

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 73 OF 2022

SHAMLA G. ALORNEKAR
AND ANR.

... Appellants

Versus

CARMEN PINTO

... Respondent

Mr A. D. Bhobe, Advocate for the Appellants.

Mr Amey Phadte, Advocate for the Respondent.

CORAM: M. S. SONAK, J.

DATED : 16th FEBRUARY 2023

P.C.:

1. Heard Mr A. D. Bhobe, learned counsel for the Appellants, and Mr A. Phadte learned counsel for the Respondent.
2. On 13.01.2023, this Court made the following order:-

"1. Heard Mr. A.D. Bhobe for the Appellants.

2. The challenge in this Appeal is, inter alia, to the order of the First Appellate Court refusing to condone the delay of 103 days in instituting the Appeal. Accordingly, it would be in the interest of justice if this Appeal is disposed of at an early date.

3. This Appeal is, accordingly, admitted on the following substantial question of law :

Whether the reasons given by the Appellants in Civil Misc. Application No.22/2018 constitute sufficient cause for seeking condonation of delay in filing an appeal against the order dated 13/09/2017 passed in Regular Civil Suit No.69/2016/F?.

4. Issue notice after admission to the Respondent, returnable on 9th February 2023. The notice to indicate that the Appeal will be taken up for final disposal on the said date, subject to any overnight part-heard matters.

5. Mr. Bhobe states that the paper book contains all documents, pleadings, etc., necessary for deciding this Appeal. However, if the Respondent wishes to file any further compilation, she is at liberty to do so by 3rd February 2023.

6. Mr. Bhobe states that the process fee and copies will be supplied latest by 17th January 2023.

7. In addition to the usual mode of service, private service is also permitted. The Appellants to file an affidavit of service."

3. Having heard the learned counsel for the parties, a case is made out for setting aside the impugned order dated 04.12.2019 and condoning the delay of 103 days in instituting the Appeal against the order dated 13.09.2017. By this order, the trial Court has rejected the plaint holding that the suit was barred by limitation.

4. The Appellants had pleaded that one of them was employed abroad, and the other was attached to the Chartered Accountant's office and remained preoccupied. There are pleadings that the Advocate for the Appellants had informed them that their presence could not be required for filing the Appeal.

5. The Appellants have also pleaded that Appellant No.2 used to periodically know about the progress of the case from her Advocate. In addition, there are pleadings about the change of SIM card and how there was an omission to inform the Advocate about the changed number. Finally, there are pleadings about the communication gap between the Appellants and their Advocate.

6. The Appeal Court has rejected the application by observing that one of the Appellants failed to produce any evidence about her occupation abroad or place of work. The Appeal Court has also observed that no cause was shown as to why the first Appellant could not file the Appeal or approach the Advocate, particularly when there is no evidence that she was employed abroad. Mainly on such grounds, the Appeal Court has declined to condone the delay of 103 days in instituting the Appeal.

7. The Appeal Court, with respect, has dealt with the issue of condonation of delay quite perfunctorily and without appreciating the cause shown. The trial Court has rejected even the matters which were not doubted by the Respondents by simply observing that no documents were produced by Appellant No.2's employment abroad. Even the cause of the communication gap due to the change of SIM card has only been stated in the order but not discussed adequately. There is no reason why such a cause was not accepted.

8. From the perusal of the impugned order, it appears that the Appeal Court is under the impression that each day's delay has to be

meticulously explained. Such an approach is contrary to the decision of the Hon'ble Supreme Court in the case of *Collector, Land Acquisition, Anantnag and Anr. vs Mst. Katiji and Ors*¹.

9. Recently, in the case of *Miss. Ezlinda Fernandes Vs Mario John Pereira, in Stamp Number (Main) No.1293 of 2019 (F)*, this Court was concerned with a case where this learned judge had declined to condone the delay of 7 days in instituting the Appeal. Accordingly, the order was set aside by this Court by referring to the law in *Collector Land Acquisition, Anantnag vs Mst. Katiji* (supra) and *N. Balakrishnan vs M. Krishnamurthy*².

10. In *Collector Land Acquisition, Anantnag vs Mst. Katiji* (supra), the Hon'ble Supreme Court has held that the legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act, 1963, to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "*sufficient cause*" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. *It is common knowledge that the Supreme Court has been making a justifiably liberal approach in matters instituted in the Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy.*

¹ (1987) 2 SCC 107

² (1998) 7 SCC 123

11. The Hon'ble Supreme Court has explained that there is a purpose for adopting a liberal approach. Such a liberal approach is adopted on principle as it is realized that:-

- a) Ordinarily a litigant does not stand to benefit by lodging an appeal late.
- b) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
- c) "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every Second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
- d) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
- e) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.
- f) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

12. The Hon'ble Supreme Court in *N. Balakrishnan* (supra) has held that a Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no

presumption that delay in approaching the Court is always deliberate. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down her plea and shut the door against her. 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. All these principles were unfortunately not even noted, much less applied by the learned First Appellate Court while refusing to condone the delay of seven days in instituting the Appeal.

13. While disposing of the Appeal instituted by Miss. *Ezilda Fernandes*, this Court observed that it is never the delay's length but the explanation's quality that matters the most. Further, the explanation offered must be evaluated pragmatically and sensitively. Finally, the Court must appreciate that the cases before it is not mere numbers or statistics. Behind each number or file is some human element seeking, if not crying, for justice. Even in this matter, the appeal court approach is contrary to the law repeatedly laid down by the Hon'ble Supreme Court and this Court on the issue of condonation of delay.

14. Accordingly, the substantial law question is answered in favour of the Appellants. The impugned order is set aside. The delay is condoned subject to the payment of costs of ₹10,000/- within four weeks from today. The costs are to be paid to the Respondents or deposited in the Appeal Court within four weeks. If the costs are

deposited, the Respondents are at liberty to unconditionally withdraw the same.

15. Now that the delay is condoned, the Appeal Court is to register the Appeal and dispose of the same on merits, provided costs are paid or deposited. The parties are to appear before the Appeal Court on 23rd March 2023 at 10.00 a.m. If the respondents do not appear, the Appeal Court must issue them notice at the Appellant's cost.

16. The Second Appeal is disposed of in the above terms. Accordingly, all concerned are to act on the authenticated copy of the order.

M. S. SONAK, J.

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