking condonation of delay.

11. At the same time, it is true, as contended by Mr. D'Sa, that the allegations of collusion or fraud cannot be lightly accepted. This is because the allegations though raised in civil proceedings are to a great extent quasi-criminal in nature. Accordingly, Mr. D'Sa is quite right in his submission that full opportunity is required to be given to all parties to make good such allegations. Mr. D'Sa submitted that such allegations cannot be accepted unless they are backed by proper proof.

12. After the matter was argued for some time, the learned Counsel for the parties, based on instructions, agreed that the impugned Order dated 28/12/2009, by which the First Appellate Court refused to condone the delay in institution of the Appeal, may be set aside and the matter be remanded to the First Appellate Court for a fresh decision on the application for condonation of delay. The learned Counsel submitted that on this occasion, both the parties may be granted leave to lead the evidence both, documentary as well as oral, to make good their respective cases on the issue of condonation of delay.

13. Normally, this Court is quite reluctant to remand the

proceedings. However, this is a matter where the application for condonation of delay cannot be decided one way or the other unless a full opportunity is granted to the parties to lead their evidence. This is one of those rare cases where the parties can be granted leave to lead evidence on the issue of condonation of delay itself, though, normally such matters are decided based on affidavits.

14. The proposal put forth by the learned Counsel for the parties is quite fair and will afford a suitable opportunity for both parties. Since the matter is being remanded, it is made clear that the observations made in this order are only *prima facie* and the First Appellate Court need not be influenced by any such observations whilst deciding and disposing of the application for condonation of delay, afresh, in accordance with the law and based on the evidence which the parties will choose to lead before the First Appellate Court.

15. According to me, this is also a fit case where the Appellant, at this stage itself, should pay costs of ₹ 25,000/- to Respondent No.1. This is because, at this stage, it is too premature to lay the entire blame on the Respondent. If the First Appellate Court, on considering the evidence which the parties will lead, comes to some conclusions which are adverse to the Respondent, the First Appellate Court can always make appropriate orders in the context of costs. However, for the present, it is only appropriate that the Appellant pays the costs of ₹ 25,000/- to Respondent No.1.

16. Mr. Menezes states that such costs will be paid to Respondent No.1 or deposited in the First Appellate Court within four weeks from today.

17. The impugned Order dated 28/12/2009 is, hereby, set aside, subject to the Appellant paying/depositing the costs within four weeks. Civil Misc. Application No.86/2009 is restored to the file of District Judge-1, at Mapusa. The District Judge, consistent with the observations made in this order, shall permit the parties to lead evidence, both, oral as well as documentary in the context of the application for condonation of delay. Since one of the Respondents is a senior citizen, the First Appellate Court to dispose of the Civil Misc. Application No.86/2009 as expeditiously as possible and, in any case, within six months from today. The learned Counsel for the parties state that both parties will cooperate with the learned District Judge for expeditious disposal of the Civil Misc. Application.

18. The substantial question of law is answered in the aforesaid terms. The Appeal is disposed of in the aforesaid terms, with costs of ₹ 25,000/-, payable by the Appellant to Respondent No.1 within four weeks.

19. The parties/their Advocates to appear before the District Judge-1, Mapusa on 29th April 2021 at 10.00 a.m. and file an authenticated copy of this order. The District Judge-1 at Mapusa to proceed further in the matter only after the Appellant produces proof

of payment of costs to Respondent No.1, or if the amount of costs is deposited with the Registry of the District Court within four weeks from today. If the costs are deposited, then Respondent No.1 herein will have the liberty to withdraw the same, unconditionally.

20. It is once again clarified that the observations in this order are only in the context of remand. Therefore, the First Appellate Court should not take into account these observations or be influenced by them whilst disposing of the Appellant's application for condonation of delay on its merits having regard to the evidence which the parties will produce before it. All contentions of all parties are, therefore, expressly left open for consideration by the First Appellate Court.

21. Further, it is clarified that this Court has not at all gone into the merits of the original dispute between the parties in the Suit and the Counter-claim.

22. The Appeal is disposed of in the aforesaid terms.

23. All concerned to act based on an authenticated copy of this order. However, the Appellant, at a later point in time, should place a certified copy of this order on the file of the First Appellate Court. The Registry to ensure that the records are returned to the District Judge -1 at Mapusa, at the earliest.

M.S. Sonak, J.