
(2015) 09 BOM CK 0121
In the Bombay High Court
Case No : Writ Petition No. 796 of 2014

Rubertina Souza

APPELLANT

Vs

Marto Dias and Others

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Citation : (2015) 09 BOM CK 0121

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : V. Menezes, for the Appellant; J. Godinho, Advocates for the Respondent

Final Decision : Allowed

Judgement

C.V. Bhadang, J—Rule. Rule made returnable forthwith. Mr. Godinho, learned Counsel waives service on behalf of the respondent no. 1 and Mrs. Linhares, learned Additional Government Advocate waives service on behalf of respondent no. 2. Heard finally with the consent of the parties.

By this petition, the petitioner is challenging the order dated 9/9/2014 passed by the learned Principal District Judge, South Goa, in Civil Misc. Application no. 23/2014. By impugned order, the learned District Judge has refused to condone the delay of 148 days in filing a revision application.

2. The brief facts are that the second respondent/Village Panchayat had issued a stop work notice in respect of the construction undertaken by the petitioner on the ground that it was unauthorized and without any construction licence/permission. Subsequently on 27/4/2009, the Deputy Director of Panchayats passed an order directing demolition. That was challenged by the petitioner before the Director and initially the appeal was allowed. The first respondent challenged the said order before the learned District Judge when the order of the Director was set aside and the matter was remanded. After remand, the Dy. Director dismissed the appeal filed by the petitioner on 22/7/2013. Feeling

aggrieved the petitioner sought to challenge the same in a revision application before the District Judge in which there was delay. The Civil Revision application was accordingly accompanied by an application for condonation of delay.

3. According to the petitioner, she is aged 90 years and staying in United Kingdom. She had given Power of Attorney to Mrs. Cecilia Dias on 26/4/2011. Cecilia Dias applied for the impugned order on 5/8/2013 and certified copy was obtained on the same day. According to the petitioner after going through the impugned order, she instructed Cecelia Dias some where in the end of September 2013 to challenge the said order. Further according to the petitioner, Cecelia Dias also left for U.K in the month of August 2013. She in turn executed a power of attorney dated 6/8/2013 in favour of one Mr. Antonio R. Mendes. It is claimed that the initial power of attorney dated 26/4/2011 permitted such a delegation. It is contended that Cecelia Dias after getting the instructions from the petitioner tried to get in touch with power of attorney Antonio Mendes but could not succeed. The husband of Cecelia Dias was not keeping good health and she was occupied with looking after her husband. Cecelia Dias could contact Antonio Mendes only in November 2013 and instructed him to file a revision. It is contended that due to inadvertence Cecelia Dias had carried the original power of attorney dated 6/8/2013 in favour of Antonio Mendes and he had to wait for the same which was sent and received some time in December 2013. It is contended that Antonio Mendes on account of his sickness could not contact his advocate. He contacted the advocate on 21/12/2013. However, on account of the festival season the revision could be filed on 18/1/2014 resulting in a delay of 148 days.

4. The application was opposed on behalf of both the respondents. It was contended that the petitioner under the garb of repairs has carried out extensive construction of a structure comprising of ground plus two floors. It is submitted that the application for condonation of delay is vague and is lacking in material particulars. The application itself would show that the petitioner has not acted with due diligence and as such it cannot be said that there is sufficient cause for not filing revision application within time.

5. The learned District Judge has found that there was no document produced to show that the Attorney Cecelia had left for United Kingdom some time in August 2013 and that she was residing there. It was found that after the impugned order was passed on 22/7/2013, the Attorney Cecelia was available in Goa till 6/8/2013, when she had allegedly executed a Power of Attorney in favour of Mendes. It has further been found that the petitioner's Attorney Cecilia had not produced any material to show that her husband was not keeping good health and that she could not get in touch with her Attorney Mendes. The learned District Judge after considering the various case laws including the decision in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, AIR 1987 SC 1353 : (1987) 13 ECC 27 : (1988) 19 ECR 565 : (1987) 28 ELT 185 : (1987) 167 ITR 471 : (1987) 1 JT 537 : (1987) 1 LLJ 500 : (1987) 1 SCALE 413 : (1987) 2 SCC 107 : (1987) 2 SCR 387 : (1987) 66 STC 228 :

(1987) 2 UJ 29 found that there was no sufficient cause made out.

