

IN THE HIGH COURT OF BOMBAY AT GOA

Writ Petition No. 83 of 2021

1. Shri Ramesh Vassudev Sarmalkar ,
70 years of age, Businessman,
Son of Vassudev Sarmalkar,
Residing at house No. 467/2,
Kakode House, Near St. Joaquim Chapel,
Borda, Margao Goa.

2. Smt. Rama Ramesh Sarmalkar,
Major of age, 69 years of age,
Wife of Ramesh V. Sarmalkar,
Residing at House No.467/2,
Kakode House, Near St. Joaquim Chapel,
Borda, Margo, Goa.

...Petitioners

V e r s u s

1. Sociedade Verlekar,
Through Its Administrators,
Shri Ashok Roulu Verlekar,
Major of age,
Having Jewelry Shop No.10,
New Market, Margao Goa.

... Respondents

2. Smt. Vijayabai Vassudev Sarmalkar
(Deceased)

3. Mrs. Viyashali Jyotendra Sarmalkar,
Major of age,
Resident of C/o Anand Keni Dalal House,
2nd floor, Comba, Margao, Goa.

4. Shri Madan Neurenkar (deceased)

5. Smt. Suman Madan Neurenkar, Major of age,
Resident of 131/1-2, Plot No.4, Aundh,

Pune 411 007.

6. Shri Atmaram S. Angle (since deceased)

7. Smt. Sujata Atmaram Angle, Major of age,
Resident of La Campala Colony, Near Milk
Booth Centre, Miramar, Panaji Goa.

... Respondents

**Mrs. A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate for
the Petitioners.**

Mr. T. Pereira, Advocate for the Respondent

CORAM: M. S. SONAK, J

DATED: 28TH JULY 2021.

ORAL JUDGMENT:-

1. Heard Mrs. Agni, the learned Senior Advocate, who appears along with Ms. Jay Sawaikar, the learned counsel for the petitioners, and Mr. T. Pereira, the learned counsel for the respondent no.1-contesting respondent.
2. Mrs. Agni, the learned Senior Advocate for the petitioner points out that respondent no.1 is the contesting respondent and the other respondents are the relatives of the petitioners who will have no interest in opposing the relief applied for in this petition.
3. Accordingly, Rule is issued in this petition and the Rule is made returnable forthwith with the consent of the learned counsel for the parties.
4. This petition is directed against the order dated 15/6/2020 by which the appeal Court has dismissed the petitioners' application seeking

condonation of delay of 58 days in instituting the appeal against the judgment and decree dated 24/10/2018 made by the learned trial Court.

5. The petitioners had applied for condonation of delay by pointing out that there was some uncertainty in their mind about whether the appeal was to be instituted before the District Court or the High Court. Besides, certain additional reasons have been given that some of the petitioners had traveled to Pune, and, there were some health issues as well.

6. Mrs. Agni submits that this is a matter where sufficient cause was shown and even the delay was not quite inordinate and, therefore, the application seeking condonation of delay should have been allowed and the petitioners should have been allowed to test the correctness of the judgment and decree dated 24/10/2018 on merits.

7. Mr. T. Pereira, the learned counsel for respondent no.1 submits that a false reason was given and, therefore, the application seeking condonation of delay was correctly dismissed. He submits that the parties have been litigating for several years and proceedings were filed even earlier before the correct fora. He submits that in such circumstances it is inconceivable that the petitioners would carry some incorrect impression about the forum. He submits that there is no error in the impugned order and, therefore, this petition may be dismissed.

8. Having perused the application seeking condonation of delay and the material in support thereof, according to me, sufficient cause was shown for condonation of delay. The impression, though erroneous, which the petitioners carried about the forum cannot be said to be not genuine.

9. Besides, even a medical certificate was produced regards health issues. The learned first appellate Court should not have discarded the medical certificate merely because the medical certificate had not stated in express terms that the petitioners were incapable of attending Court. The petitioners had made a statement on oath that they were in Pune and returned to Goa only on 29/10/2018. This statement should not have been doubted simply because it was not backed by any documentary evidence. In such matters, some lapse may be there on the part of the parties seeking condonation of delay. However, as long as such a lapse is not mala fide or intended to derive some undue benefits, condonation, should not be refused.

10. In ***N. Balakrishnan Vs. M. Krishnamurthy*** 1998(7) SCC123 this is what the Hon'ble Apex Court has held in the context of consideration of application seeking condonation of delay.

11. Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

*12. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality*.*

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.”

12. The learned first appellate Court has also considered the decision of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & others** (2013) 12 SCC 649, and according to me that decision also helps the case of the petitioners. Therefore, according to me, a case is made out for condoning the delay of 58 days in instituting the appeal before the first appellate court. However, as observed in **N. Balakrishnan** (supra), the opposite party, cannot be forgotten. The opposite party has to be compensated for the inevitable prejudice. Accordingly, this is a fit case where the delay can be condoned subject to the petitioners paying costs of Rs.15,000/- (Rupees Fifteen thousand only) to respondent no.1 within four weeks from today.

13. This petition is disposed of by making the following order:

ORDER

a) The impugned order dated 15/6/2020 is hereby set aside and the delay of 58 days in instituting the appeal against the judgment and decree dated 24/10/2018 is condoned subject to the petitioners paying costs of Rs.15000/- to respondent no.1 within four weeks from today.

b) The costs may be either directly paid and proof produced before the appeal Court or the costs may be deposited before the appeal Court within four weeks. If the costs are deposited, respondent no.1 will be at liberty to withdraw the same.

c) If no costs are paid or deposited within four weeks, from today, then, this petition will be deemed to have been dismissed with costs of Rs.5000/- without further reference to this Court.

14. Rule is made absolute in the aforesaid terms.

15. If the cost is paid or deposited, then, the appeal Court to admit the appeal and issue notice to the parties for the disposal of the appeal in accord with law and on its own merits.

16. The petitioners to file an authenticated copy of this Order before the appeal Court within six weeks from today. All concerned to act on an authenticated copy of this order.

M. S. SONAK, J.

MARIA
AURA
PEREIRA

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MARIA AURA
PEREIRA
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