

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.97 OF 2022

1. Mrs Salcette De Miranda e Borges
Alias Mrs. Salette Fatima Miranda,
wife of Shri K Sainath Shetty
aged 65 years.

2. Shri K Sainath Shetty
Aged 55 years,

Both Residing at House No. 683,
Betim Bardez Goa.

....Petitioners

Versus

1. Mr. Helder Joaquim Das Santos
Almas De Miranda,
S/O Late Mr. Vincete Santos Almas
De Miranda,
age 69 years, Surgeon,
R/O V. Martires Da Revolucao
527, Macuti, Beira, Mozambique;

2. Mrs. Ana Paula dos Santos Salgado,
61 years, W/O Mr. Helder Joaquim das
Santos Almas de Miranda,
R/O V. Martires da Revolucao
527, Macuti, Beira, Mozambique;

3. Vincente Tadeu das Santos almas De
Miranda, S/O Vincente Santos Almas
De Miranda, Age 61 years, civil engineer,
R/o P.O. Box 540 Maputo, Mozambique;

4. Sabino Antonio Xavier Miranda,

(Since deceased through his legal representatives)

4(a). Mr. Nelson D'souza
(since deceased)
Residing at Betim, opp. Betim Ferry
Wharf, Bardez Goa;

5. Fernanda Gonsalves Miranda,
(Since deceased) through her legal
representatives,

5(a) Zenaida Miranda e Marques, and
her husband

5(b) Neville Marques
Both R/o Canada;

5(c) Maria dos Anjos Miranda and her
husband

5(d) Shri. Hugo Miranda
(since deceased)
Both R/O France;

5(e) Shri Daniel de Miranda and his wife

5(f) Smt. Joseline Miranda
Both R/o France;

5(g) Yvonne Miranda and her husband

5(h) Shri. Anthony Countinho
Both residing at UK;

5(i) Evelise de Miranda,
major married, teacher
Residing at Betim, widow of Nelson D
Souza;

5(j) Shri Nelson D'souza
(since deceased) Husband of
Evelise de Miranda

5(j)(i) Shri Nigel Anthony De Souza,

5(j)(ii) Ms. Erica Maria De Souza
Both R/O H No. 680,
Opposite Tiny —Tots School,
Betim, Bardez-Goa;

6. Shri Savio Manuel Sabino Borges,
s/o Late Shri Leo Borges,
Major in age, R/O Hno.68,
Betim Bardez Goa.

....Respondents

Mr J.A. Lobo, Advocates for the Petitioners.

CORAM: M. S. SONAK, J.

DATE : 21st JULY 2023

ORAL JUDGMENT :

1. Heard Mr Lobo for the petitioners.
2. Rule. The rule is made returnable forthwith.
3. Mr Lobo states that respondents have been duly served and an affidavit of service has already been filed.

4. This petition questions the order dated 10.11.2021 by which the trial Court has condoned the delay and restored the suit dismissed for non-prosecution.

5. Mr Lobo submits that there was a delay of almost ten years which was not at all explained. He points out that except for a bare statement that the plaintiffs learned about the dismissal of the suit for non-prosecution on 20.01.2017, no other explanation is given in the application. He points out that no specific prayer was made for condonation of delay. He submits that the Trial Court acted perversely and arbitrarily in condoning such an inordinate delay and restoring the suit. For all these reasons, Mr Lobo submits that the impugned order warrants interference.

6. Since the respondents have not appeared despite service, the application dated 31.01.2017 by which restoration was applied was perused. The application pointed out the confusion occasioned, perhaps, due to the statements of some of the defendants that plaintiff no.2 had died when in fact at that stage plaintiff no.2 had not died.

7. The application also points out that the plaintiffs were residing abroad and had entrusted the matter to their advocate. Only after they returned did they come to know about the dismissal of the suit for non-prosecution on 20.01.2017. The application has detailed averments explaining why there is no delay from the date of the

knowledge. In any case, from the application, it is evident that the applicants have shown sufficient cause. However, there may not be a formal application or a prayer for the condonation of delay.

8. The application also points out that even after plaintiff no.2 died, the legal representatives were already on record, given the earlier demise of plaintiff no.1. This position is also borne out from the record.

9. Considering the averments in the application, which were only denied by the petitioners by filing a reply, it is not as if no sufficient cause was shown for ordering the restoration. The exercise of positive discretion by the Trial Court in the peculiar facts of the present case cannot be said to be perverse or arbitrary to warrant interference in the exercise of extraordinary jurisdiction.

10. In *N. Balakrishnan V/s. M. Krishnamurthy*¹, the Hon'ble Supreme Court has held that when the trial Court positively exercises discretion, normally, the higher Courts must not interfere unless a case of perversity or arbitrariness is made out. The Hon'ble Supreme Court has held that in such matters, there is always some lapse on the part of the party or the Advocate. However, more than that is required to deny the party an additional opportunity. Unless there are

¹ (1998) 7 SCC 123

malafides involved or the delay is to prejudice or harass the opposite party, the Court must show utmost consideration to the suitor.

11. In the present case, there is no question of harassment or malafides to the respondents. The plaintiffs claim to own the suit property, and the petitioners (Defendants) claim title by adverse possession. Therefore, taking into account all such circumstances, cumulatively, no case is made out for interference in the impugned order.

12. However, the Hon'ble Supreme Court has held that when discretion is exercised, the opposite party should not be forgotten. Some provisions must be made for costs payable to the opposing party.

13. In the facts of the present case, the Trial Court should not have ordered the restoration without requiring the claimants/plaintiffs to pay costs to the petitioners herein. To that extent, the impugned order is modified, and it is directed that the applicants/original plaintiffs must pay costs of ₹25,000/- to the petitioners herein.

14. Such costs must be deposited before the Trial Court within a time to be indicated by the Trial Court. Payment of such costs is not a condition precedent to the restoration. The Trial Court should fix the time limit because the respondents have not appeared in this Court

despite notice. Henceforth the Plaintiffs must diligently pursue the case and not seek unnecessary indulgences.

15. The Registry to ensure that a copy of this order is placed in the file of Regular Civil Suit No.487/2000/C pending in the Court of Civil Judge, Senior Division, Mapusa at the earliest.

16. The rule in the Writ Petition is disposed of in the above terms.

M. S. SONAK, J.

NITI K

HALDANKAR

Digitally signed by NITI K
HALDANKAR
Date: 2023.07.24 15:00:31 +05'30'