

Maria S.

**IN THE HIGH COURT OF BOMBAY AT GOA**

**WRIT PETITION NO.75 OF 2023**

1. Mr Surindar K. Khosla  
Aged 68 years @ Surindar Kumar and  
his wife
2. Mrs Vijayalakshmi Khosla  
Aged 66 years  
Both major of age,  
Resident of 502/1, Sankwadi,  
Arpora, Bardez-Goa.
3. Maizons Lake View Resort  
A proprietary concern of Petitioner No.1  
Having its office at 502/1  
Sankwadi, Arpora  
Bardez-Goa.

**... Petitioners**

*Versus*

1. M/s Maizons Coastline Developers  
Private Limited Company,  
registered under Indian Companies  
Act, 1956, having its office at Sankwadi,  
Arpora, Bardez-Goa.
2. Pradeep Pundalik Ghadi Amonkar,  
major of age, and his wife
3. Mrs. Rohini Pradeep Ghadi Amonkar,  
major of age,  
both residents of Gangadhar Apartments,  
near building, ground floor,  
behind Ganesh Mandir, Khorlim,  
Mapusa Bardez Goa, 403501.
4. Sunil Dattaram Divkar,  
major of age, and his wife,
5. Mrs. Tanuja Sunil Divkar,  
major of age,

both residents of 71-D-6,  
Feiro Alto Duler  
Mapusa Bardez Goa.

6. The Managing Director,  
Economic Development Corporation  
Limited, Panaji-Goa.

**...Respondents**

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

**Mr Shivan Desai with Ms Tahira Menezes, Advocate for Respondent No.1.**

**Ms S. Shaikh, Advocate for Respondent No.6.**

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**CORAM: M. S. KARNIK, J.**

**DATED: 27<sup>th</sup> APRIL 2023**

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**JUDGMENT:**

1. Invoking the jurisdiction of this Court under Article 227 of the Constitution of India, the petitioners-plaintiffs seek to challenge the judgment and order dated 07.01.2023 passed in Miscellaneous Application No.122/2016 in Civil Suit No.40 of 2005 thereby dismissing the application for extension/condoning the delay of 228 days in filing the application under Order 9 Rule 9 of Code of Civil Procedure ('CPC' for short).
2. The petitioners are referred to as the plaintiffs and the respondents are referred to as the defendants for convenience.
3. The respondents are duly served. Shri Shivan Desai, learned counsel appears on behalf of respondent no.1 alongwith

Ms Tahira Menezes. Ms S. Shaikh, learned counsel appears on behalf of respondent no.6.

4. The plaintiffs filed a suit for declaration, permanent injunction and other consequential reliefs.

5. It is the case of the plaintiffs that in respect of the suit property there was an agreement executed between the plaintiffs and defendants dated 23.03.2004. The plaintiffs had paid the entire loan due from the defendants no.1 to 5 to defendant no.6 besides other dues, taxes and invested Rs.850 lakhs for development of the resort. Upon payment being made by the plaintiffs to the defendant no.6, there was an attempt made to release the property in favour of defendants no.1 to 5 and therefore the suit was filed restraining the defendant no.6 from handing over title deeds and releasing the property in question in favour of defendants no.1 to 5.

6. Ms Agni learned senior advocate for the plaintiffs submitted that the plaintiffs are based in U.K. The plaintiff no.1 is suffering from cancer for the last few years. The plaintiff no.1 was in Goa since December 2015 till 1<sup>st</sup> June 2016. The plaintiff no.1 used to make inquiries with his advocate who was dealing with his matters who informed him that his matter is being duly attended to. The Advocate concerned was handling other litigations as well on behalf of the plaintiffs. It was when another case being Civil Suit no.215/2013 which was also handled by the same advocate was found to have been decreed against the plaintiffs, that on making inquiries regarding other matters, the plaintiffs realised that the present suit was

dismissed for default. The advocate appearing for the plaintiffs narrated his difficulties and expressed his inability to appear and defend the interest of the petitioners for personal reasons.

7. Accordingly, a composite application dated 20.07.2015 for restoration under Order 9 Rule 9 read with Section 151 of CPC and for condonation of delay was filed. The application was supported by an affidavit of the concerned advocate. Since it was a composite application, the plaintiffs also prayed that the delay of 228 days in filing the application under Order 9 Rule 9 be condoned. The defendants opposed the application by filing a reply. The defendants opposed the application by filing a reply. The trial Court dismissed the application on 07.01.2023 which order is impugned in this petition.

8. Learned counsel Shri Desai with advocate Ms Tahira Menezes appearing for the respondent no.1 and advocate Ms S. Shaikh for the respondent no.6 raised a preliminary objection as regards maintainability of this petition as, according to them, under Order 9 Rule 9 of CPC an appeal from order lies under Order 43 Rule 1(c) CPC. This objection is that the plaintiffs having filed a composite application under Order 9 Rule 9 for restoration and for condoning the delay/extending the time in filing the application, the dismissal will have to be regarded as one under Order 43 Rule 1(c) CPC.

