

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

**WRIT PETITION NO.257 OF 2019
AND
MISC. CIVIL APPLICATION NO.835 OF 2019**

1. Mrs. Mary Pereira,
D/o. Late Francis Xavier Rosario,
housewife 64 yrs of age 2 and her
husband, Represented by her POA
Mr. Menino Pereira.

2. Mr. Menino Pereira
Advocate by profession,
72 yrs of age,
both Residents of Do Rosario,
Chambers, 3rd floor,
Above Pastry Palace,
Vasco da Gama-Goa.

3. Mrs. Magdaline Furtado
D/o. Late Francis Xavier Rosario,
Housewife, 78 yrs of age
and her husband

4. Mr. Lenny Furtado, retired,
82 yrs of age, both residing at
P.B.No. 10,11, Zanzibar, Tanzania.

5. Miss Ann Rosario,
D/o. Late Francis Xavier Rosario,
Spinster, 74 yrs of age retired nurse,
residing at 28 Mackay Close, Calcot,
Reading Berkshire, R.G.3, Code No.
5XW, England.

6. Mrs. Bessa Pereira
D/o. Late Francis Xavier Rosario,

housewife and her husband,
69 yrs of age.

7. Mr. Luis Pereira
service, 75 yrs of age
both residing at 25,
Brimwood Blvd, Unit 86,
Scarborough, Ontario,
M I V I E, 2, Canada.
all major in age and having address as
3rd floor, Do Rosario Chambers
Opp the Church, Vasco [being the
address of the Power of attorney holder
i.e. Decree Holder no.2.
Petitioner No.2 for self & Power of
attorney for petitioner no.1, 3 to 7.

....Petitioners

Versus

Anant Vengurlekar alias
Babi Vengurlekar
Since deceased represented by
his legal heirs:

1a. Sangam Anant Vengurlekar,
1b. Mahesh alias Baburao Anant
Vengurlekar (since Deceased)
1c. Girish Anant Vengurlekar (deceased)
All resident of Parvati Niwas,
Maimollem, Vasco da Gama-Goa.
1d. Mrs. Siddhi Vengurlekar
W/o. Sangam Anant Vengurlekar.
1e. Mrs. Mayuri Vengurlekar,
Widow of Baburao Anant Vengurlekar.
1f. Mrs. Suprita Vengurlekar
Widow of Girish Anant Vengurlekar.
1g. Mrs. Milan Dhuri,
and her husband

1h. Mr. Sadanad Dhuri,
All resident of Parvati Niwas,
H.No Nil, Maimollem,
Vasco da Gama-Goa.

....Respondents

Mr S. Malik, Advocate *for the Petitioners.*

Ms Rupa Banaulikar, Advocate *for the Respondent Nos.1(a) to 1(d).*

CORAM : M. S. SONAK, J.

DATE : 23rd FEBRUARY 2023

ORAL JUDGMENT :

1. Heard learned Counsel for the parties.
2. Rule. The rule is made returnable immediately with the consent of and at the request of the learned Counsel for the parties.
3. The petitioners are the Decree Holders who had instituted execution. The decree orders the eviction of the respondents (Judgment Debtors) and also directs some payment of arrears.
4. The execution was dismissed for default and non-prosecution on 20.09.2017. Therefore, the petitioners filed an application on 21.03.2018 for restoration. Since there was a delay of about five months, an application was made for condonation of delay.

5. By the impugned order dated 04.12.2018, the Executing Court has dismissed the Application for condonation of delay by observing that no sufficient cause was shown.

6. In the Application at Exhibit B-1, the Decree Holders had stated that her Advocate, Ms S. Naik, inadvertently forgot to note down the next hearing date, and further, the case slipped out of her mind. The Court has held that this was nothing but sheer negligence on the applicant's part, mainly because applicant no.2 was also an Advocate. The Court has also recorded that the execution was more than five years old, and there was a direction to conclude the same expeditiously. The Court also noted that such a lethargic approach does not constitute sufficient cause even if the Advocates file affidavits on record, which do not give sufficient cause to condone the delay.

7. The observations of the Executing Court though correct generally, cannot be upheld in the peculiar facts of the present case. Firstly, the explanation furnished by the Advocate for the Decree Holder that there was some lapse on her part in noting down the next date or about the matter slipping out of her mind cannot be regarded as a malafide excuse. Further, the applicants, one of whom is an Advocate, were pursuing the matters, and possibly they had no reason to suspect that the same had been dismissed for non-prosecution.

8. Secondly, the applicants have no reason to delay the matter, which involves the execution of a decree which they have obtained after several years of litigation. Of course, there may be some lapse on the part of their Advocate or even on their part in not pursuing the matter with their Advocate. However, nothing is on record to conclude that the applicants were irresponsible litigants or that they have gained an undue advantage due to their delay. Accordingly, discretion could have been exercised favouring the Decree Holders by imposing some costs. However, this was not a fit case where the delay should not have been condoned or the executing proceedings not restored.

9. In this case, the concerned Advocate had filed her affidavit. Even one of the applicants had filed the affidavit. There was nothing on record to dispute the contents of such an affidavit seriously. The learned Executing Court was right in observing that this was an old matter and there are directions for disposal of such old matters. However, in the peculiar facts of this case, discretion should have been exercised in condoning the delay and restoring the execution application.

10. Accordingly, the impugned order dated 04.12.2018 is set aside for the above reasons. Accordingly, the delay in seeking restoration is condoned. Since the sufficient cause shown for restoration and

condonation of delay is practically the same, even the Application for restoration is allowed.

11. However, all this is subject to the petitioners' paying respondent nos.1(a) to 1(d), who an Advocate before this Court represents, costs of ₹10,000/- within four weeks from today. Such costs can be deposited before the Executing Court, and respondent nos.1(a) to 1(d) would be entitled to withdraw the same unconditionally upon deposit.

12. The rule is made absolute in the above terms. Accordingly, Misc. Civil Application does not survive the disposal of the Writ Petition and is disposed of.

M. S. SONAK, J.

NITI K
HALDANKAR

Digitally signed by NITI K
HALDANKAR
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