Niti

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.662 OF 2019

1. Shri Devendra Raghuraj Deshprabhu,
age 67 years.

2. Mrs Sunita Devendra Deshprabhu,
age 61 years,
Both residents of House No.4/68,
Nanerwada, Pernem Goa.

3. Shri Jitendra Raghuraj Deshprabhu,
age 62 years (deceased represented
through LRs)

3.a Ms. Mrinalini Jitendra Deshprabhu,
daughter of late Jitendra Deshprabhu,
aged 34 years, unmarried,
Resident of Nanerwada, Pernem Goa.

3.b Mast. Yuvraj Jitendra Deshprabhu,
Son of late Jitendra Deshprabhu,
Age 11 Years, (Minor),
Resident Of Nanerwada, Pernem Goa.

4. Mrs. Rupa Jitendra Deshprabhu,
age 56 years, Both residents of House
No. 4/68, Nanerwada, Pernem Goa. ….PETITIONERS

Versus

1. Tukaram Swar (Since Deceased),
Through Legal Heirs
1(A) Vilasini Swar,
age 80 years (since dec.)
1(B) Ramanand Swar,
age 60 years,

1(C) Premanand Swar,
age 52 years,
All residents of Mausawda,
Pernem, Goa.

2. Shri Rajaji Balkrishna Deshprabhu,
age 70 years, Resident Of Nanerwada,
Pernem, Goa.

3. Mrs. Anjalika Raghunathrau Prabhu
Dessai Deshprabhu alias Shilpa Satish
Ugrankar, age 65 years,

4. Mr. Satish Shripad Ugrankar,
age 70 years, both Respondent No.3 And
4 residents Of H.No. 2A,
Ram Mahal, J.N. Tata Road, Bombay.

5. Mrs. Achaladevi Raghunathrau
Prabhu Desai Deshprabhu alias
Devika Dilip Kulkarni, age 65 years,

6. Shri Dilip Mahabal Kulkami,
age 69 years,
both Respondent No.5 And 6
Residents Of H. No. 23 B,
New Neelsagar Co-Operative
Housing Society 2, A/B Perry Cross
Road, Bandra (W), Mumbai 400 050. ....RESPONDENTS

Mr P. Vaze, Advocates the Petitioners.

Mr Deepak Gaonkar, Advocate for Respondent Nos.1(B) and 1(C).

CORAM: M. S. SONAK, J.

DATE : 19th JANUARY 2024

ORAL JUDGMENT :

1. Heard Mr P. Vaze for the petitioners and Mr Gaonkar for respondent nos.1(A) and 1(B) (contesting parties).

2. Rule. The rule is made returnable immediately at the request and with the consent of the learned Counsel for the parties.

3. The challenge in this petition is to the Tribunal's order dated 25.04.2019 restoring Mundkar Revision Application No.50/2005 after condoning the delay of 4 years and 276 days. The challenge in this petition is to the combined order condoning such inordinate delay and restoring the revision.

4. Mr Vaze, learned Counsel for the petitioner submits that this delay of 4 years and 276 days was inordinate and there was no sufficient cause shown. He submitted that the contesting respondents obtained an ex-parte stay from the Tribunal and then the matter was unduly delayed.

5. Mr Vaze states that the Revision Application was withdrawn on 16.01.2013 on a motion made by the Advocate along with a letter of authority. A written endorsement was made seeking leave to withdraw the revision. Shri Pradeep Deshprabhu, one of the respondents in the revision, also made his endorsement. After all this, the Tribunal made an order disposing of the revision as withdrawn.

6. Mr Vaze submits that after the delay of 4 years and 276 days an application was made for restoration by blaming the Advocate. The contesting respondents now disclaim knowledge about this withdrawal and state that the Advocate was only instructed to withdraw his appearance and not the revision.

7. Mr Vaze refers to ***Esha Bhattacharjee V/s. Managing Committee of Raghunathpur Nafar Academy and Ors.***[1] and submits that a liberal approach does not mean totally unfettered free play. He submits that there is a distinction between inordinate delay and delay of short days. He submits that in the former case, the approach of the Courts and the Tribunals has to be strict and not liberal as was incorrectly observed by the Tribunal.

8. For all the above reasons, Mr Vaze submits that the impugned order which borders on perversity and unreasonableness warrants interference.

9. Mr Gaonkar defends the impugned order based on the reasoning reflected therein. He submits that from the record it is apparent that there were no written or oral instructions to the Advocate to withdraw the revision application itself. There is no record of this Advocate even informing the contesting respondents about the withdrawal. It was only after the contesting respondents got knowledge of the withdrawal that an application for restoration was made.

[1] (2013) 12 SCC 649

10. Mr Gaonkar relies on ***N. Balakrishnan V/s. M. Krishnamurthy***[2] to submit that since the Tribunal has exercised discretion in a positive manner and such exercise is neither arbitrary nor perverse, this Court ought not to interfere.

11. Mr Gaonkar, based on the above, submitted that this petition may be dismissed.

12. The rival contentions now fall for determination.

13. The Tribunal in this case has basically proceeded on the premise that in such matters the approach of the Tribunal must be liberal to secure the ends of justice. Based on this approach, the Tribunal has condoned the delay.

14. In *Esha Bhattacharjee* (supra), as was rightly pointed out by Mr Vaze, the Hon'ble Supreme Court has held that the terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation. The Court has also held that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the Courts are not supposed to legalise injustice but are obliged to remove injustice. The Court has also held that no presumption can be attached to deliberate causation

[2] (1998) 7 SCC 123

of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

15. *Esha Bhattacharjee* (supra) also holds that the concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play. Besides, there is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants a strict approach whereas the second calls for a liberal delineation. The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of a liberal approach. If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation. It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation. The entire gamut of facts is to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception. Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the

ultimate institutional motto. The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

16. In this case, the delay was no doubt inordinate and, therefore, the Tribunal was expected to take a strict approach and not simply take the liberal approach.