9. Learned senior advocate Ms Agni responding to the preliminary objections submits that though a composite application was filed, what is under challenge in this petition is an order refusing to condone the delay in filing the application

under Order 9 Rule 9. The stage of considering the application under Order 9 Rule 9 was yet to arise. According to learned senior advocate the question of considering the application under Order 9 Rule 9 would arise only after the delay is condoned. In the submission of learned senior advocate, the reasons for restoration of the suit and condoning the delay in filing the application under Order 9 Rule 9 may be same but the nature of the order passed will determine the remedy. In any case it is submitted by the learned senior advocate that mere availability of a remedy under Order 43 will not be a bar for this Court to exercise jurisdiction under Article 227 of the Constitution of India.

**10.** On the other hand, learned counsel for the respondent no.1 and respondent no.6 submitted that when a composite application is made under Order 9 Rule 9 of CPC, the order dismissing the application on the ground that the delay has not been sufficiently explained will tantamount to an order passed under Order 9 Rule 9 CPC against which an appeal from order lies under Order 43 Rule 1(c) of CPC.

**11.** Heard learned senior advocate and learned counsel appearing for the parties.

**12.** The suit filed by the plaintiffs for declaration and injunction was dismissed for default. A composite application was made under Order 9 Rule 9 of CPC for restoration of the suit and for condoning the delay/extension of the time of 228 days in filing the application. Order 9 of CPC deals with the provision regarding appearance of parties and consequence of non-

appearance. Rule 8 Order 9 prescribes the procedure where the defendants only appear. The provision reads thus:-

*'8. Procedure where defendant only appears.- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall take an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.'*

13. Order 9 Rule 9 provides decree against plaintiff by default bars fresh suit. It reads thus:

*'(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfied the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.'*

14. On a reading of the provisions of Order 8 Rule 8 it is seen that where the defendants appears and the plaintiffs does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. The suit was dismissed by the trial Court as the defendants appeared and the plaintiffs did not appear when the suit was called on for hearing. Present is not the case where the defendants admitted to the claim or part of the claim. Admittedly, there is no decree in

terms of Order 9 Rule 8 against the defendants. The impugned order simply is dismissing the suit for default of the plaintiffs.

15. I may incidentally refer to the definition of “Decree” as defined by clause 2 of Section 2 CPC. As to what is a decree is clearly spelt out from the definition. It is provided that the decree shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include any order of dismissal for default. The order passed by the trial Court under Order 9 Rule 9 dismissing the suit for default in the absence of the plaintiff, is therefore not a decree.

16. The question is whether an appeal from order is maintainable under Order 43 Rule 1(c) of CPC against the impugned order which is refusing to extend the time in filing the application under Rule 9 of Order IX CPC. Order 43 Rule 1 (c) CPC reads thus:-

*1. **Appeals from orders.**- An appeal shall lie from the following order under the provisions of section 104, namely:-*

*a)..*

*c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a dismissal of a suit.'*

17. It may also be relevant to refer to the provisions of Section 104 of CPC which reads as under:-

*'104. **Orders from which appeal lies.**- (1) An appeal shall lie from the following orders, and save otherwise expressly provided in the body of this Code*

*or by any law for the time being in force, from no other orders:-*

*(ff) an order under Section 35-A;*

*(ffa) an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;*

*(g) an order under Section 95;*

*(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;*

*(i) any order made under rules from which an appeal is expressly allowed by rules;*

*Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.*

*(2) No appeal shall lie from any order passed in appeal under this section.*

18. The reading of Section 104 makes its mandate clear that appeal shall lie from those orders provided in Section 104, and save otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders. It is to be noted that sub-Section 1 of Section 104 provides that appeal shall lie from any order made under the rules from which an appeal is expressly allowed by rules. The intention of Section 104 is clear that only those orders from which appeal would lie are maintainable and from no other orders. The provisions of Order 43 which provides for appeal from orders must be

construed in the light of the mandate prescribed by Section 104. Reading of the provisions of Order 43 Rule (1) clearly indicates that wherever the legislature intended to provide for the remedy of appeal under the provisions of Section 104, the same is categorically provided for. For example, Order 43 Rule 1(a) provides for an appeal from an order under Rule 10 of Order VI returning the plaint to be presented to a proper Court. There is no provision for an appeal from order against an order rejecting the application made under Order 10 Rule 7 for return of plaint. In contradiction to Order 43 Rule 1(a) is Order 43 Rule 1(j) which provides that an appeal shall lie from an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale. The legislative intent is very clear that an appeal in respect of those orders from which an appeal from order is specifically provided would lie and from no other orders.

