

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 133 OF 2021

SHRI POTO MAHADEV GAONKAR ...PETITIONERS
(DECEASED) THROUGH LEGAL HEIRS
AND ORS.

V/S.

SMT. SAVITRI POTO GAONKAR ...RESPONDENTS
(DECEASED) THROUGH LEGAL HEIRS
AND ORS.

Mr. A.D. Bhobe, Advocate *for the petitioners.*

Mr. V.P. Thali, Advocate *for the respondents.*

CORAM : MANISH PITALE, J

RESERVED ON : 23RD November, 2021

PRONOUNCED ON : 2nd December, 2021

ORDER:

1. By this Writ Petition, the petitioners have challenged order dated 14/01/2021, passed by the Court of Principal District Judge, South Goa (Appellate Court) whereby an application for bringing on record legal representatives of respondent no.6 (original plaintiff no. 10) and for condonation of delay, as also setting aside of abatement, has been rejected. This is the second round before this Court on the aforesaid issue, because the Appellate Court by an earlier order

dated 29/01/2018, had rejected the said application at Exh-18. It was challenged by the petitioners by filing Writ Petition No. 328 of 2018. By order dated 15/06/2018, this Court partly allowed the Writ Petition, setting aside the order of the Appellate Court dated 29/01/2018 and remanded the matter back for consideration afresh on merits after hearing the rival parties.

2. The petitioners had filed Special Civil Suit No.24/99/A alongwith respondent Nos.5 to 12 against the contesting respondent Nos.1 to 4 for declaration of ownership in the suit property and for injunction. The suit was thereafter re-registered as Regular Civil Suit No.12/2010/A, in view of the amendment of the Goa Civil Courts Act,1965. During the pendency of the suit the original plaintiff No.10 Gurudas Gaokar died. Admittedly no application was filed for bringing his legal representatives on record. It is the case of the contesting respondents that since the cause of action is not severable, the entire suit stood abated.

3. On 30/07/2011, the aforesaid suit was decreed by the trial court, against which the contesting respondents filed Regular Civil Appeal No.153 of 2011, before the District Court. In the said appeal, in place of the original plaintiff No.10 Gurudas Gaokar, who was

arrayed as respondent No.9, his widow Smt. Pittol Gurudas Gaokar was impleaded as respondent No.9 (a).

4. On 09/07/2012, the aforesaid appeal was partly allowed and the matter was remanded back to the trial Court with a direction to decide the suit afresh on the basis of Surveyor's report and after hearing rival parties. Even after remand, in the pending suit no application was moved for bringing on record the legal representatives of the original plaintiff No.10. In fact, the deceased original plaintiff No.10 Gurudas Gaonkar was continued to be shown as plaintiff No.10. It is the case of the petitioners that they had informed their lawyer about the death of the said Gurudas Gaonkar, but necessary steps could not be taken because their Advocate was suffering from cancer. It is relevant that on 07/07/2014, the Advocate representing the petitioners died.

5. On 05/05/2016, the Trial Court dismissed the suit, against which the petitioners and the proforma respondents filed Regular Civil Appeal No.55 of 2015, before the Appellate Court. In this appeal also, at the time of filing no effort was made on behalf of the petitioners to bring the legal representatives of the said original plaintiff No.10 on record. In fact, he was shown as respondent No.6

in the said appeal and neither his widow nor his children were impleaded as parties.

6. The aforesaid application at Exh.18 was filed on 10/01/2017 in the pending appeal on behalf of the petitioners to bring on record legal representatives of the said Gurudas Gaokar shown as respondent No.6 in the appeal. In this application it was sought to be explained that due to the ill health and eventual death of the Advocate representing the original plaintiff, necessary steps to bring on record the legal representatives of the said Gurudas Gaokar could not be taken. An affidavit of the son of the said Advocate was placed on record in support of the said contention. The contesting respondents filed their reply and opposed the application for bringing on record the legal representatives of the said Gurudas Gaokar. On 29/01/2018, the Appellate Court dismissed the application. As noted above, Writ Petition No.328 of 2018 filed by the petitioners against the same was partly allowed and the matter was remanded back to the Appellate Court. By the impugned order dated 14/01/2021 the Appellate Court again rejected the said application, against which the present Writ Petition has been filed.

7. Mr. A.D. Bhole, learned Advocate appearing for the petitioners vehemently submitted that the Appellate Court committed a grave error in rejecting the application for bringing on record the legal representatives of the said Gurudas Gaokar, as also the prayer made therein for condonation of delay and setting aside abatement. It was submitted that the Appellate Court did not appreciate the law laid down by the Hon'ble Supreme Court in the judgments relied upon. The said court placed much emphasis on procedure rather than substantive justice between the parties. It was submitted that the contesting respondents themselves had impleaded the widow of the said original plaintiff no.10 Gurudas Gaokar when they had filed appeal before the Appellate Court and this aspect ought to have been considered in the proper perspective. It was further submitted that the petitioner had nothing to gain by seeking to implead the legal representatives after considerable delay and no prejudice would be caused to the contesting respondents if the application were to be allowed.

