

Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 722 OF 2023

1. Smt. Malini Vithal Raikar,
Wife of late Vithal Raikar,
Aged 72 years, Major in age,
Indian National
And her sons,

2. Mr. Siddhesh Vithal Raikar,
Aged 44 years, Businessman,

3. Mr. Shailesh Vithal Raikar,
Aged 37 years, Businessman,

All residents of H.No.462,
Maruti Nagar, Davorlim,
Salcete, Goa.

... PETITIONERS

VERSUS

1. Mr. Jose Felix Piedade da Costa
(Expired) and his Wife,

2. Mrs. Maria Alice Caldeira e Costa,
(Since deceased represented through
L.R.),
Both Major of age,
Landlords residents of Madel,
Margao, Goa.

2(a). Mr. Malvino Kane Roncon Pereira,
s/o Antoniop B. R. Pereira,
BF-2/BF-3, Empress Emma,
Per Seraulim, Colva,
Salcete Goa.

3. Mr. Prabhakar Fondu Naik,
Since deceased, through his LR's;
(a) Smt. Savita Prabhakar Naik,
Wife of late Prabhakar Naik,
Aged 70 years, housewife, (deceased)

(b) Mr. Mahesh Prabhakar Naik,
Son of late Prabhakar Naik,
Aged 50 years, Married
And his wife,

(c) Mrs. Yogita Mahesh Naik,
Wife of Mahesh Naik,
All residents of HG. No. 22,
Orlim, Near Temple, Orlim,
Salcete Goa.

(d) Mrs. Smita Govind Silimkhan,
And her husband,

(e) Mr. Govind Trivikram Silimkhan,
Aged about 52 years, businessman,
Both residents of TF/4, 3rd floor,
Sapana centre, Dr. Dada Vaidya Road,
Panaji Goa.

... RESPONDENTS

Mr. Ashwin D. Bhobe with Mr. Sanman R. Keny, Advocates for the
Petitioner.

Mr. Mangurish Angle, Advocate for Respondent No.2(a)

CORAM:- BHARAT P. DESHPANDE, J.
DATED :- 25th April, 2024

JUDGMENT

1. Rule. Rule is made returnable forthwith.
2. Heard finally with consent.

3. The challenge in the present petition is to the rejection of condonation of delay application filed by the Petitioner in filing an appeal. The impugned order is dated 14.07.2023, whereby the learned District Judge refused to condone the delay of more than 900 days in accepting the appeal, thereby challenging the order of eviction passed by the Rent Controller on 02.05.2019.

4. Mr. Bhobe, learned counsel appearing for the Petitioners would submit that the Petitioners were represented by an Advocate before the Rent Controller, however, there was no communication between the Advocate and the Petitioner and accordingly, the Petitioners were not represented properly before the Rent Controller. He submits that the Petitioners were not at fault and accordingly, an ex-parte order was passed directing eviction of the Petitioner by the Rent Controller on 02.05.2019.

5. Mr. Bhobe would further submit that the Petitioner got knowledge of the order of eviction dated 02.05.2019 only when they received a notice in the execution proceedings filed in the year 2021. The Petitioner immediately filed an application for condonation of delay in preferring an appeal and explained the grounds, sufficient for the purpose of condoning the delay.

6. Mr. Bhobe submits that the Petitioner had no knowledge of the order passed by the Rent Controller dated 02.05.2019 and accordingly, this was a sufficient ground for the purpose of condoning the delay

7. Mr. Bhobe further submit that the learned Trial Court misconstrued the facts and observed that the certified copy attached to the memo of appeal shows about the knowledge of the Petitioners in the year 2019 itself. He submits that the said certified copy was infact collected by the Petitioner from the execution application which was served upon them in the year 2021. What the Petitioner did is only attaching such certified copy to the appeal memo, however, the learned Trial Court considered that the certified copy was applied by the Petitioners and accordingly, held that the Petitioners had knowledge of the judgement or eviction in August 2019 itself.

8. Mr. Bhobe would submit that there was no deliberate attempt on the part of the Petitioners to file the appeal late as an adverse order was passed against them and the Petitioners are facing the sword of eviction from the premises. He submits that the ground mentioned in the application ought to have been considered liberally inorder to give an opportunity to the Petitioners to argue the appeal on merits. He then submits that by rejecting the

condonation of delay application the valuable right of the Petitioner is taken away.

9. Mr. Bhobe placed reliance on the case of *Esha Bhattacharjee Vs. Managing Committee, (2013) 12 SCC 649* and *Sheo Raj Singh (deceased) through Lrs. Vs. Union of India & Another, (2023) 10 SCC 531* to buttress his submissions regarding explanation of sufficient cause and not only the excuse.

10. Per contra, the learned counsel appearing for the Respondent Mr. Angle would submit that the eviction proceedings were filed on the premise that the tenanted portion was sub-let to the Petitioner by the Respondent No. 3. He submits that the Petitioners though duly served in the proceedings, never led any evidence in support of their case. Mr. Angle would submit that the record of Rent Controller would go to show that the Advocate engaged by the Petitioners withdrew his appearance by issuing a legal notice which was duly served on the Petitioners and such documents were placed in the file.

11. Mr. Angle would submit that the reasons in the application for delay are false and concocted to the knowledge of the Petitioners and they unnecessarily blamed their Advocate who was perfectly justified in filing an application for withdrawal of

appearance by issuing notices as he was not receiving instructions.

