

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.35/2019

1. MRS INDUMATI RAMAKRISHNA
DEVASTHALI ALIAS INDUMATI
VENKATESH TENGSE ALIAS
INDUMATI VENCOTEXA BOTO,
d/o late Ramakrishna Narayan
Devasthali alias Boto, w/o Mr
Venkatesh Durgaram Tengse, age
73 years, resident of H. No. 861/A,
Bhatwaem, Poiguinim, Canacona-
Goa.

2. MR. VENKATESH DURGARAM
TENGSE alias BOTO, (since
deceased represented through LRs)

2(a) MR. SHRIPAD VENKATESH
TENGSE, 55 years of age, r/o H.
No. 55, Near Govind Madhav
Temple, Dhavali, Ponda - Goa.

2(b) MRS. ANAGHA SHRIPAD
TENGSE, 50 years of age, r/o H.
No. 55, Near Govind Madhav
Temple, Dhavali, Ponda - Goa.

2(c) MR. ABHAY VENKATESH
TENGSE, 53 years of age, r/o
Welwada, Poinguinim, Canacona -
Goa.

2(d) MRS. MANASI ABHAY
TENGSE, 47 years of age, r/o
Welwada, Poinguinim, Canacona -
Goa.

2(e) MR. PRAMOD VENKATESH
TENGSE, 51 years of age, r/o H.
No.861/A, Bhatwadem, Poinguinim,
Canacona - Goa.

2(f) MRS. ARCHANA PRAMOD
TENGSE, 47 years of age, r/o H.
No. 861/A, Bhatwadem, Poinguinim,
Canacona - Goa.

2(g) MR. MANOHAR VENKATESH
TENGSE, 49 years of age, r/o H. No.
861/A, Bhatwadem, Poinguinim,
Canacona - Goa.

2(h) MRS. RUKMINI MANOHAR
TENGSE, 45 years of age, r/o H.
No. 861/A, Bhatwadem, Poinguinim,
Canacona - Goa.

2(i) MRS. SANDHYA SANTOSH
TENGSE, 40 years of age, r/o H.
No. 55, Near Govind Madhav
Temple, Dhavali, Ponda - Goa.

3. MR. GIRISH QUESSOVA
SAVAIKAR, 47 years of age, r/o H.
No. 350, Post Gulei, Ambeli,
Sattari - Goa.

4. MRS. ANURADHA GIRISH
SAVAIKAR, 38 years of age, r/o H.
No. 350, Post Gulei, Ambeli,
Sattari - Goa.

... PETITIONERS

Versus

1. MR SHRIKANT MADHUSUDHAN
DEVASTHALI, son of late
Madhusudhan Naraina Devasthali

major of age, r/o Xelem - Loliem,
Canacona - Goa.

2. MR. AAKASH SHRIKANT
DEVASTHALI major of age, son
of Mr. Shrikant Madhusudhan
Devasthali, r/o Xelem - Loliem,
Canacona - Goa.

3. MR. AKHIL SHRIKANT
DEVASTHALI, s/o Mr. Shrikant
Madhusudhan Devasthali, major of
age, r/o Xelem - Loliem, Canacona
- Goa.

4. M/S GOLD RESORTS PVT.
LTD., Company registered under
the Indian Companies Act, 1956
Through its Director / Secretary /
Principal Officer having registered
office at Jain Bhawan, 12, Bhagat
Singh Marg, New Delhi 110 001
and Corporate Office at Augusta
Point, 5th Floor, Golf Course Road,
Gurgaon 112 992.

5. MR. SANTOSH VENKATESH
TENGSE, 46 years of age, r/o H.
No. 55, Near Govind Madhav
Temple, Dhavali, Ponda - Goa.

... RESPONDENTS

Mr Ashwin Bhole, Advocate for the Petitioners.

Mr Jatin Ramaiya, Advocate for the Respondent No.4.

CORAM: M. S. SONAK, J.

DATED: 16th March 2023

JUDGMENT:

- 1.** Heard Mr Ashwin Bhobe for the petitioners and Mr Jatin Ramaiya for respondent no.4.
- 2.** Rule. The Rule is made returnable immediately considering the Order dated 10.02.2023.
- 3.** The challenge in this petition is to the orders dated 30.10.2018 and 15.12.2018 made by the learned Senior Civil Judge at Margao. By the Order dated 30.10.2018, the petitioners' (plaintiffs') evidence was closed for failure to file an affidavit in lieu of examination in chief. By application at Exh.91, the petitioners applied for recall of the Order dated 30.10.2018. However, by Order dated 15.12.2018, this application below Exh.91 was dismissed. Hence the present petition.
- 4.** Mr Ashwin Bhobe, learned counsel for the petitioners submits that sufficient cause was shown for not filing the affidavit in lieu of examination in chief on 30.10.2018. Merely on the ground that no medical certificate or record could be produced on the said date, the opportunity for leading evidence should not have been closed. He submits that this position was explained in substantial detail in the application for recall at Exh.50. He

submits that the Trial Court did not adequately consider this cause. Finally, he submits that the Order closing evidence is extremely harsh and, therefore, the same should have been recalled by compensating the opposite party with costs. For all these reasons, Mr Bhobe submits that the impugned orders may be set aside.

5. Mr Jatin Ramaiya, learned counsel for the respondent no.4 defended the impugned orders based upon the reasoning reflected therein. He pointed out that several opportunities were granted to the petitioners. He submitted that the learned Trial Judge closed the evidence only after the petitioners failed to file affidavit in lieu of examination in chief despite the grant of the last opportunity. Therefore, he submits that no proper cause was shown in the recall application. Further, there was no explanation why the evidence could not commence despite so many opportunities. For all these reasons, Mr Ramaiya submitted that this petition may be dismissed.

