

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.6 OF 2021

M/S. SEA QUEEN BEACH RESORT PVT. LTD.,

A company registered under the Indian Companies Act, having its office at H.No.684, E & F Block, Kuvempunagar, Mysore, represented by its authorized representative, Mr. Pawandeep Singh Sahni, son of Mr. Sawinder Pal Singh Sahni, 27 years in age, having office at H. No.684, E & F Block, Kuvempunagar, Mysore.

... Petitioner

Versus

1. Shri Agnelo Fernandes (expired through Lrs.)

a) Catherine Fernandes, wife of Agnelo Fernandes, major of age,

b) Peter Fernandes, s/o Late. Shri Agnelo Fernandes, major of age,

c) Miss. Sandra Fernandes, d/o Late Shri Agnelo Fernandes, major of age,

d) Miss. Candy Fernandes, d/o Late Shri Agnelo Fernandes, major of age,

e) Miss. Olinda Fernandes, d/o Late Shri Agnelo Fernandes, major of age, all residents of Sunshine Sea Grill and Party House, Colva, Salcete Goa.

... Respondents

Mr. Jatin Ramaiya, Advocate for the petitioner.

Mr. Balkrishna Sardessai, Advocate for the respondents.

CORAM: M. S. SONAK, J

DATE : 17th January 2022

ORAL JUDGMENT :

1. Heard Mr. J. Ramaiya, learned counsel for the petitioner, and Mr. B. Sardesai learned counsel for the respondents.
2. Rule. The rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.
3. The challenge in this petition is to the judgment and order dated 23.08.2021 in Misc. Civil Appeal No.22/2021 by which the appeal Court has condoned the delay of 139 days in applying for setting aside *ex-parte* decree.
4. At the very outset, Mr. Ramaiya pointed out that ground No. XV in the memo of appeal instituted by the respondents herein making certain allegations against the trial Judge. Ground XV in the appeal memo reads as follows:-

“The Dismissal of the application of condonation by the Trial Court is not only without proper appreciation but highly indicative of a bias and a prejudiced view especially considering the admission by the learned trial Court and thereby denying natural justice to the appellant.”

5. It is most unfortunate for such ground should be raised in the memo of appeal making baseless and irresponsible allegations against the trial Judge. This Court was inclined to consider action but Mr. Sardesai, learned counsel on behalf of the respondents,

based on instructions, has unconditionally tendered an apology and offered to withdraw ground No. XV and the baseless allegations therein. Besides this is a case where Mr. Sardesai again, based on the instructions has offered to pay costs of ₹25,000/- instead of ₹5000/- that has been awarded by the appeal Court. Having regard to both these circumstances, leave is granted to the respondents to withdraw the ground No. XV from the appeal memo. This ground shall therefore stand expunged from the records.

6. Mr. Ramaiya, learned counsel for the petitioner submits that no sufficient cause was shown in this case as was quite correctly analyzed and observed by the learned Trial Judge. Mr. Ramaiya invited my attention to the observations at para 13 of the Trial Court's order in which the trial Court, has held that the reason for the delay could not be regarded as genuine.

7. The appeal Court, in this case, has taken into account the findings recorded by the trial Court but the appeal Court has held that the respondents were under the bonafide perception that the matter will be pursued on the same dates. There was an error in recording the proper date in the diary. This error was on account of shifting of the office and the concerned file being kept on the file rack where disposed of matters were normally placed

and finally, there were some issues due to one of the respondents mother's ailment for which she had to be admitted to Tata Memorial Hospital at Mumbai. The appeal Court has also noted that the Advocate for the respondents had also assumed responsibility for certain faults in the prosecution of the matter. Having regard to all these facts, the appeal Court positively exercised discretion and condoned the delay of 139 days.

8. According to me, this is not a case of any perversity or unreasonable exercise of discretion on the part of the appeal Court. Merely because some other view is possible or because the view taken by the learned trial Judge was also plausible view cannot be a ground to exercise extraordinary jurisdiction and interfere with the positive exercise of discretion by the appeal Court. In this case, there was nothing on record to indicate that the delay on the part of the respondents was deliberate or as a part of some dilatory strategy.

9. In *N. Balakrishnan vs M. Krishnamurthy*¹, the Hon'ble Supreme Court has held 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

¹ 1998 (7) SCC 123

as part of a dilatory strategy, the Court must show utmost consideration to the suitor. Further, the Hon'ble Supreme Court has held that once the Court accepts the explanation as sufficient, it is the result of the positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse.

10. The Hon'ble Supreme Court has also held that 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 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.

11. The Hon'ble Supreme Court in the aforesaid matter noted that the conduct of the appellant does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life

an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

12. In the present case also, having regard to the conduct of the respondents, the discretion exercised by the First Appellate Court does not warrant interference. The respondents in this case, were no doubt irresponsible in making baseless allegations against the trial Judge but this error has been acknowledged and suitable amends have also been made by withdrawing the offending ground and payment of exemplary costs. The payment of costs of ₹25,000/- is appropriate having regard to the observations made by the Hon'ble Supreme Court that the Court should not forget the opposite party altogether.

13. For the aforesaid reasons, this petition is partly allowed and disposed of by making the following order :

(a) The impugned order to the extent it condones the delay is not interfered with. However, the costs are enhanced from ₹5000/- to ₹25,000/-.

(b) The respondents to pay/deposit the costs before the trial Court within two weeks from today. If such costs are either

not paid or deposited before trial Court within two weeks from today, then, this petition shall be deemed to have been allowed and the impugned judgment and order dated 23.08.2021 shall be deemed to have been set aside by this Court.

(c) Ground XV from the appeal memo lodged by the respondents stand expunged and the apology of the respondents through their learned counsel is also accepted.

(d) The trial Court will now have to decide the application for setting aside *ex parte* decree on its own merits and in accord with law. In doing this, the trial Court need not unnecessarily be influenced by the observations made in the impugned order or for that matter its earlier order which has already been set aside. The trial Court also need not be influenced by any observations made by this Court in this order as well.

(e) All contentions of all parties on merits are left open for determination by the trial Court.

14. Mr. Sardesai states that some settlements can be explored in this matter because the respondents have neither any intention

to encroach nor to retain any encroachment if indeed there is any encroachment found. He proposes that joint inspection may be ordered or some suitable Commissioner be appointed to hold an inspection and to give a report. He states that if such a report indeed points out any encroachment then, the respondents have no intention of continuing with such encroachment. He states that according to the respondents, there is no encroachment and this offer is made without prejudice. The parties can make such a request before the trial Court and the trial Court to consider making necessary orders if it deems fit and proper. However, pending all this, there is no necessity to delay the hearing of the application for setting aside the decree.

15. The rule is made partly absolute in the aforesaid terms.

16. All concerned to act on the authenticated copy of this order.

M. S. SONAK, J

TARI AMRUT NAGESH Digitally signed by TARI AMRUT NAGESH
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