12. Mr. Angle would submit that there is no dispute that the Petitioners were duly served with the notice forwarded by their Advocate on their registered address. Thus, the Petitioners had knowledge that their Advocate has withdrawn his wakalatnama and therefore, they ought to have been diligent, either to appear in person or by engaging another Advocate for appearing in the said matter. However, according to him, the Petitioners deliberately remained absent and accordingly, the order was passed on 02.05.2019.

13. Mr. Angle would submit that the period of appeal is 30 days and hence, such period expired on 03.06.2019, whereas, the appeal was filed after a period of 3 years, without disclosing any sufficient cause. According to Mr. Angle, the reasons disclosed in the application for condonation of delay are only excuses thereby blaming their Advocate and cannot be termed as sufficient cause.

14. In reply, the learned counsel Mr. Bhobe would submit that the order passed by the Apex Court by suspending the period of limitation during Covid period is available to the Petitioners only for the purpose of considering the delay of number of days. He submits that if such period of 2 years is removed from the actual

number of days, the delay would be only of, at the most one year.

15. Rival contentions fall for determination.

16. The eviction proceedings were filed in the year 2014 and vide order dated 02.05.2019, the application for eviction was allowed by the Rent Controller directing to hand over vacant possession of the suit premises.

17. The Petitioners filed an application for condonation of delay along with the memo of appeal. The explanation of condoning the delay is basically found in paragraph nos. 4 and 5. The first ground is that the Petitioners were not aware of the Judgement as at that time their Advocate on record did not intimate them about the Judgement passed by the Rent Controller. It is also claimed that earlier the matter was referred for mediation and thereafter, the Advocate failed to intimate the progress or otherwise of the matter. It is also mentioned that thereafter, the Advocate for the Applicant became sick and there was no communication between the Petitioners and his Advocate.

18. Mr. Angle is justified in submitting that apart from ground mentioned in paragraph 4, there is no other ground mentioned in the application for condonation of delay.

19. The tenor of this application for condonation of delay would

go to show that the entire blame is put on the Advocate who was representing the Petitioner before the Rent Controller. However, the learned Trial Court after examining the record of the Rent Controller, observed that such contentions raised by the Petitioner is factually incorrect. The reasons for it are found in Paragraph 11 of the impugned order. The Court observed that the Advocate appearing for the Petitioners had infact filed an application before the Rent Controller on 06.01.2019 at exhibit 37 disclosing therein that he wishes to withdraw his appearance on the ground that his client i.e. the Petitioners were not giving him instructions and that they were also not available on telephone calls. Such application filed by the Advocate was supported with a copy of notice issued by the Advocate to the Petitioners so also the acknowledgement cards showing that such notice was served on the Petitioners. This fact has been suppressed by the Petitioners in their application. Rather there is no denial of receipt of such notice on their own Advocate intimating the Petitioners that he intended to withdraw his appearance. A copy of such notice attached to the application for withdrawal, itself show that the Advocate tried to contact the Petitioners and since he was not receiving proper instructions, he desired to withdraw the appearance.

20. The learned Trial Court also observed that the address of Petitioner No.1 mentioned in the said notice issued by the Advocate and the address in the cause title, is same. Thus, the presumption that once a legal notice or a notice from an Advocate is forwarded with Acknowledgment Card on a registered address, the same is considered to be served on the person mentioned therein.

21. The learned Trial Court also observed that inspite of receipt of such notice the Petitioners failed to take any steps either to appear or to engage another Advocate.

22. In this regard the reasons disclosed in the application for condonation of delay appears to be concocted and incorrect, thereby blaming the earlier Advocate. This fact has been observed by the learned Court while rejecting such ground for the purpose of condoning the delay.

23. The second ground in the application is the sickness of the Advocate. There is only one statement in paragraph 4 that thereafter, the Advocate became sick. There is no affidavit filed of such Advocate to disclose as to whether he was sick and whether he was unavailable. However, the record speaks otherwise, as the same Advocate appeared before the Rent Controller and filed an

application for withdrawal of his appearance with the ground that he is not receiving instructions and the client is not contacting him. Thus, the observations of the Court in rejecting such ground cannot be faulted with.

24. In the case of ***Sheo Raj Singh(supra)*** the Apex Court in paragraph nos. 31 and 32 observed thus:-

“31. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an "explanation" and an "excuse". An "explanation" is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must, however, be taken to distinguish an "explanation" from an "excuse". Although people tend to see "explanation" and "excuse" as the same thing and struggle to find

out the difference between the two, there is a distinction which, though fine, is real.

32. An "excuse" is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an "excuse" would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication".

25. The fine distinction between an excuse and an explanation is mentioned by the Apex Court. In the present matter, it is clear from the record that the reasons disclosed by the Petitioners and that too casually comes within the category of excuse and not explanation.

26. In the case of ***Esha Bhattacharjee(supra)***, the Apex Court

carved out principles for condonation of delay in para no. 21 & 22. These principles if applied to the matter in hand would clearly go to show that the reasons disclosed in the application for condonation of delay is not more than any excuse. It cannot be termed as an explanation.

27. The contention of Mr. Bhobe that the observations of the Court regarding certified copy and the dates mentioned therein, is taken for the first time in this Court. Such explanation was not given to the learned Court though this aspect was very much argued on behalf of the Respondents. Thus, such ground cannot be taken for the first time and that too in the proceedings under Article 227 of the Constitution of India.

28. The last contention of Mr. Bhobe that suspension of limitation from March 2020 till March 2022 was available to the Petitioners. I am unable to accept such contention for the simple reason that the limitation to file appeal was over from the month of June 2019 itself i.e. much prior to the order passed by the Apex Court.

29. Having said so there is no substance in the present petition and accordingly, the petition stands dismissed with no costs.

BHARAT P. DESHPANDE, J.