

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**SECOND APPEAL NO.86 OF 2019
AND
CIVIL APPLICATION NO.208 OF 2019**

1. Piedade Carvalho,
Major, s/o Lawrence Carvalho,
r/o House No.444, Chichanwado,
Ambaulim, Quepem, Goa and his wife;

2. Smt. Severina Carvalho,
(deceased, represented by Lrs)

2a. Joao Carvalho,
s/o Piedade Carvalho,
Major in age, agriculture,
And his wife;

2b. Rosa Maria Carvalho,
Major in age, agriculture,
Both residing at Xepem,
Chichewaddo, Ambaulim,
Quepem, Goa;

2c. Manuel Carvalho,
s/o Piedade Carvalho, major,
agriculture and his wife;

2d. Manuelina Carvalho,
Major in age, both residing at
Chichewaddo, Ambaulim,
Quepem Goa;

2e. Lawrence Carvalho, (dec. thru'LR's)
s/o Piedade Carvalho,
major in age, agriculture,

and his wife;

2e) 1. Deckwin Daniel Carvalho,
S/o late Lawrence Carvalho
17 years in age, Student
Residing at Chichewaddo, Ambaulim,
Quepem Goa;

2(f) Piedade Carvalho,
Major in age, agriculture,
Both residing at Chichewaddo,
Ambaulim, Quepem Goa.

2g. Milagres Carvalho,
s/o Piedade Carvalho,
major, agriculture, and his wife;

2h. Maria Carvalho,
Major in age, agriculture,
Both residing at Chichewaddo,
Ambaulim, Quepem Goa;

2i. Natalina Fernandes,
d/o Piedade Carvalho,
major in age, agriculture
and her husband;

2j. Xavier Fernandes,
Major in age, agriculture,
Both residing at Chichewaddo,
Ambaulim, Quepem Goa;

2k. Santan Silva,
d/o Piedade Carvalho, major,
agriculture, and her husband;

2l. Jose Silva,
Major in age, agriculture,
Both residing at Chandrawaddo,

Fatorda, Salcete Goa;

2m. Salosav Hilario,
d/o Piedade Carvalho,
major in age, agriculture,
and her husband;

2n. Bostianv Hilario,
Major in age, Agriculture,
Both residing at Cumbada
Curtorim, Salcete, Goa.

... Appellants

Versus

1. Mrs. Maria Victoria Boavinda
Furtado, Major, landlady, widow,
w/o late Valeziano Natividade,
Mario das Angustias Furtado alias
Valesio Furtado (deceased)
Represented by Lrs. Already on record.

2. Mr. Jose Furtado alias Jose Cassio
Furtado, Major, widower, retired,
s/o Valesio Furtado,

3. Miss Nimi Furtado alias Maria Nimi
Furtado, Major, d/o Valesio Furtado,
Unmarried, artist.

4. Mrs. Savita Furtado alias Savita
Livia Maria Furtado, d/o Valecio
Furtado, major, service, married
without communion of bens,
All residents of c/o Pedro A.T.
Fernandes, B-305, Grand Landscape,
Dr. Dada Vaidya Road,
Panaji Goa.
(Plaintiff no. 2, 3 and 4 being
represented by their constituted by

Power of Attorney, Mr. Pedro A.T.
Fernandes)

5. Izabella Sucorina Pereira,
Married, housewife,
r/o Condi Quepem.

... Respondents

Mr Sanman Keny, Advocate for the Appellants.
Mr G. Agni, Advocate for Respondent Nos.1 to 4.

CORAM: M. S. SONAK, J.

DATE : 21st OCTOBER 2022

ORAL JUDGMENT :

1. Heard Mr Keny for the appellants and Mr Agni for respondents nos.1 to 4 (contesting respondents). Respondent no.5 had not contested the matter before the trial Court or the appellate Court. Therefore, it is only appropriate that with the consent of the learned Counsel for the contesting parties, this appeal is taken up for final disposal at this stage. Accordingly, this appeal is admitted and taken up for final disposal.

2. Accordingly, this appeal is admitted on the following substantial question of law:

a. Whether the First Appellate Court was justified in rejecting and repelling the sufficient cause as expressed by the appellant in the subject application for condonation of delay of 67 days on the premise of non-production of the original

copies of the public documents of illness of the appellant no.1 by stating that the same are disputed by the respondent on oath by virtue of their reply with affidavit?

3. With the consent and request of the learned Counsel for the contesting parties, the appeal is taken up for final disposal.