8. It was highlighted that if the impugned order is not set aside, the entire proceeding might abate, because the contesting respondents are bound to approach the Appellate Court with the

contention that since the cause of action is not severable, entire proceedings would abate without consideration of the case of the petitioners on merit.

9. On the other hand, Mr. V.P. Thali, learned Counsel appearing for the contesting respondents submitted that no indulgence could be shown to the petitioners because they miserably failed to take necessary steps as per law to bring on record legal representatives of the aforesaid deceased party. It was submitted that the original plaintiff no.10 was a party alongwith the petitioners and the proforma respondents and therefore, there was no scope for the petitioners to claim that they were not aware about the death of the said person. Even after remand of the matter by the Appellate Court, during the period the suit remained pending in the second round, the petitioners did not take any steps to bring on record the legal representatives. In this situation, according to the learned Counsel for the contesting respondents, rights of the said respondents stood crystallised in their favour and the same ought not to be upset by any indulgence shown to the petitioners.

10. It was submitted that the contesting respondents would certainly suffer grave prejudice if all requirements of procedural law

were ignored while granting opportunity to the petitioners in the facts of the present case. It was further submitted that abatement occurs automatically by operation of law and that therefore, there was no ground made out by the petitioners for interference in the impugned order passed by the Appellate Court. It was submitted that if any other view was taken in the matter, the whole basis of procedural law would stand ignored and that therefore, the Writ Petition deserved to be dismissed.

11. Having heard the learned Counsel for the rival parties, it needs to be examined whether the Appellate Court was justified in dismissing the application at Exh.18 filed on behalf of the petitioners for bringing on record legal representatives of the original plaintiff No.10. The Appellate Court has held that the petitioners failed to demonstrate sufficient cause for condonation of delay in bringing on record legal representatives and that therefore, the application deserved to be rejected. Rejection of the said application has the effect of the suit abating to the extent of the original plaintiff No.10. Since the decree sought in the present case would not be severable, it is apprehended by the petitioners that the

entire suit would stand abated, which would be extremely prejudicial to them.

12. In the present case, as noted above, in the first instance the suit filed by the petitioners was decreed. Even before the said decree was passed on 30/07/2011, in the suit filed by the petitioners, on 27/12/2010, the original plaintiff No.10 had expired. The appeal filed against the said decree was partly allowed on 19/07/2012 and the matter was remanded back to the trial Court for deciding the suit afresh based on Surveyor's report and after hearing arguments of the rival parties. At this stage also, no steps were taken for bringing on record the legal representatives of original plaintiff No.10. On 05/05/2016, the suit was dismissed by the trial Court, against which the petitioners filed Regular Civil Appeal No.55 of 2016. On 10/01/2017, the petitioners eventually moved the application seeking permission to bring on record legal representatives of respondent No.6 in the said appeal (Original plaintiff No.10). Obviously, there was delay in moving the said application.

13. A perusal of the application filed on behalf of the petitioners shows that the petitioners stated that they became aware of the

death of the original plaintiff No.10 on 28/09/2016, when the report of the Bailiff was perused.

14. In the very said application, the petitioners stated that when the matter was before the trial Court, they had instructed their Advocate about the death of original plaintiff No.10, but since the Advocate was suffering from cancer and he was undergoing medical treatment, he used to remain absent and perhaps for that reason, an appropriate application was not filed. It is then stated that the said Advocate expired on 07/07/2014, when the matter was pending before the trial Court after remand from the Appellate Court. It is also stated that the son of the Advocate withdrew his appearance and thereafter, another Advocate filed Vakalatnama and attended the proceedings before the Trial Court.

15. An affidavit of the said son of the original Advocate was filed alongwith the said application, wherein a categorical statement was made that he was not aware about the death of the original plaintiff No.10 or that his legal representatives were not brought on record and further that the delay caused in bringing on record the legal representatives was purely on account of the fault of the Advocate. It was also stated in the application that the subsequent Advocate

who was engaged in the matter before the trial Court was also unaware about the death of original plaintiff No.10.

16. The Appellate Court in the impugned order has placed much emphasis on the contradiction in the stand taken by the petitioners in the aforesaid application, wherein they initially stated that they became aware about the death of original Plaintiff No.10 when report of the Bailiff was received in the pending appeal, while thereafter they stated that instructions were given to the Advocate when the matter was pending before the trial Court about the death of original Plaintiff No.10. On this basis, the Appellate Court has drawn adverse inference against the petitioners. It is also held that even though the widow of the said plaintiff was shown as representing his interest in the appeal filed by the respondents in the first round, that in itself would not be sufficient for explaining the delay on the part of the petitioners, for the reason that the appeal filed in the second round could not be said to be in continuation of the earlier appeal filed before the Appellate Court. There is no reference in the impugned order to the affidavit of the son of the Advocate representing the petitioners before the trial Court, the assertion about his withdrawal of appearance and that

part of the reason for delay could be attributable to the Advocates or their ignorance about the death of original plaintiff No.10.

