

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
SECOND APPEAL NO. 70 OF 2022
AND
CIVIL APPLICATION NO. 82 OF 2022

- 1 Shri Evaristo Luciano Pinto,
Landlord, major, married,
75 years of age,
Resident of H.No.361, Marra,
Pilerne, Bardez Goa.
(Since deceased through LR's)
1a) Mr Mathew Anthony Chrispiano Pinto
Aged 68 years and his wife,
POA of 1(b) & 2.
(Since deceased through LR Resp. No.1b.)

- 1b) Mrs. Grace Jacinto Pinto,
Aged 61 years,
Both residing at Marra, Pilerne,
Bardez Goa.

- 2 Smt. Dore's Antonieta Pinto (deceased)
Through LR's 1(a) and 1(b),
64 years of age,
Wife of Appellant No.1,
Resident of H.No.361,
Marra, Pilerne, Bardez Goa.

..... Appellants

Versus

- 1 Shri Roghunath Jaganath Sardessai
(deceased)

2 Mrs. Sunanda Raghunath Sardessai,
(widow of the Respondent No.1)
Resident of Mumbai,
Through her POA i.e. D-10.

- 3 Mrs Vidya G. Herekar,
Married to Guirish Herekar,
Both major of age,
Resident of Mumbai,
- 4 Rajesh Roghunath Sardessai,
Both majors, resident of Mumbai.
- 5 Abhijit Roghunath Sardessai,
Married to Smruti Abhijeet Sardessai,
Both majors, residents of Mumbai,
- 6 Shradha Gurunath Nayak,
Married to Gurunath Nayak,
Both residents of Mumbai,
Presently at Japan.
- 7 Shri Shridhar Balkrishna Shenvi Bhobe
(expired),
r/o Saipem, Candolim, Bardez Goa.
- 8 Smt. Indrabai Sinai Bhobe (expired),
Both represented by legal representatives
of Respondents 7 and 8
- 8a) Shri Kamlaker Shridhar Bhobe,
Son of deceased Respondent No.7
- 8b) Smt. Sumetra Kamlakar Bhobe,
Wife of Kamlakar Bhobe,
Both residents of Saipem, Candolim,
- 8c) Mrs Sushma Suresh Shanbhag,
Daughter of Respondent No.7
- 8d) Mr Suresh Shanbhag,
Both residents of Saipem, Candolim,
- 8e) Miss Mangala Shridhar Bhobe,
Daughter of Respondent No.7
Residents at Saipem, Candolim,

9 Smt. Dwarkabai Usno Sinai Bhobe,
Since deceased represented by heirs,
Respondent Nos. 10 to 20.
Widow of Usno Shankar Bhobe,
Residing at Nerul, Bardez Goa.

10 Shri Govind Usno Sinai Bhobe,
POA for Defendant No.1 to 6

11 Smt Mangala Govind Sinai Bhobe,
Wife of Respondent No.10,
Both residents of Nerul, Bardez.

12 Shri Vasudev Usno Sinai Bhobe,

13 Smt. Prabhat Vasudev Sinai Bhobe,
Wife of Respondent No.12,
Both resident of Nerul, Bardez.

14 Shri Ganesh Usno Sinai Bhobe,
Since deceased, represented by his
Legal heirs,

14a) Smt. Sudha Ganesh Bhobe,
14b) Gautam Ganesh Bhobe,
14c) Veena Gautam Bhobe,
All residents of Nerul, Bardez

15 Smt. Sarojani Dalvi,
Daughter of Usno Bhobe,
Resident of Nerul, Bardez Goa.

16 Shri Shyam K. Dalvi (since deceased)
Represented by legal heirs;

16a) Bharati Kamat,
Daughter of Respondent No.15,

16b) Rajan Kamat,
Both residents of Nerul, Bardez,

16c) Raju Dalvi,
Son of Respondent No.15,

- 16d) Suchetra Raju Dalvi,
Both resident of Nerul Bardez.
- 16e) Sangeeta Kamat,
Daughter of Respondent No.15,
- 16f) Vivek Kamat,
r/o Nerul Bardez
- 16g) Sanjeev Dalvi,
Son of Respondent No.15,
- 16h) Monica Dalvi,
Both resident of Nerul, Bardez.

