
(2014) 07 BOM CK 0334

In the Bombay High Court

Case No : Appeal From Order No. 19 of 2014

Comunidade of Malcornem

APPELLANT

Vs

Budo Custa Molic and Others

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Citation : (2015) 2 ALLMR 672 : (2015) 6 BomCR 395 : (2015) 3 MhLj 782

Hon'ble Judges : F.M. Reis, J.

Bench : Single Bench

Advocate : Devidas Pangam, Advocate, for the Appellant; R.G. Ramani, for the Respondent

Judgement

F.M. Reis, J.? Heard Mr. Pangam, learned Counsel appearing on behalf of the Appellant and Mr. Ramani, learned Counsel appearing on behalf of the Respondents No. 1 and 2a to 2e. Admit. Heard forthwith by consent of the learned Counsel appearing on behalf of the respective parties. Mr. Ramani, learned Counsel waives service on behalf of the Respondents No. 1 and 2a to 2e.

2. The above Appeal challenges the Order passed in Civil Miscellaneous Application No. 143/2012 whereby the Application for condonation of delay to set aside the ex-parte decree passed by the learned Lower Appellate Court came to be dismissed.

3. Mr. Pangam, learned Counsel pointed out that the decree under challenge before the learned Lower Appellate Court was in favour of the Appellant. The learned Counsel pointed out that the Respondents before the learned Lower Appellate Court were issued summons which were allegedly served on the Comunidade. The learned Counsel pointed out that the Administrator of the Comunidade who is based in Margao has in fact returned the summons in view of the fact that there was no time to inform the Appellant. The learned Counsel further pointed out that the Administrator never informed the Appellant about the summons in such Appeal as such, the Appeal went uncontested and the

decree came to be passed by the learned Lower Appellate Court setting aside the judgment of the learned Trial Court. The learned Counsel pointed out that in view of the said decree valuable right of the Appellant would be displaced and cause grave injustice in case the Appeal is not heard afresh. The learned Counsel further pointed out that only after the receipt of the notice in mutation proceedings on the basis of judgment of the learned Lower Appellate Court, the Appellant learnt about the ex-parte judgment passed in the Appeal preferred by the Respondents. The learned Counsel further pointed out that immediately thereafter, the Appellant filed an Application to set aside the decree passed by the learned Lower Appellate Court which came to be dismissed along with the Application for condonation of delay. The learned Counsel further pointed out that the learned Judge has failed to examine the averments in the Application for condonation of delay while passing the impugned Order and as such the impugned Order deserves to be quashed and set aside.

4. On the other hand, Mr. Ramani, learned counsel appearing for the Respondents No. 1 and 2(a) to 2(e) has vehemently opposed the above Appeal. The learned counsel has pointed out that in terms of the Code of Communitade, the notice to the Communitade has to be served through the Administrator and as such, the Appellant was duly served with a notice in the Appeal. The learned Counsel further pointed out that there is no material on record to show that the Administrator has not informed about the receipt of such summons to the Appellant herein. The learned Counsel further pointed out that even the summons were sought to be returned on the premise that the time was short to inform the Administrator. The learned Judge has in fact granted such adjournment. The learned Counsel further pointed out that there is gross negligence on the part of the Appellant in not appealing before the learned Lower Appellate Court when the Appeal preferred by the Respondents was under consideration and as such, the Appellant is not entitled for any indulgence from this Court. The learned Counsel thereafter has taken me through the impugned Order passed by the learned Lower Appellate Court and pointed out that the learned Judge has rightly dismissed the Application filed by the Appellant. The learned Counsel further submitted that the Appellant had good case on merits and as such, the learned Lower Appellate Court rightly allowed the Appeal preferred by the Respondents. The learned Counsel as such, points out that the Appeal be rejected.

5. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. In the present case, it is not in dispute that the Appellant was not personally served with the summons in the Appeal preferred by the Respondents. No doubt, Mr. Ramani, learned Counsel appearing for the Respondents has pointed out that the summons were served on the Administrator in terms of the provisions of the Code of Communitade which is deemed to be summons served on the Appellant herein. But however, it is not in dispute that the Administrator is based at Margao and the Appellant has office at Molcornem, Quepem Taluka. In this background, the averments made by the

attorney in the affidavit in support of their Application for condonation of delay that there was no communication by the office of the Administrator to the Appellant at Molcornem, in connection with the receipt of the said summons is plausible. In fact, there is no material on record produced by the Appellant to establish that such communication was received by the Appellant herein. Considering the said averments, it would not be justified to brush aside the contention of the Appellant that the Appellant was not aware about the Appeal preferred by the Respondents which came to be disposed of in the absence of the Appellant.

6. A part from that, the registered address as disclosed in the cause title before the Trial Court where the Appellant were Defendants, a different address was shown than the one shown in the cause title before the learned Lower Appellate Court. There is no explanation by the Respondents as to how this registered address was changed by the Respondents before the Appellate Court. In such circumstances, it was incumbent upon the Respondents to serve the Appellant in the Appeal preferred by the Respondents at the office of the Appellant at Molcornem. In fact, the address shown in the cause title before the Trial Court in Special Civil Suit No. 23/99 is through an attorney who was based in Baga, Curchorem in Quepem Taluka. In the cause title before the Appellate Court in Regular Civil Appeal No. 155/2010 though it is stated that the meeting place of the Comunidade is Molcornem, the name of the attorney has not been disclosed and the service was effected through the Administrator in Margao. In such circumstances, I find that the contention of the Appellant that they were not duly served cannot be disbelieved. In such circumstances, it was incumbent upon the Respondents to serve the Appellant through their attorney in Molcornem or at the residential address.

7. While examining the Application for condonation of delay, there can always be element of negligence on the part of such Applicant. What is material in such circumstance is to examine whether there was any gross delay with malafide intention on the part of such Applicant to deliberately approach the Court belatedly. In fact, on perusal of the reply filed by the Respondents, there are no malafides attributed to the Appellant, There is no cogent evidence on record to show that the Appellant had knowledge of the proceedings initiated by the Respondents before the learned Lower Appellate Court. In such circumstances and in the interest of justice, I find that the learned Judge was not justified to dismiss the Application for condonation of delay and set aside the ex-parte decree passed in the Appeal preferred by the Respondents. No doubt, Article 11 of the Code of Comunidade permits the summons to the Administrator of the Comunidade but in the peculiar facts and circumstances of the case and taking note of the fact that the Respondents themselves chose to serve the attorney of the Comunidade before the Trial Court which was stated to be registered address of the Appellant before the Trial Court, it was not open to the Respondents to change such address and serve the Administrator in the Appeal preferred against the Appellant herein.

8. The Apex Court in the judgment reported in Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others, has observed at para 21 thus :

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1.(i) 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.

21.2.(ii) 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.

21.3.(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4.(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5.(v) Lack of bona tides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6.(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7.(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8.(viii) 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 strict approach whereas the second calls for a liberal delineation.

21.9.(ix) 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 liberal approach.

21.10.(x) 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 a litigation.

21.11.(xi) 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.

21.12.(xii) The entire gamut of facts are 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.

21.13.(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

9. Taking note of the well settled principles reiterated by the Apex Court referred to herein above, I find that there is no reason to refuse the Application for condonation of delay filed by the Appellant herein. The learned Judge has proceeded erroneously while dismissing the Application for condonation of delay. In view of the above, I pass the following:--

ORDER

"(i) The impugned judgment and decree dated 02.12.2010 passed by the learned Lower Appellate Court is quashed and set aside.

(ii) The Application for condonation of delay filed by the Appellant is allowed subject to the Appellant paying to the Respondents costs of Rs. 7,500/- as condition precedent.

(iii) Regular Civil Appeal No. 155/2010 is re-stored to the file of the learned District Judge.

(iv) The learned District Judge is directed to decide the said Appeal afresh after hearing the parties in accordance with law.

(v) All the contention of the parties on merits are left open.

(vi) Parties are directed to remain present before the Lower Appellate Court on 25.09.2014 at 10:00 a.m."