6. The rival contentions now fall for my determination.

7. The Order dated 30.10.2018 by which the learned Trial Judge closed the petitioners' evidence reads as follows:-

“ORDER

Since no medical record is placed on record and because the Ld. Advocate is not in position to inform the Court about the alleged sickness, this application rejected. Since, ultimate opportunity was granted for leading evidence and no evidence led today, being old matter, the further evidence of the plaintiff hence closed.”

8. From the above, it is apparent that the main reason for denying adjournment and closing the evidence was the inability of the Advocate to produce the medical record. In the application for recall at Exh.50 however, the petitioners pointed out that the affidavit in lieu of examination in chief of the plaintiff no.1 was in fact filed on an earlier occasion. However, that affidavit had to be withdrawn due to the ill health and old age of the plaintiff no.1. This withdrawal was after obtaining leave of the Court. The documents produced on record were retained with the same exhibit number.

9. The application for recall explains that the draft of the affidavit in lieu of examination in chief of plaintiff no.2(g) was ready but the same could not be filed pending verification by plaintiff no.2(g). The Advocate for the plaintiffs did contact plaintiff no.2(g), who stated that he was not keeping well and was

having fever of and on. To the application for recall, even a copy of the affidavit was annexed.

10. The application explains that Advocate G. Gaonkar from the office of Advocate V. K. Daniel, the lawyer engaged to appear on behalf of the plaintiffs, therefore sought time and the matter was posted on 30.10.2018. On the said date again, Advocate Z. Vaz from Advocate V. K. Daniel's office appeared and was constrained to seek further time as plaintiff no.2(g) continued to be unwell. The certificate was produced along with the application for recall about plaintiff no.2(g) suffering from viral fever on the said date.

11. The application then explains the communication gap between Advocate V. K. Daniel and Advocate Z. Vaz. There is reference to personal difficulties of the Advocate which, despite best efforts could not be resolved. Based upon all this, recall was applied for.

12. The Trial Court however, has reasoned that the petitioners were not quite diligent in the matter. The Court also reasoned that the suit was of the year 2010 and therefore, adjournments could not be granted. The Court also doubted the certificate about the plaintiff no.2(g) suffering from viral fever. The Court

noted that this reason was not stated in the application seeking adjournment. Based upon all this the Court dismissed the application for recall.

13. From the record, it does appear that there were some lapses on the part of the petitioners and their advocates. However, the overall conduct of the petitioners was not sufficient to castigate them as some sort of irresponsible litigants. An affidavit in lieu of examination in chief had been filed in the past but the same had to be withdrawn with the leave of the Court because the said plaintiff was unwell and of old age. Plaintiff No.2(g)'s affidavit was ready but could not be filed on the first occasion for want of verification and on the second due to the viral fever contracted by plaintiff no.2(g). Besides, there were certain personal difficulties concerning Advocate V. K. Daniel. This forced him to request his juniors to appear in the matter.

14. The applications for adjournment therefore could not contain the details or be backed by medical certificates. However, the application for recall was fairly detailed and the same was backed by documents and even a medical certificate.

15. The consequences of closure of evidence are extremely harsh. If the petitioners are denied opportunity to lead evidence,

it is almost certain that their suit would be dismissed. Therefore, some consideration was due to the petitioners in the facts and circumstances of the present case. Some prejudice would occasion to the respondents where such consideration is shown. However, such prejudice could always have been compensated by costs.

16. In the context of sufficient cause for condonation of delay, the Hon'ble Supreme Court in the case of *N. Balakrishnan v. M. Krishnamurthy – (1998) 7 SCC 123* has held that in all such cases there can be some lapse on the part of the litigant concerned. However, that alone, is not enough to turn down his plea and shut the door against him. If the explanation does not smack of malafides or is not put forth as a part of the 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 the acceptance of the explanation.

17. The Hon'ble Supreme Court further held that where a litigant's conduct does not on the whole warrant to castigate him as an irresponsible litigant, the Court must be slow to visit such litigant with the drastic consequences. The Court observed that what the appellant before it did in defending the suit was not very much fair 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. These observations can be applied to the facts and circumstances of the present case.

18. For all the above reasons, the impugned orders warrant interference. This is not to say that the approach of the Trial Court was entirely wrong. This Court is conscious of the directions to the Trial Courts to dispose of old matters. This was a 2010 matter which the Trial Court was required to dispose of at the earliest. Therefore, despite opportunities when the Trial Court found that the petitioners were not leading evidence, this course was adopted. However, interest of justice would have been better served if an additional opportunity were to be granted to the petitioners subject no doubt to payment of substantial costs to compensate the opposite party.

19. Accordingly, the impugned orders are set aside subject to payment of costs of ₹15,000/- by the petitioners within two weeks from today. Such costs should be deposited within two

weeks before the Trial Court. Upon deposit the respondents would be entitled to withdraw this amount unconditionally.

20. However, if the petitioners fail to deposit such costs within two weeks from today then, this petition shall be deemed to have been dismissed with costs of ₹5,000/-.

21. The ad interim stay on the proceedings granted on 11.01.2019 is vacated. The parties to appear before the Trial Court on 05.04.2023 at 10.00 a.m. and file an authenticated copy of this Order. If some parties or their advocates fail to appear, the Court must issue notices to them.

22. The Rule is made absolute to the above extent.

23. All concerned to act on the authenticated copy of this Order.

M. S. SONAK, J.

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