17 Smt. Shanta V. Palang,
Daughter of Usno Bhobe,

18 Shri Vasudev N. Palang
Husband of Respondent No.17,
Both residents of St. Cruz,
Ilhas Goa.

19 Shri Devidas Usno Sinai Bhobe,
Unmarried, resident of Nerul,
Bardez Goa.

20 Mrs Yeshsavni G. P. Poi,
Wife of Respondent No.21
(since deceased through her legal heirs)

20a) Shri Mahesh Gajanan Poi,
Major, unmarried, son of deceased
Respondent No.20,
r/o Bhosule Sadan,
Ambedkar Path, Bombiwali West,
(Vishnu Nagar) Thana, Bombay.

21 Shri Gajanan Pandurang Poi,
Husband of Respondent No.17,
Both residents of Bhosule Sadan,
Ambedkar Path, Bombiwali West,
(Vishnu Nagar) Thana, Bombay.

.....Respondents

Mr Gaurish Agni and Mr K. Kavlekar, Advocates for the Appellants.
Mr Tarun Rebello and Mr Kabir Sabnis, Advocates for Respondent
Nos. 2, 3, 4, 5, 6 and 10.

CORAM: M. S. SONAK, J.

DATED: 19th AUGUST 2023

ORAL JUDGMENT

1. Heard Mr G. Agni, who appears along with Mr K. Kavlekar, learned counsel for the Appellants, and Mr Tarun Rebello, learned counsel for Respondent Nos. 2, 3, 4, 5, 6, and 10.

2. Mr Agni clarifies that all the Respondents have been duly served.

3. This appeal was admitted on 23.12.2022 on the following substantial questions of law:

A) Whether, considering the law in **N. Balakrishnan vs. M. Krishnamurthy** - (1998) 7 SCC 123 and **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Ors.** - (2013) 12 SCC 649, the First Appellate Court ought to have focussed upon the cause shown rather than go by the length of the delay?

B) Whether the First Appellate Court applied incorrect legal principles in dismissing the application for condonation of delay in instituting the First Appeal?

4. Accordingly, instead of deciding the application for interim relief, with the consent of the learned counsel for the parties, the appeal was taken up for final disposal.

5. Mr Agni, learned counsel for the Appellants submits that the delay of 256 days in instituting the appeal against the judgment and decree dated 02.12.2016 was satisfactorily explained. He submits that the Appellants were based in Mumbai and they engaged an Advocate to institute the appeal. However, on account of difficulties relatable to the said Advocate, the appeal could not be filed within a prescribed period of limitation. He pointed out that the Advocate has also filed an affidavit in the matter.

6. Mr Agni relied on *N. Balakrishnan Vs M. Krishnamurthy*¹ and *Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy and others*² to submit that the Courts must adopt a liberal approach to the condonation of delay. He submitted that the right of filing the first appeal is a valuable right and as far as possible the same should not be denied to the parties.

7. Mr Rebello, learned counsel for Respondent Nos. 2, 3, 4, 5, 6, and 10 defended the impugned order based on the reasoning reflected therein. He pointed out that the Appeal Court has bestowed detailed consideration on the causes shown and found that the same was not sufficient. He submitted

¹ (1998) 7 SCC 123

² (2013) 12 SCC 649

that there was no illegality or perversity in the approach of the First Appellate Court and therefore, this Court ought not to interfere in this matter.

8. Mr Rebello also referred to the conduct of the Appellants before the trial Court. For this, he referred to observations made by the trial Court in paragraphs 5 and 7 of the judgment and decree which was sought to be appealed after the delay of 256 days. He pointed out that it was solely because of the Appellants that the disposal of the suit was delayed by almost 25 years. He pointed out that frivolous applications were filed before the trial Court and even the same were dismissed with exemplary costs, the same were not paid by the Appellants.

9. Mr Rebello pointed out that most of the Respondents are senior citizens, who succeeded after almost 22 years in obtaining a decree from the Civil Court. Such a decree was made on 02.12.2016. Almost seven years have passed since such decree and therefore, no indulgence must be shown to the Appellants.