6. I have heard Mr. Menezes, the learned counsel appearing for the petitioner, Mr. Godinho, the learned counsel appearing for the first respondent and Ms. Linhares, the learned counsel appearing for the second respondent.

7. It is submitted by Mr. Menezes that the petitioner had acted with due diligence and was prevented from circumstances beyond her control in preferring the revision application within time. He also contended that there is permission for repairs and in fact in the earlier round of litigation before the Director, the appeal was allowed. He submitted that the petitioner is willing to abide by any condition that may be imposed including that of payment of costs, if the delay is condoned.

8. Mr. Godinho, the learned counsel appearing for the first respondent has strenuously opposed the prayer. The learned counsel has referred to the photographs which are produced on record, in order to show the extensive nature of work undertaken. It is submitted that the petitioner thus is not entitled to the order of condonation of delay.

9. Mrs. Linhares, the learned counsel for the second respondent has also supported the impugned order. It is submitted that the petitioner without paying any heed to the stop work notice has undertaken the work of extensive construction.

10. I have given my anxious consideration to the rival circumstances and the submissions made. At the out set it may be stated that the merits of the controversy need not be gone into at this stage. The question is whether the petitioner can be said to have sufficient cause for not filing the revision application within time. The Hon"ble Apex Court in the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 5 CTC 547 : (2013) 4 RCR(Civil) 785 : (2013) 11 SCALE 418 : (2013) 12 SCC 649 : (2014) 1 SLJ 20 , after taking a survey of the decisions holding the field had culled the following principles which are relevant in para 21 of the judgment:

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 fides 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 encapsule 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.

21.14.

11. Some additional guidelines have been laid down in para 22 as under:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) 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.

22.4. (d) 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.

12. It can thus been seen that normally the Court would be justified in taking a liberal view in the matter, in respect of delays of short duration. In other words if there is no gross delay, the Court may, having regard to the facts and circumstances of the case, consider to condone the delay. It is trite that the case made out in support of the prayer cannot be examined on mathematical precision. An overall view of the facts in a pragmatic manner has to be taken. There cannot be any straight jacket formula and each case would depend upon its own facts and circumstances, which have to be examined and assessed, in the light of the principles as aforesaid.

13. Coming to the present case, it is true that each days delay is not explained. The overall explanation given is that the petitioner who is aged 90 years is staying abroad. The power of attorney Cecelia Dias had also proceeded to U.K. some time in August 2013 and there was a further delegation in favour of Mr. Antonio Mendes. The case made out is that Mrs. Cecelia Dias had carried the power of attorney with her and Mr. Antonio Mendes was required to wait for the same. The case made out in the application would show that Mr. Mendes was instructed in the beginning of November, 2013 to file the revision application. Thereafter, there is some delay on account of the alleged sickness of Mr. Mendes and eventually the Civil Revision Application along with an application for condonation of delay is filed on 18/01/2014.

14. Taking an overall view of the matter, in my considered view no lack of diligence can be attributed and I find that the delay can be condoned subject to costs of Rs. 25,000/- to be paid to the first respondent.

15. Shri V. Menezes, the learned Counsel appearing for the applicant submits that two weeks" time may be granted to pay/deposit the costs.

16. In the circumstances, the petition is allowed. The impugned order dated 22/7/2013 is hereby set aside. The application for condonation of delay filed by the petitioner is allowed. The delay in filing the revision application is hereby condoned subject to costs of Rs. 25,000/- (Rupees Twenty five thousand only) to be paid to the first respondent. The parties to appear before the learned District Judge on 29/09/2015 at 10.00 a.m. The costs of Rs. 25,000/- shall be paid on or before 29/09/2015. Rule is made absolute in the aforesaid terms with no order as to costs. The learned District Judge is requested to decide the revision application as expeditiously as possible and preferably within a period of three months from the date of appearance of the parties.