

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.211 OF 2019

1. M/s Vijay Metal Works,
A registered partnership firm,
Constituted under the
Indian Partnership Act and
Registered in the office of the
Registrar of Firms,
With its office at Nizari Bhavan,
5th floor, Panaji — Goa.
Represented by its Partners

2. Shri Anand V. Madgavkar,
Major, son of Shri Vijay A. Madgavkar,
Having office at Nizari Bhavan,
Menezes Braganza Road,
Panaji — Goa.

3. Shri Anil V. Madgavkar
Major, son of Shri Vijay A. Madgavkar,
Having office at Nizari Bhavan,
Menezes Braganza Road,
Panaji-Goa.

....Petitioners

Versus

1. Shri Ramesh Anant Kerkar,
(deceased) Through legal representatives

1(a) Smt. Shantabai Ramesh Kerkar
Major, widow of late Ramesh A. Kerkar,
Residing near Shantadurga Temple,
Kerim, Ponda — Goa.
(since deceased, represented by legal
representatives, the respondent no.1(b) to
1(g).

1(b) Mr. Kishor Ramesh Kerkar,
Major, son of late Ramesh Anant Kerkar,
Residing near Shantadurga Temple,
Kerim, Ponda – Goa.

1(c) Mrs. Kishor Kerkar,
Major, daughter in law of
Late Ramesh Anant Kerkar
Residing near Shantadurga Temple,
Kerim, Ponda — Goa.

1(d) Shri Rajan Kadkade,
Major, son of late Ramesh Anant Kerkar,
Councillor of Bicholim Municipal
Council, Bicholim — Goa.
r/o Atilpeth, Bicholim — Goa.

1(e) Smt. Rajan Kadkade,
Major, Wife of Shri Rajan Kadkade,
d/o late Ramesh Anant Kerkar,
r/o Atilpeth, Bicholim — Goa.

1(f) Shri Pradip Velingkar,
Major, son in law of late Ramesh Anant
Kerkar, r/o near Narcinha Temple,
Veling, Mardol — Goa.

1(g) Smt. Pradip Velingkar,
Wife of Pradip Velingkar,
d/o late Ramesh Anant Kerkar
r/o Near Narchinha Temple,
Veling, Mardol — Goa.

2. Shri Atmaram Pundalik Naik,
Major, businessman
Having office at Nizari Bhavan,
Menezes Braganza Road,
Panaji-Goa.

....Respondents

Mr A.D. Bhobe and Ms Annelise Fernandes, Advocates for the Petitioners.

Mr P. Sawant, Advocate for Respondent Nos.1(b),1(c),1(d) & 1(e).

CORAM: M. S. SONAK, J.

DATE : 21st MARCH 2023

ORAL JUDGMENT :

1. Heard Mr Bhobe for the petitioner and Mr P. Sawant for respondent nos.1(b), 1(c), 1(d) & 1(e).
2. Rule. The rule is made returnable immediately at the request of and with the consent of the learned Counsel for the parties.
3. The petitioner, the original plaintiff in Special Civil Suit No.28/2003/A, challenges the order dated 16.01.2019 made by the Senior Civil Judge, 'A' Court at Ponda condoning delay of two years five months seventeen days in applying setting aside an ex-parte judgment and decree dated 03.03.2010 made in the said suit.
4. Mr Bhobe, the learned Counsel for the petitioner, submits that no sufficient cause was shown to condone the inordinate delay. He submits that the Court has confused between the issues of condonation of delay and setting aside of ex-parte decree. The evidence of the two witnesses was not correctly appreciated. Mr

Bhobe, therefore, submits that the impugned order warrants interference.

5. Mr Sawant submits that the cause shown for the delay was sufficient, and the trial Court has adequately considered the same. Further, he proposed that the cause shown for the delay was substantially the same cause shown for setting aside the ex-parte decree. Since the evidence was overlapping, there was no error on the part of the Trial Court in considering such evidence that was led on behalf of the respondents - defendants. Finally, he submits that the Advocate for the respondents has deposed in the matter and accepted the responsibility. Considering such peculiar circumstances, the impugned order, which suffers from no jurisdictional errors, may not be interfered with.

6. Mr Sawant, without prejudice, submits on instructions that the respondents whom he represents will pay costs of ₹50,000/- by adjusting the costs of ₹5,000/- already paid and further to show their bonafide deposit the decreed amount of ₹10,00,000/- before the Trial Court if some reasonable time is granted. He submits that this will sufficiently compensate and also secure the petitioner. He offers that this is another reason this Court should not interfere with the impugned order.

7. The rival contentions now fall for my determination.

8. The Trial Court has condoned the delay of two years, five months and seventeen days for applying to set aside the ex-parte decree. Although the delay appears to be *prima facie* inordinate, in such matters, it is not merely the length of the delay but the quality of explanation that is crucial.

