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**(2019) 12 BOM CK 0116**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 766 Of 2012**

Shantadurga Kumbhar Juvekarin

APPELLANT

Vs

Devaki Krishna Devasthan And Ors

RESPONDENT

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**Date of Decision :** 17-12-2019

**Acts Referred:**

Limitation Act, 1963 — Section 5, 14

Code Of Civil Procedure, 1908 — Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(d)

Constitution Of India, 1950 — Article 227

**Citation :** (2019) 12 BOM CK 0116

**Hon'ble Judges :** Dama Seshadri Naidu, J

**Bench :** Single Bench

**Advocate :** J.E. Coelho Pereira, V. Braganza, V.R. Tamba

**Final Decision :** Dismissed

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## Judgement

**Facts:**

1. The petitioner, as plaintiff, filed Suit No.36/10/A for declaration, injunction, and other consequential reliefs. He sued three defendants. Later, the defendants entered appearance and applied under Order VII Rule 11 CPC to have the plaint rejected. And the Trial Court, through its order dated 08.11.2011, rejected the plaint. The rejection was, it seems, on the premise that the plaint suffers under Order VII Rule 11(a) and (d).

2. Aggrieved, the petitioner filed the first appeal on 19.01.2012, as the order is appealable. He claimed there was a delay of 18 days and, accordingly, applied under Section 5 of the Limitation Act to have that delay condoned. Eventually, the first appellate Court, through its order dated 13.06.2012, dismissed the delay condonation petition. But it left the main appeal remained untouched. Once the appellate Court dismissed the delay condonation petition, it could have, consequently, dismissed the first appeal. It has not done that.

Which is the Remedial Step: Second Appeal or Revision?

3. In that factual backdrop, the petitioner filed this Writ Petition in 2012. Later, there is ambiguity about the maintainability of the Writ Petition. The law is well settled: if an application under Order 7, Rule 11 of CPC is allowed, the plaintiff must challenge the trial Court's order in appeal; if the application is dismissed, the defendant must file a revision. If we confine to the first appeal, if the plaintiff fails in the first appeal, he must take the first appellate Court's judgment in a second appeal.

4. Here, the plaintiff has filed the first appeal with a delay. To have that delay condoned, as I have noted above, applied under Section 5 of the Limitation Act. That application was dismissed. Against the appellate Court's order dismissing the delay petition, what remedial step is available? It is it a revision or a second appeal?

5. The counsel on either side has felt that as the order of reusing the delay condonation is in a first appeal, it should be challenged in a second appeal, rather than in a revision, say, under Article 227 of the Constitution of India. So, on that premise, the petitioner, who first filed the revision, sought this Court's leave to convert the Writ Petition into a Second Appeal. Then, the petitioner's counsel has even submitted draft questions of law.

6. When I have taken up the Writ Petition for hearing, the petitioner's counsel has drawn my attention to this Court's earlier order permitting him to convert the writ petition. He has, in fact, wanted me to direct the Registry to renumber the writ petition as a second appeal and to accept the petitioner's substantial questions of law.

7. So I must examine the issue deeper. Indeed, to this day, the unnumbered First Appeal still remains before the first appellate Court. Only the interlocutory application was dismissed. As the appeal remains untouched, the petitioner's filing a second appeal against an interlocutory order does not arise. Suffice to say an appeal is a statutory felicity provided to an aggrieved person. There can be no appeal by default or as a matter of course-ex debito justitiae. It must be provided for.

8. On the other hand, a revision under Article 227 of the Constitution, if it were, is a residuary remedy. It needs no express statutory sanction. The High Court exercises its supervisory jurisdiction to keep the subordinate courts and tribunals within their jurisdictional bounds. For that purpose, more often than not, it invokes Article 227, severely constricted that constitutional command may be. So I am afraid it is fallacious to insist that even an interlocutory order in a first appeal must be subjected to a second appeal. Period.

9. As I have kept the writ petition intact, it needs adjudication on the merits.

Submissions on the Merits:

Petitioner:

10. The petitioner's counsel has submitted that the delay was 18 days, and it was sufficiently explained. To elaborate, he has submitted that the petitioner initially applied on time and secured a certified copy of the order, but it contained an error. Therefore, again the Registry issued a corrective to that error. Then, the petitioner could secure the corrected certified copy only on 31.12.2011. Therefore, the petitioner reckoned the delay as 18 days. In the end, the learned counsel has urged this Court to allow the Writ Petition in the interest of justice, so the parties could resolve the dispute on the merits.

Respondent:

11. On the other hand, the learned counsel for the respondents has submitted that the impugned order requires no interference, as it remains unassailable. To elaborate, the learned counsel has submitted that the delay is not 18 days; it must have been 48 days. According to the learned counsel, the corrected certified copy was ready by 01.12.2011, but the petitioner's counsel claimed it only on 31.12.2011. Therefore, the delay of 30 days still remained unexplained. The learned counsel has submitted that the petitioner has pleaded as if the Registry had supplied the certified copy belatedly on 31.12.2011, but that was far from the truth. To support his contention, the learned counsel has relied on *Prabhabai v. Fulchand* 2016 (5) Mh.L.J. 589.

12. Heard Shri J. E. Coelho Pereira, the learned Senior Counsel for the Petitioner, and Shri V. R. Tamba, the learned counsel for the Respondent No.1.

Discussion:

13. True, the petitioner suffered an order under Order VII, Rule 11 of CPC. So his plaint was rejected. He appealed on 19.11.2011, supposedly with a delay of 18 days. Admittedly, the petitioner first secured the certified copy on 19.11.2011. Then, his counsel noticed an error in the order; he wanted the Registry to rectify that error. The Registry rectified that error. The petitioner pleads that his counsel in the meanwhile went to some other place on professional work and came back a few days later. So he could secure the certified copy only on 31.12.2011.

14. Granted, the petitioner has not pleaded in explicit terms his justification for the delay: that is, why he could not have the certified copy soon after 01.12.2011. That said, the petitioner supplies the reason of his counsel's unavailability. Once represented by a counsel, a party cannot be expected to go on his own and secure the certified copy. It lies in the lawyer's domain. For the lawyer's lapse, let the client not suffer-more particularly, if the delay is reasonable.

15. At any rate, whether the delay is 18 days or 48 days, I reckon it cannot be treated as inordinate; nor can it be termed the petitioner's negligence. Prabhabai, this Court's decision the respondent has relied on, concerns the role of Section 14 of the Limitation in delay condonation. I am afraid it has no

relevance here.

16. Under these circumstances, it only serves the interest of justice if the Court allows the parties to contest the matter on the merits, even on the question of the plaint rejection.

Conclusion:

I, therefore, set aside the impugned order, dated 13.06.2012, but subject to the condition that the petitioner pay Rs. 5,000/- to the Goa State Legal Services Authority in two weeks after this order is uploaded. As the delay now stands condoned, the First Appellate Court may endeavour to entertain the First Appeal, expeditiously.