10. Mr Rebello pointed out that even in *N. Balakrishnan* (supra) and *Esha Bhattacharjee* (supra), the Hon'ble Supreme Court has held that if the parties deliberately adopt dilatory tactics, no indulgence must be shown to such parties.

11. Based on the above grounds, Mr Rebello urged dismissal of this Second Appeal.

12. The rival contentions now fall for determination.

13. The record shows that the Appellants instituted an appeal against the judgment and decree dated 02.12.2016, almost 256 days beyond the prescribed period of limitation. Therefore, the appeal was accompanied by an application for condonation of delay.

14. In the application seeking condonation of delay, the Appellants pleaded that they are based in Mumbai and they approached their trial Court Advocate in the first week of March to institute an appeal against the judgment and decree dated 02.12.2016. This means that the approach to the first Advocate was after the expiry of the prescribed period of limitation of 30 days to institute the appeal before the First Appellate Court.

15. The application then proceeds to state that the trial Court Advocate referred the appeal to some other Advocate for preferring an appeal. Some time was therefore spent in identifying and engaging the other Advocate.

16. The application then states that the Advocate so engaged had to travel frequently to the National Green Tribunal, Pune, and Debt Recovery Tribunal in Mumbai and therefore, was unable to prepare the appeal. The application states that the Advocate so engaged had to be busy with the thread ceremony of his son. The application states that summer vacation intervened. The application also states that the Advocate took urgent repairs and renovation of his office and this work could be completed only by the

second week of August. No appeal could be filed soon thereafter because the Ganesh Chaturthi holidays intervened. The application also states that during the intervening period, the Appellants being the permanent resident of Mumbai were preoccupied with their daily routines and could not visit Goa very often or expedite the institution of the appeal. There is a reference to the telephone call to the Advocate and the assurance of the Advocate that the appeal would be filed.

17. The cause shown, indicates that the Appellants were making efforts to institute the appeal. Although these were not circumstances beyond the control of the Appellants, the conduct of the Appellants at least qua the institution of the appeal cannot be styled as highly irresponsible or such as could not be condoned even after imposition of exemplary costs upon the Appellants. True, as pointed out by the Appeal Court, there was no bar to institute an appeal during the vacation or the Appellants acting with greater diligence and ensuring that his Advocate finds some time for the Appellants and institute the appeal which was already delayed as expeditiously as possible. Still, it does appear that the Appellants were following up on the matter with his Advocate for the institution of the appeal.

18. Mr Agni's contention that the parties should not suffer for any causes attributable to their Advocate cannot be accepted as some blanket proposition. Besides it is trite that the opposite parties must not be made to suffer for the fault of the parties Advocate. In this case, the record bears out

that the Respondents obtained a decree after almost 22 years, after the institution of the suit. The trial Court's judgment and decree refers to dilatory tactics adopted by the Appellants which contributed to this delay in the disposal of the suit. Mr Rebello correctly pointed out that even the Respondents are senior citizens and at some point in time they should be allowed to enjoy the fruits of the decree obtained by them though after so much delay for which the Appellants were responsible.

19. In paragraphs 5 and 7 of the trial Court's judgment and decree dated 02.12.2016, the trial Court was constrained to make the following observations:

"5. Be that as it may, it is also pertinent to mention that vide Orders passed at exhibit 183 and exhibit 188, the Court has found that the Defendant nos.1 and 2 were engaging in dilatory tactics. The Defendant nos.1 and 2 are now found stretching their dilatory tactics a bit too far. The Court repeatedly recorded a finding that the Defendant nos. 1 and 2 were engaging in dilatory tactics to delay the disposal of this suit and are making efforts to relegate this very old suit, pertaining to senior citizens, back to the stage of trial. The last two applications filed by the Defendant nos.1 and 2 have been dismissed with exemplary costs, payable by the Defendant nos. 1 and 2 to the Plaintiffs. Those costs have also not been paid.

7. To sum up, I must observe that the Court has already given the Advocate for the Defendant nos. 1 and 2 a very long rope. There is a limit even to dilatory tactics. The patience of the Court has now run out. If the undersigned does not take a proactive stand today, this suit will shortly celebrate its silver

jubilee. As mentioned above, all the learned Advocates (including the Defendant nos.1 and 2) have filed their detailed Written Arguments. I have perused those Written Arguments, as also the remaining record.”