17. Having said this, the record does bear out that no express instructions were given to the Advocate for withdrawal of the revision application. Although, such express instructions may always be necessary because an Advocate has the implied authority, still, there is nothing on record to show that the Advocate intimated the contesting respondents about the withdrawal. There is also no good reason enough as to why the contesting respondent should have wanted to withdraw the revision application after having obtained an interim relief against the Deputy Collector's order which had set aside the purchase order issued favouring the contesting respondents. All these factors are required to be considered and were considered by the Tribunal while condoning this inordinate delay.

18. Even the contention about the Advocate, who appeared in the matter being under some confusion about whether he was supposed to withdraw his appearance or withdraw the revision itself cannot be ruled out. It cannot be said that this cause which was shown by the contesting

respondents ricked of malafides or was a cause which was entirely fanciful or concocted.

19. In such matters, the length of delay is not to be always focused. The quality of explanation or the quality of sufficient cause shown is what is important. The Tribunal has relied on ***N. Balakrishnan V/s. M. Krishnamurthy***[3]. This decision, in turn, holds that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is not a matter, acceptability of the explanation is the only criterion. 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 his plea and to shut the door against him. If the explanation does not smack of mala fides or it 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 then the court should lean against acceptance of the explanation. There is no presumption that delay in approaching the court is always deliberate.

20. In ***Peruman Bhagvathy Devaswom, Perinadu Village V/s. Bhargavi Amma (dead) by LR's and Ors.***[4], the Hon'ble Supreme Court has explained the approach to be adopted for condonation of

[3] (1998) 7 SCC 123

[4] (2008) 8 SCC 321

delay in taking steps to bring the legal representatives of deceased parties on record. The Court noted that the opposite Counsel had not informed the Court about the death of the respondent. The appellant came to know of the death of the respondent from his Counsel and took immediate steps to continue the appeal. The hearing dates of the appeal were not fixed periodically. The Court held that the party had no way of knowing about the pendency of the appeal and considering all these circumstances, the delay should have been condoned. The Court held that lack of diligence or negligence can be attributed to an appellant only when he is aware of the death and fails to take steps to bring the legal representatives on record. Where the appellant being unaware of the death of the respondent, does not take steps to bring the legal representatives on record, there can be no question of any want of diligence or negligence.

21. The Hon'ble Supreme Court also made a distinction between appeals pending in the sub-ordinate Court and the appeals pending in the High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as `adjournment of hearing'. In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed.

22. Before the Administrative Tribunal, though dates are usually given for periodical appearance, in this particular case, there is a record that the matter was adjourned sine die. After a lapse of several years, the matter was taken on Board and the notices were issued to the Advocates. Pursuant to such notice, the contesting respondents' Advocate appeared and made an endorsement about the withdrawal of the revision. All these circumstances have been considered by the Tribunal and, therefore, it cannot be said that the approach of the Tribunal was unreasonable and arbitrary or perverse.

23. As noted earlier, the Tribunal has relied upon *N. Balakrishnan* (supra), but the Tribunal has imposed some very significant observation in the said decision based upon which such an inordinate delay could not have been condoned without awarding substantial costs to the petitioners, who were not at all to be blamed in this matter. The Hon'ble Supreme Court has held that 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. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss. Here the Tribunal in the name of liberal approach has condoned the delay and forgot the petitioners, who, for no fault on their part are forced to suffer. The impugned order, therefore, does warrant interference to the extent it makes no provision for awarding any costs to the petitioners.

24. *N. Balakrishnan* (supra) also holds that 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 revisional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. However, while condoning the delay, the Court should not forget the opposite party altogether. Further, the Hon'ble Supreme Court has held that where the conduct of the appellant seeking condonation does not on the whole warrant to castigate him as an irresponsible litigant, this factor should be considered for condonation. Therefore, upon consideration of the facts on record and the law laid down in *Esha Bhattacharjee* (supra) and *N. Balakrishnan* (supra), this petition will have to be partly allowed. No case is made out for the condonation and restoration. However, such condonation and restoration would have to be made subject to the contesting respondents paying the petitioners costs of ₹15,000/- (Rupees Fifteen Thousand only) within four weeks from today. Such costs can be deposited in this Court within four weeks from where the petitioners can withdraw the same by providing their bank details. However, if such costs are not deposited within four weeks from today, then, the application for condonation of delay and restoration made before the Tribunal shall be deemed to have been dismissed and the proceedings in Mundkar Revision Application no.50/2005 shall terminate.

25. At or before the deposit of such costs necessary intimation will have to be given to the learned Counsel for the petitioners. The Registry

to ensure that the contesting respondents or their Counsel gives such intimation to the Counsel for the petitioners. After deposit, the parties to appear before the Tribunal on 26.02.2023 at 10.30 am and file an authenticated copy of this order. The Tribunal is directed to dispose of Mundkar Revision Application No.50/2005 as expeditiously as possible and, in any case, within a maximum of 6 months from the parties filing an authenticated copy of this order. The Counsel for the parties must cooperate with the Tribunal for expeditious disposal of the Mundkar Revision Application No.50/2005.

26. The rule is made partly absolute in the above terms.

27. There shall be no order for costs, except as indicated above.

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

M. S. SONAK, J.

NITI K HALDANKAR

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