

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.95/2015
WITH
CIVIL APPLICATION NO.245/2015

VERONICA D'CUNHA (since
deceased) through her legal heirs

a)Mrs. Ranjana D'Cunha, daughter of
late Mrs. Veronica D'Cunha, wife of
Mr. Justus Fernandes, aged 35 years,
housewife

b)Mr. Justus Fernandes, husband of
Mrs. Ranjana D'Cunha, son of late Mr.
Henricks Fernandes, aged 34 years,
service, both r/o H.No. M-A-4, Alto
Betim, Penha De France, Porvorim,
Goa.

... APPELLANTS

Versus

1. MR. JONATHAN FRANCIS
D'SOUZA, aged 19 years, son of Mr.
Fernando F. C. D'Souza, R/o H.no.59,
Souza Waddo, Uccassaim, Bardez-
Goa.

2. MARK E. D'CUNHA, major of
age, 54 years, son of Mr. Philip
D'Cunha, resident of Neres, Ronald 1,
29223, Celle, Germany.

3. MRS. MARK E. D'CUNHA, of
major age, 53 years, son of Mr. Philip
D'Cunha, resident of Neres, Ronald 1,
29223, Celle, Germany.

... RESPONDENTS

Mr. Gaurish Agni, Advocate *for the Appellant*.
Mr. J. Abreu Lobo, Advocate *for Respondent No.1*.

CORAM: M. S. SONAK, J.

DATED: 8th September 2022

ORAL ORDER:

1. Heard Mr. Agni for the appellants and Mr. Lobo for respondent no.1.

1. This appeal challenges the Trial Court's decree dated 21.01.2009 and the Appellate Court's Order dated 21.04.2015 declining to condone the delay in instituting the appeal against the said decree.

2. The record bears out that the Special Civil Suit No.53/2005/B was instituted on 04.05.2005 and the appellant was duly served therein. On 22.09.2005, Advocate Morajkar put in an appearance on behalf of the appellant and even undertook to file his Vakalatnama. After appearing in the matter without filing any Vakalatnama upto 21.07.2008, the said Advocate did not appear in the matter any further. Therefore, on 21.07.2008, an order was made by the Trial Court to proceed ex-parte against the defendants including the appellant herein.

3. The Trial Court recorded evidence of the plaintiff and on 21.01.2009 decreed the suit ex-parte. After almost three years, the appellant filed an application under Order 9 Rule 13 of the Civil Procedure Code for setting aside the ex-parte decree. However, this application was withdrawn by the appellant on 06.04.2013 by filing a written application and affidavit dated 06.02.2013.

4. The appellant, in her application seeking withdrawal, admitted that she had written a letter to Advocate Cordeiro which was produced on record on the last date of hearing by said Advocate Cordeiro. In the said letter, she had instructed her Advocate not to further appear in the matter, since, she was not interested in its outcome. Mr. Morajkar, is stated to be the junior of Advocate Cordeiro.

5. The application for withdrawal dated 06.02.2013 was not only signed by the appellant but was supported by her affidavit. In the affidavit, whilst admitting that she had sent the letter to Advocate Cordeiro, she claimed that she did not remember how she became aware of the Civil Suit filed against her. She also claimed that she does not remember having written such a letter to Advocate Cordeiro.

6. The averments in paragraphs 10 and 11 of the appellant's affidavit accompanying her application for withdrawal dated 06.02.2013 read as follows:-

“10. I say that I still do not remember how I became aware of the Civil Suit filed against me by the Respondents, however, being confronted with the letter produced by Adv. Cordeiro which is written by me to Adv. Cordeiro, I admit that the same is written by me and bears my signature.

11. I say that I still do not remember having written the above referred letter to Adv. Cordeiro at the time of filing the present proceedings, however now I admit that it is my handwriting and bears my signature.”

7. Significantly, along with this appeal memo, the application for withdrawal and the affidavit accompanying the same were not annexed. According to me, this is the most crucial document in the matter and therefore, there can be no excuse in not annexing this document. This appeal was instituted in the year 2015 and Mr. Agni now contends that he was carrying this letter with him and was in the process of handing it over to the Court until, Mr. Lobo, learned counsel for the respondent no.1 interjected and himself handed over this crucial document to the Court.

8. Since, practically everything turns upon the application for withdrawal and the affidavit accompanying the same, the

appellant, was duty-bound to annex this document in the first instance to the appeal memo. The defence that such a document was in the file of her Advocate or that her Advocate was in the course of producing it is not a defence that can be accepted considering the importance of this document to this matter.

9. Be that as it may, after withdrawing the application for setting aside of the ex-parte decree, the appellant preferred an appeal to the District Court questioning the ex-parte decree. Such an appeal would no doubt be maintainable provided the delay in instituting the same was sufficiently explained. There was a delay of four years, two months and ten days in instituting the appeal.

10. Mr. Agni points out that the ground raised in the application seeking condonation of delay was that the appellant, after the demise of her husband in the year 2004 had gone into depression. Further, she was herself suffering from several medical ailments and consequently, could not attend to the matter.

11. The Appeal Court, has considered the cause shown and found that the same was not sufficient to explain the inordinate delay of over four years in instituting the appeal. Besides, the Appeal Court, has quite correctly taken into consideration the

filing and withdrawal of the earlier application for setting aside of the ex-parte decree. The appellant, had, though not in so many words, tried to blame her advocate for not attending her case. However, when the Advocate produced the letter from the appellant containing instructions from her not to pursue this matter, the appellant, withdrew her application. In the application seeking withdrawal and the affidavit accompanying the same, the appellant, categorically admitted writing the said letter to her Advocate. She also admitted that the signature on the said letter is her's. However, very vaguely she claimed to have a lapse of memory about writing such a letter. The defence of lapse of memory may at the highest offer some explanation as to why this letter was not disclosed to the Trial Court along with the application seeking setting aside of the ex-parte decree. However, the letter, completely exposes the falsity of the appellant's case. Unfortunately, by not annexing a copy of the application for withdrawal and the affidavit accompanying the same along with this appeal memo, it is possible to say that similar attempt was made before this Court as well.

12. In any case, the First Appellate Court has exercised its discretion by applying correct principles. No case is made out for condonation of inordinate delay of over four years. The cause

shown was founded on false statements. The conduct of the appellant was also far from equitable.

13. In the above circumstances, this appeal raises no substantial questions of law. The appeal is accordingly dismissed. No costs are imposed, in the fond hope that the appellant hereafter will produce all relevant documents before Courts of law.

14. Civil application does not survive and the same is also dismissed.

M. S. SONAK, J.