20. Therefore, this is a case where some indulgence can be shown to the Appellants subject to the Appellants paying costs of ₹3,00,000/- to the Respondents. The imposition of such costs is absolutely necessary if any indulgence has to be extended to the Appellants because the Appellants must not be permitted to question the trial Court’s decree after a delay of 256 days, by simply coming up with a case that the Advocate they engaged was too busy to institute the appeal within some reasonable period. Even if some indulgence is to be shown to the Appellants because from their side they took steps to engage an Advocate to institute the appeal. Such indulgence can obviously, not be at the cost of the Respondents.

21. The record shows that the Respondents instituted suit in the year 1994. The same was decreed only in the year 2016. At least *prima facie*, it is the Appellants who are responsible for the delay. The Appellants filed frivolous applications and after they were dismissed with costs, did not even bother to pay such costs. Such conduct is relevant for determining the quantum of costs that the Appellants must now pay to the Respondents if the delay is to be condoned.

22. The decree was made in 2016, almost 22 years after the institution of the suit. Till date, the Respondents have not got the fruits of their decree. At least if the appeal were to be instituted within the prescribed

period of limitation or within some reasonable period from the expiry of the period of limitation, the appeal would have been disposed of one way or the other. It is almost seven years since the Respondents have secured a decree in their favour, but the Respondents have deprived the fruits of such a decree. On cumulative consideration of all such factors, indulgence can be extended to the Appellants subject to payment of costs of ₹3,00,000/- within six weeks from today.

23. Even in *N. Balakrishnan Vs M. Krishnamurthy* (supra), the Hon'ble Supreme Court has held that in every case of delay, there can be some lapse on the part of the litigant concerned. As long as there is no material to show that the delay was occasioned by the party deliberately to gain time then the court should lean in favour of acceptance of the explanation. However, while condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. Therefore, it should be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court must compensate the opposite party for the loss.

24. Right of an appeal is a valuable right. The Appellants should have at least one opportunity to question the trial Court's decree on merits. As noted above, the conduct of the Appellants though leaves much to be desired, was not such as to castigate the Appellants wholly irresponsible. Some efforts were made by the Appellants to institute the appeal within a reasonable period. The delay in this case is of 256 days. However, if all circumstances are considered, a case is made out to condone the delay

subject to no doubt payment of substantial costs to compensate the Respondents.

25. For all the above reasons, the substantial questions of law as framed are answered in favour of the Appellants.

26. The impugned order is set aside only conditionally. The delay of 256 days in instituting the appeal against the judgment and decree dated 02.12.2016 is condoned subject to the Appellants depositing before the Appeal Court an amount of ₹3,00,000/- within six weeks from today. Liberty to the Appellants to apply for interim relief before the Appeal Court after the deposit of the amount as directed above within six weeks from today. If this amount is not deposited within six weeks then, the Appellants will not have the benefit of condonation. In that case, this Second Appeal shall be deemed to have been dismissed with costs of ₹50,000/-. It is necessary to impose such costs because the Appellants have in a way succeeded in depriving the Respondents of the fruits of their decree for the last seven years.

27. However, if the amount of ₹3,00,000/- is deposited before the Appeal Court within six weeks from today then the delay in instituting the appeal shall stand condoned and the Appeal Court is directed to dispose of such appeal as expeditiously as possible and in any case within six months from the date of such deposit.

28. If the amount is deposited, the Respondents shall be at liberty to withdraw the same from the First Appellate Court.

29. The appeal is allowed subject to payment of the amount as aforesaid within six weeks from today. If this amount is not deposited within six weeks then, the Appellants will not have the benefit of condonation. In that case, this Second Appeal shall be deemed to have been dismissed with costs of ₹50,000/-. The executing Court must then execute the decree expeditiously, and in any case, within six months from the decree holders applying for the same.

30. All concerned to act on the basis of the authenticated copy of this order.

31. The Civil Application No. 82 of 2022 does not survive the disposal of the appeal and the same is also disposed of accordingly.

M. S. SONAK, J.

TARI AMRUT NAGESH Digitally signed by TARI AMRUT NAGESH
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