17. This Court is of the opinion that litigants approaching Courts do rely heavily in this country on the Advocates whom they engage for representing their cause. More often than not, the litigants are illiterate and being unaware about the niceties of law, they fully rely upon their advocates. Having engaged an Advocate, the litigants generally rely upon them for guidance and information regarding proceedings pending before the Court. Although there does appear to be contradiction in the contents of the application filed on behalf of the petitioners in the present case, it cannot be ignored that the petitioners specifically stated that they had informed their Advocate before the trial Court about the death of the original plaintiff No.10, but the said Advocate was suffering from cancer and he eventually expired on 07/07/2014. Thereafter, the son of the said Advocate withdrew his appearance and another Advocate was engaged. The aforesaid son of the earlier Advocate, who withdrew his appearance, filed an affidavit in support of the said application before the Appellate Court. He clearly stated that he was not aware about the death of original plaintiff No.10 or that his legal representatives

were not brought on record. He specifically stated that delay in bringing on record the legal representatives of original plaintiff No.10 was due to the fault of the Advocate.

18. The petitioners had specifically stated in their application that constituted attorney of the petitioners/original plaintiffs i.e. one of the plaintiffs had signed the Vakalatnama to engage another Advocate before the trial Court and that the said person was also the constituted attorney for the legal representatives of the deceased original plaintiff No.10. It was also stated that the Advocate subsequently engaged was not aware about the death of original plaintiff No.10.

19. A perusal of the impugned order passed by the Appellate Court shows that there is no discussion on the aforesaid aspects of the matter. The said statements in the application for condonation of delay on behalf of the petitioners were significant for explaining the circumstances in which the application was eventually filed on 10/01/2017, in the appeal pending in the second round before the Appellate Court. This Court is of the opinion that the Appellate Court erred in failing to refer to the aforesaid material as a reasonable explanation for delay on the part of the petitioners.

20. This Court is also of the opinion that the Appellate Court erred in examining the effect of the widow of original plaintiff No.10 being shown as his representative in the appeal filed by the respondents in the first round, which was partly allowed. When the matter stood remanded to the trial Court, undoubtedly, the petitioners failed to take steps to bring on record the legal representatives of the deceased original plaintiff No.10. The widow of the said plaintiff who was shown as his representative in the appeal was also not shown as party in the proceedings before the trial Court, although the matter was remanded. It is also a matter of debate as to whether the proceedings in the form of appeal now pending before the Appellate Court could be said to be a proceeding in continuity of the earlier appeal wherein the widow of original plaintiff No.10 was indeed shown as representing his interest. The emphasis on the niceties of the law and hair-splitting arguments made on behalf of the respondents before this Court have the tendency of emphasising on law, ignoring the fact that law ultimately is to assist the Court to do justice between the parties.

21. In the present case, there can be no doubt about the fact that if the impugned order is not interfered with, the petitioners will suffer

extreme prejudice. The apprehension expressed on their behalf that the abatement of the suit in respect of original plaintiff No.10 may have the effect of the entire suit abating, is a real apprehension indicating the extent of prejudice that the petitioners are likely to suffer. The petitioners had nothing to gain by deliberately delaying the filing of the application for bringing on record legal representatives of the deceased original plaintiff no.10. On the other hand, the respondents will not be prejudiced if the application filed by the petitioners is granted because, at the most, the respondents will have to contest the matter on merits before the Appellate Court. The requirement of contesting the matter on merits cannot be said to be a matter of prejudice for the respondents, as it would be appropriate for the Court to deal with the issues that arise between the parties on merits and then to determine their *inter-se* rights.

22. This Court is of the opinion that in this backdrop, it would be in the interest of justice that the present Writ Petition is allowed, so that the petitioners get an opportunity to contest the appeal pending before the Appellate Court on merits.

23. Accordingly, the Writ petition is allowed. The impugned order passed by the Appellate Court is set aside and the application filed

by the petitioners at Exh.18 is allowed. Consequently, it is directed that the legal representatives of respondent No.6 before the Appellate Court (original plaintiff No.10 – Gurudas Gaokar), details of whom are given in paragraph 13 of the said application (Exh-18) shall be brought on record. The amendment in that regard shall be carried out by the petitioners before the Appellate Court within three weeks and the said Court shall decide the appeal as expeditiously as possible.

MANISH PITALE, J.