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**(2015) 02 BOM CK 0338**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 619 of 2014**

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| Mariano Mesquita and Others | Vs | APPELLANT  |
| Selva Raju Nadar and Others |    | RESPONDENT |

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**Date of Decision :** 10-02-2015

**Acts Referred:**

**Citation :** (2015) 5 ALLMR 669 : (2015) 6 MhLj 940

**Hon'ble Judges :** N.M. Jamdar, J.

**Bench :** Single Bench

**Advocate :** J.J. Mulgaonkar, Advocate, for the Appellant; Sudin M.S. Usgaonkar, Advocate, for the Respondent

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## Judgement

N.M. Jamdar, J.—By this petition, the petitioners challenge the order passed by District Judge, South Goa dated 11 August 2014 dismissing Civil Miscellaneous Application for condonation of delay of 136 days in filing an Appeal from Order. The petitioners in the appeal had challenged order passed by the Civil Judge Senior Division, Vasco dated 9 December 2013, dismissing their application for temporary injunction. The petitioners filed a suit for permanent and mandatory injunction against the respondents. According to the petitioners they are heirs of one Marcal Mesquita who owned and possessed several properties including the one which was subject matter of the suit. According to the petitioners the respondents without any right had proceeded to carry out construction in the property. The petitioners accordingly filed a suit and also took out an application for temporary injunction to restrain the respondents from carrying out any construction in the suit property. The Civil Judge came to the conclusion that petitioners had not made out any prima facie case and accordingly by the order dated 9 December 2013 rejected the application for temporary injunction. Thereafter, the petitioners filed an appeal along with condonation of delay on 24 May 2014, which application for condonation has been rejected by the impugned order dated 11 August 2014.

2. The delay sought to be condoned is of 136 days. The petitioners in the

application averred that, after passing of the order there was inter se dispute between the petitioners who are brothers and due to which it took some time to engage services of an advocate. It is also stated that the petitioners then approached retired Hon"ble Chief Justice of Gujarat High Court to take legal advice on the dispute and as per his advice new advocate was appointed. According to the petitioners it is because of this position that there was a delay of 136 days which the petitioners prayed to be condoned.

3. Mr. J.J. Mulgaonkar, the learned Counsel for the petitioners reiterated the contentions raised in the application and urged before the learned Appellate Court. Mr. Sudin Usgaonkar, the learned Counsel for the respondents strongly opposed the application on the ground that the reasons that the petitioners were having inter se dispute and that they approached the mediator, are frivolous grounds and will not constitute sufficient cause. He submitted that the learned Judge was right in dismissing the application for condonation of delay. Mr. Usgaonkar also relied upon the decision of the Apex Court in the case of *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai*, ], more particularly, paragraphs No. 23 and 24 of the said decision. He submitted that in this decision the Apex Court has taken a review of all earlier decisions and has taken a view that it is no longer the law to consider application for condonation of delay liberally.

4. In the decision of the Apex Court relied upon by Mr. Usgaonkar, the Apex Court has noted the basic principle that generally a party does not stand to benefit from approaching the court late, and court leans generally towards condonation and delay if it is not of long duration unless it is shown that the party who has succeeded in the court below is put to a disadvantage by condoning the delay. By refusing to condone the delay, the case of a party is shut out from consideration on merits. The application for condonation of delay will have to be considered on facts and circumstances of each case. It is also true that vested rights accrued to a party under a impugned order are not to be lightly taken away. It is a matter of balancing of equities, which will depend on various factors.

5. There is also a distinction between inordinate delay and delay of short duration. The delay of 136 days, in the facts of the present case, cannot be termed as an inordinate delay. The interim relief prayed for by the petitioners was refused by the Court below and there is no interim relief operating against the respondents at present. Interim relief sought was that the respondents be restrained from carrying out construction in the property. As on date there is no restraint order against the respondents. Therefore, it cannot be said that if the appeal is considered on merits, by condoning the delay, as on date the respondents are put to any inconvenience. Consequence of refusal to condone delay will be that the appeal will be dismissed, the respondents will carry on construction, which will seriously prejudice the case of the petitioners in the suit, which is for permanent injunction.

6. The reason given in the application that there was an inter se dispute between the brothers because of the failure of the petitioners in the trial Court in respect of temporary injunction, cannot be considered as impossible. It is also stated that the parties sought advise and mediation of the retired Judge, who is named in the application. There is no reason to disbelieve this cause as well. These two factors were sufficient enough explanations. The learned Judge while dismissing the application has taken a needlessly rigid approach, without considering the equities of the case.

7. That the petitioners approached the appellate Court with a delay could be the argument of the respondents to consider whether the petitioners are entitled to temporary injunction. The aspect of delay thus could be considered by the learned Judge while considering the appeal on merits, but it was highly inequitable not to consider the appeal at all, by refusing to condone the delay. Thus the learned District Judge was in error in not condoning delay in the appeal. In view of this position, the Writ Petition deserves to be allowed and is accordingly allowed in terms of prayer clause (a). The appeal filed by the petitioners stands restored to file to be disposed of as per law. All Contentions of the parties are kept open including the contentions of the respondents that the petitioners have approached the appellate Court late, which will be considered on its own merit. Rule is made absolute in the above terms. No costs.