4. The challenge in this appeal is mainly to the order dated 02.08.2018, by which the first appellate Court declined to condone the delay of 67 days in challenging judgment and decree dated 28.09.2017 in Regular Civil Suit No.158/2000. The First Appellate Court has reasoned that the original medical certificates were not produced despite the respondents challenging the same on oath.

5. In this case, the delay was of only 67 days. Further, the explanation offered was that the appellant was illiterate, knowing neither to read nor write. He was a senior citizen suffering from various ailments related to his age. He engaged an Advocate to represent him in the matter, and the Advocate was regularly appearing for them before the trial Court. He has also deposed that he would occasionally attend his Advocate's office to find out about the status of the case. The appellant explained that in April 2017, however, he could not contact the Advocate due to his ill

health and hospitalisation. Therefore, he requested his son to reach the Advocate. There is an explanation about how the Advocate omitted to inform the appellant about the decree in the suit.

6. The original medical certificates were not annexed along with the Application seeking condonation. Though the respondents did challenge the averments on the affidavit, in my opinion, there was no case for dismissing the Application for condonation of delay. The reasons set out in the Application constitute sufficient cause. The denials were not based upon any material as stated but were mere denials. Based on that, the Application could not have been dismissed simply because the originals of the medical certificate were not produced. Besides, the appellants have not gained anything by delaying the filing of the appeal.

7. In the case of *N. Balakrishnan V/s. M. Krishnamurthy*¹, the Hon'ble Supreme Court has held that there may be some lapse in case of an application seeking condonation of delay. However, the delay must be condoned unless the same is malafide or intended to draw some undue advantage.

¹ (1998) 7 SCC 123

8. In this case, the appellants' overall conduct does not warrant castigating him as an irresponsible citizen. Nevertheless, the following observations in paragraphs 8 to 13 are transcribed below as, in my judgment, they would assist the appellant's case.

"8. The appellant's conduct 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.

9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in reversional

jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the delay. In such cases, the superior cut would be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

*11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae ut sit finis litium* (it is*

for the general welfare that a period be putt to litigation). 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**² and **State of West Bengal Vs. The Administrator, Howrah Municipality**³.

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

² AIR 1969 SC 575

³ (1972) 1 SCC 366

too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the applicant's part, the Court shall compensate the opposite party for his loss."

9. Thus, applying the above principles to the circumstance from the record, the above substantial question of law is answered in favour of the appellant.

10. Consequently, the delay of 67 days in instituting an appeal before the First Appellate Court must be condoned. However, in doing so, the observations in *N. Balkarishan* (supra) that the Court should not forget the opposite party must be borne in mind. The Court has observed that while condoning the delay, the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and would have also incurred significant litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the applicant's part, the Court shall compensate the opposite party for his loss.

11. In this case, Mr Agni pointed out that the subject matter of the litigation is a property admeasuring almost 14000 sq. mtrs. at Quepem. He pointed out that the property touches the road. He

submits that prejudice will now occasion the contesting respondents because the decree in their favour will not be subject to the decision in the appeal, which might take considerable time. He points out that there will be further litigation expenses.

12. Considering all the above aspects, though a case is made out for condoning the delay, such condonation shall be subject to the appellant paying the contesting respondents costs of ₹25,000/-.

13. Accordingly, this appeal is allowed. The impugned order dated 02.08.2018 is set aside. The delay of 67 days in instituting the appeal against the decree dated 28.09.2017 is hereby condoned subject to the appellants depositing before the First Appellate Court costs of ₹25,000/- within four weeks from today.

14. If the costs are deposited within four weeks, the delay shall stand condoned, and the First Appellate Court should admit and register the appeal against the decree dated 28.09.2017. Further, the appellate Court should endeavour to dispose of this appeal as expeditiously as possible and, in any case, within eight months from the date of deposit of the costs of ₹25,000/-. The appellants should give due intimation to the learned Counsel for the contesting respondents about the deposit of such costs.

15. If, however, the appellants fail to deposit the amount of costs within four weeks, this appeal shall be deemed to have been dismissed with costs of ₹10,000/-.

16. If the costs are deposited within four weeks, the parties are to appear before the First Appellate Court on 05.12.2022 at 10.00 a.m.

17. The appeal is disposed of in the above terms.

18. Civil Application does not survive the disposal of the second appeal and is therefore disposed of as such.

M. S. SONAK, J.

NITI K HALDANKAR
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K HALDANKAR
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