9. The respondents whom Mr Sawant represents not only pleaded sufficient cause but further examined two witnesses supporting the cause shown. Applicant no.1(b) deposed in the matter, and more importantly, the Advocate for the applicants also deposed in the case. The evidence refers to the ill health of the Advocate, as a result of which he could give no proper intimation of the ex-parte decree to the applicants. No doubt, as pointed out by Mr Bhobe, there is some lapse on the part of the applicants in not regularly pursuing the matter with the Advocate. However, based on this lapse, which is not accompanied by malafides, the applicants need not be condemned to suffer the ex-parte decree against them.

10. In *N. Balakrishnan vs M. Krishnamurthy*¹, the Hon'ble Supreme Court has held that condoning delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say such discretion can be exercised only if the delay is within a certain limit. The length of the delay is no matter; the acceptability of the explanation is the only criterion. Sometimes delay of the shortest range

¹ 1998 7 SCC 123

may be uncondonable due to want of an acceptable explanation. In contrast, in certain other cases, delay of a 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 a 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 wholly untenable grounds or arbitrary or perverse. But it is different when the first Court refuses to condone the delay. In such cases, the Superior Court would be free to consider the cause shown for the delay afresh, and it is open to such a superior Court to come to its own finding even untrammelled by the conclusion of the lower Court. The Hon'ble Supreme Court then explained the reason for such a different stance.

11. In the present petition, however, it suffices to note that the Trial Court has condoned the delay due to a positive exercise of discretion. Moreover, given the oral evidence of the two witnesses, such an exercise cannot be styled as arbitrary or perverse. Therefore, no case is made out for interfering with the impugned order except by adding to the conditions already imposed on the Respondents.

12. Further, in *N. Balakrishnan* (supra), the Hon'ble Supreme Court has observed that there can be some lapse on the part of the litigant concerned in every case of delay. That alone is insufficient to turn down his plea and shut the door against him. If the explanation

does not smack of mala fides or 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, 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 would have incurred quite 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.

13. In this case, the Court has awarded costs of only ₹5000/- to the petitioners. These costs can hardly be regarded as compensatory considering that a delay of over two years has been condoned. Moreover, since the reasons for the condonation of delay and for setting aside the ex-parte decree overlap, it is evident that even the ex-parte decree will now have to be set aside based on the same reasoning. Considering all these facts, the Trial Court should have awarded costs of at least ₹50,000/-. Now that the above respondents have offered to pay such costs, the impugned order is modified, and the cost amount is enhanced from ₹5,000/- to ₹50,000/-.

14. Further, now that the ex-parte decree will have to be set aside, the original plaintiffs must be secured of the decretal amount should they succeed on trial. Otherwise, if the original petitioners, on merits,

succeed in securing a decree, additional time would have to be spent in execution proceedings. Moreover, if the respondents who had applied for setting aside of the ex-parte decree after condoning the delay involved in so applying could not be made to suffer for some mistakes on the part of their Advocate, so also the petitioners cannot be made to suffer for the fault of the respondents' Advocate. Indeed, the petitioners are not to be blamed for the predicament the respondents found themselves in. Therefore, some security will have to be provided to the petitioners if the ex-parte decree is to be set aside.

15. Mr Sawant, on instructions, has stated that the respondents seeking the setting aside of the ex-parte decree would deposit the decretal amount before the Trial Court by way of security. This statement is accepted. Considering the above and the fact that the cause shown for condonation and setting aside the ex-parte decree is the same, the ex-parte decree is also set aside rather than requiring the trial Court to complete the formality subject to terms.

16. The petition is accordingly disposed of by making the following order :

(a) The impugned order condoning the delay is sustained subject to certain conditions. So also, the ex-parte decree dated 03.03.2010 made in the suit is

hereby set aside, again, subject to certain conditions prescribed hereafter.

(b) respondent nos.1(a) to 1(e) should deposit costs of ₹50,000/- before the Trial Court within ten days from today after due intimation to the learned Counsel for the petitioners. Upon deposit, the petitioners will be free to withdraw such costs unconditionally.

(c) The respondent nos.1(a) to 1(g) to deposit an amount of ₹10,00,000/- as security in two instalments in the Trial Court. The first instalment of ₹5,00,000/- will be within two months from today, and the balance ₹5,00,000/- within two months after the first deposit. This amount is to remain deposited before the Trial Court. However, the Trial Court will order the investment of this amount in a nationalised bank. This invested amount will abide by the final decree in the suit.

(d) If costs are deposited within the time indicated above, the suit is to stand restored. However, if after the restoration of the suit, the above respondents no.1(a) to 1(g) default in depositing the security amount, then the ex-parte decree would revive based

on the premise that the conditions subject to which the same was set aside, were not fulfilled.

(e) The Trial Court is directed to expeditiously dispose of the suit and endeavour to conclude the same within a year from today.

(f) The stay on the proceedings is vacated. The parties are to appear before the trial Court on 10.04.2023 at 10.00 a.m. and file an authenticated copy of this order.

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

18. All concerned are to act on an authenticated copy of this order.

M. S. SONAK, J.

NITI K
HALDANKAR



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HALDANKAR
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