**19.** In terms of Order 43 Rule 1(c) of CPC what is appealable is the order under Rule 9 of Order IX rejecting the application (in a case open to appeal) for an order to set aside the dismissal of the suit. The impugned order passed by the trial Court is an order dismissing the suit for default and if I may use the expression, in terms of the first part of Order 9 Rule 8 of CPC. The order is simply an order dismissing the suit for default as a consequence of non-appearance of the plaintiff. The order passed by the trial Court dismissing the suit in default in the present case is not a decree. The impugned order is refusing to extend the time in filing the application under Order 9 Rule 9 of CPC for restoration of the suit. Having regard to the mandate of Section 104 of CPC, though a composite application is filed for restoring

the suit under Order 9 Rule 9 of CPC and for extension of time in making the application, the impugned order cannot be construed as an order under Order 9 Rule 9 CPC. The reasons for restoration under Order 9 Rule 9 CPC and for condoning the delay of 228 days in filing the application may be the same but the question of considering the application under Order 9 Rule 9 would arise only after the time to file the application under Order 9 Rule 9 is extended. Such an application in terms of the Limitation Act, 1963 has to be made within 30 days. The application was made belatedly after 228 days. The application may be composite but it will be the nature of the impugned order passed that will have to be seen for the purpose of construing whether such order is appealable or not under Section 104 CPC. The impugned order dismissing the application for extension of time to prefer an application under Order 9 Rule 9 is not an appealable order under Order 43 Rule 1(c). I am, therefore, not inclined to accept the objections raised by the learned counsel for the respondent no.1 and respondent no.6 that the writ petition should not be entertained as appeal from order lies against the impugned order.

**20.** Let me now consider whether the trial Court was justified in dismissing the application for extension of time to file application for restoration of suit under Order 9 Rule 9 of CPC. The trial Court was of the opinion that the plaintiffs did not act diligently in conducting the matter and that no ground is made out for condoning the delay of 228 days. After the suit was filed by the plaintiffs, in the application it is stated that the plaintiffs were under the impression that their Advocate would attend to

their matter diligently. It is the case that the plaintiff no.1 and 2 are ordinarily residing in U.K. and that the plaintiff no.1 comes to Goa in connection with the business of plaintiff no.3. It appears that nobody attended the suit on behalf of the plaintiffs on 19.03.2015, 30.07.2015, 19.11.2015, 13.10.2015 and finally the trial Court dismissed the suit on 19.11.2015. The plaintiffs came to know of the dismissal of the suit only in July 2016 when they were served with a notice in respect of a different execution proceeding. Upon enquiry about the other pending matters, the plaintiffs came to know that the suit was dismissed as their advocate failed to remain present. A composite application was made for condonation and restoration of the suit supported by an affidavit of the advocate representing the plaintiffs in the suit who had taken all responsibility for the lapse on his part on account of sickness of his wife. It is also stated in the affidavit that the plaintiffs were following up the matter with him. It was also stated that the advocate had informed the plaintiff no.1 that his presence would be required only at the stage of evidence. The trial Court was of the opinion that the plaintiff no.1 was in Goa between December 2015 upto 1.6.2016, however, no steps were taken by him to visit his Advocate's office and find out about the matter and hence, the suit was dismissed after giving ample opportunities to the plaintiffs.

**21.** Learned counsel for respondent no.1 and learned counsel for respondent no.6 vehemently argued in support of the impugned order and submitted that the plaintiffs have not been diligent in conducting the suit.

**22.** In my opinion the order passed by the trial Court calls for interference. The Advocate for the plaintiffs filed an affidavit taking the responsibility for the lapse on his part on account of the sickness of his wife. It is clearly mentioned in the affidavit that the plaintiffs were following up the matter with him and that he has informed the plaintiff no.1 that his presence would be required only at the stage of evidence. There was no reason to doubt the affidavit which has been filed by the advocate. This is a case where a delay of 228 days cannot be said to be so gross and unexplained that the same cannot even be condoned by imposing appropriate costs on the plaintiffs. The facts of the case are such that the plaintiffs cannot be made to suffer on account of the lapse on the part of his advocate. The defendants can be suitably compensated with cost. The writ petition deserves to be allowed subject to payment of ₹50,000/- payable equally to the respondent no.1 and respondent no.6. The cost of ₹50,000/- to be deposited in the trial Court within a period of 4 weeks from the date of uploading of this order.

**23.** The impugned order is set aside. The application to the extent that it seeks the relief of extension of time to file application for restoration of suit under Order 9 Rule 9 is allowed. The application for restoration of suit under Order 9 Rule 9 be heard on its own merits expeditiously.

**24.** The petition is disposed of in the above terms.

**M. S. KARNIK, J**