

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 757 OF 2018
AND
MISC. CIVIL APPLICATION NO. 279 OF 2019
AND
STAMP NUMBER (APPLN.) NO.3320 OF 2018 (Filing No.)
IN
WRIT PETITION NO. 757 OF 2018

JAO FRANCISCO DIAS, THR
POA, CATARINA VAZ AND ANR.

... Petitioners

Versus

JOSEFINA FERNANDES AND 2
ORS.

... Respondents

Mr G. Agni and Mr K. Kavlekar, Advocates for the Petitioners.

CORAM: M. S. SONAK, J.

DATED : 27th APRIL 2023

P.C.:

1. Mr Agni, learned counsel for Petitioners, states that the service is now complete. Further, he points out that by order dated 09.03.2023, notice was given for final disposal at the admission stage.
2. Regards the deposit of ₹25,000/- towards the security costs, Mr Agni submits that the amount will be deposited by tomorrow since the Petitioner has carried the amount with him in cash.

3. The earlier order is now modified, and the Petitioners are directed to deposit this amount before the trial Court within a week from today.

4. The challenge in this petition is to the order dated 26.04.2018 by which the learned trial Judge denied the motion for condonation of delay in filing the written statement. Consequently, the learned trial Judge declined to take on record the written statement of the Petitioners.

5. Mr Agni learned counsel for the Petitioners, pointed out that the Petitioners were never furnished the documents referred to in the plaint or documents relied upon in the list of documents. He submits that by application dated 03.03.2015, the Petitioners had to apply to the trial Court for directions to the plaintiffs to furnish such documents. Accordingly, an order was made on 24.03.2015 directing the plaintiffs to supply such documents.

6. Mr Agni submits that after the documents were furnished, the written statement was sought to be filed along with the application seeking condonation of delay. However, the condonation was applied as a matter of abundant caution. Mr Agni submits that until all the documents were furnished, time for filing of written statement did not commence.

7. Mr Agni submits that the learned trial Judge did not consider all these aspects while passing the impugned order and declining to

condone the delay in filing the written statement. Mr Agni submits that serious prejudice will occasion the Petitioners if the delay is not condoned and the written statement is not taken on record. Mr Agni submits that prejudice can always be compensated by requiring the Petitioners to pay some nominal costs to the Respondents/plaintiffs.

8. Despite service, the Respondents have not bothered to appear before this Court.

9. The record shows that the Petitioners had to file an application dated 03.03.2015 to request the learned trial Judge to direct the Respondents/plaintiffs to furnish the copies of documents referred to in the plaint and relied upon in the list of documents. Such an order was made by the trial Court regard to some of the documents on 24.03.2015. Even the plaintiffs endorsed on this application that they undertake to furnish the copies of the documents only relied upon in the plaint without prejudice to the rights and contentions of the plaintiffs and others.

10. After the documents were furnished, the Petitioners by application dated 06.02.2016, sought for condonation of delay of eight months to place on record the written statement. There is no clarity about the date the documents were furnished to the Petitioners. However, some statements were made in the application dated 06.02.2016 on the furnish of documents. The Petitioners admitted a lacuna in not filing the written statement within time but explained that this was not some intended error.

11. The Petitioners also pointed out that a reply had already been filed to oppose the application for a temporary injunction, and the statements made in the written statement align with the reply. Therefore, it was pointed out that there was no question of any surprise.

12. Now if the application for condonation of delay is construed holistically along with the circumstances like the Petitioners being forced to apply to obtain all documents referred to in the plaint, the delay in filing the written statement should have been condoned. The sufficient cause was shown for this delay, and the prejudice that would occasion the Respondents/plaintiffs could always have been compensated by way of costs.

13. The delay was from the date the documents were furnished. Although there is not much clarity about the date when such documents were given, it is apparent that they were given only after the trial Court issued directions for furnishing such documents. Even the Respondents/plaintiffs filed an undertaking to furnish such documents.

14. The Petitioners have explained how a written statement was prepared, but the same could not be finalized for want of documents. Therefore, if all these factors are cumulatively considered, a case is made out for condoning the delay and allowing the Petitioners to file a written statement. This should, however, be subject to payment of costs.

15. In *N. Balakrishnan Vs. M. Krishnamurthy*¹, the Hon'ble Supreme Court, has explained that in most cases where the condonation is applied, there is a likelihood of some lapse on the part of the party seeking condonation. However, even in this case, the Petitioners admitted a lacuna but claimed no intended error. Therefore, unless the explanation for the delay smacks malafide or is put forth as a dilatory strategy, consideration must be shown to the party seeking condonation of delay. But, simultaneously, the Court must not forget the opposite party, which would suffer prejudice due to the condonation of delay.

16. Therefore, applying the above principles and balancing the equities, a case is made out for condoning the delay subject to payment of costs of ₹25,000/- to the Respondents/plaintiffs.

17. The petition is allowed. The impugned order is set aside. The application for condonation of delay is allowed, and the Petitioners' written statement is directed to be taken on record. However, all this is subject to the payment of costs of ₹25,000/-.

18. The costs amount to be deposited within one week before the trial Court. Upon deposit, the trial Court to permit the Respondents/plaintiffs to withdraw this amount unconditionally.

¹ (1998) 7 SCC 123

19. The Stamp Number (Appln.) No.3320 of 2018 (F) for bringing legal representatives of deceased Respondent No.1 on record is also disposed of accordingly.

20. All concerned are to act on the authenticated copy of this order.

M. S. SONAK, J.

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