

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

**APPEAL FROM ORDER NO.12 OF 2023
(CONVERTED FROM
WRIT PETITION NO.607 OF 2022)**

Mr Pravin Naik,
son of Tulshidas Naik,
aged 54 years,
and resident of Trimurti,
V.N.Naik Road,
Chadrawadda, Fatorda,
Margao Goa.

...Appellant

Versus

Mr Shrinivas Prabhu Dessai,
s/o Rohidas Prabhudessai,
married, age 56 years,
service, Resident of K1 CD
Good Earth, Dongorwaddo,
Fatorda, Margao Goa.

... Respondent

Ms Swati Kamat Wagh, Advocate appearing pro bono for the Appellant.

Mr Varun Bhandankar, Advocate under Legal Aid Scheme for the Respondent.

CORAM: M. S. SONAK, J.

DATED : 4th MAY 2023

ORAL JUDGMENT

1. Heard Ms Swati Kamat Wagh, learned counsel for the Appellant, and Mr Varun Bhandankar, learned counsel for the Respondent.

2. Considering the decision of the Hon'ble Supreme Court in the *Commissioner, Mysore Urban Development Authority Vs S. S. Sarvesh* in Civil Appeal No.1463 of 2019 decided on 05.02.2019, leave is granted to convert this petition into an Appeal From Order. Necessary amendment to be carried out immediately.
3. The Appeal is admitted and, with the consent, taken up for final disposal.
4. The Appeal challenges the orders dated 09.10.2019 and 12.02.2020 made by the Court of Adhoc District Judge-1, FTC-I, South Goa, Margao (Appeal Court). By the order dated 09.10.2019, the Appellant's Appeal, i.e. Regular Civil Appeal No.67/2018/FTC-I, was dismissed for default due to the non-appearance of the Appellant and the Advocate provided to him under the Legal Aid Scheme. By the order dated 12.02.2020, the Appeal Court dismissed the Appellant's Civil Misc. Application No.133/2019 seeking restoration/readmission of the Appeal.
5. The roznama indicates that the Appellant and his Advocate under the Legal Aid Scheme were not quite diligent in pursuing the Appeal. The main reason for this lack of diligence is somewhat surprising. The Appellant and his Advocate under the Legal Aid Scheme believed that the Presiding Officer would be biased because, in the trial Court, this Presiding Officer had framed the issues. For this reason, it appears that the Appellant and Advocate under Legal Aid Scheme were avoiding a hearing on merits.

6. The record also shows that the Appellant had applied for transfer on the above ground, but the Principal District Judge, South Goa, dismissed the transfer application. There was no clarity on whether such dismissal was for default or on merits.

7. On 09.10.2019, when the Appeal was dismissed for default, neither the Appellant nor his Advocate under the Legal Aid Scheme was present. In the application for setting aside ex-parte order and readmission of the Appeal, the Appellant stated that due to some personal hard-pressed difficulties, the Appellant could not remain present in the Court on the said date. There is a further statement that the Advocate for the Appellant who appears on the free Legal Aid Scheme had some other engagement and hence could not be present in the Court when the Appeal came to be dismissed.

8. Mr Bhandankar points out that the reasons for the absence on 09.10.2019 are wholly inadequate. Further, he points out that such reasons must not be considered in isolation but must be considered with the fact that on numerous occasions, the Appellant and his Advocate failed to remain present. Finally, Mr Bhandankar referred to the observations in paragraph 8 of the impugned order dated 12.02.2020.

9. Paragraph 8 of the impugned order dated 12.02.2020 reads as follows:-

"8. The Appeal was filed on 10.07.2018. The roznama indicate that from 10.07.2018 till 16.11.2018 the matter was kept for the appearance of the Respondent. On 07.12.2018 the Respondent came to be served. On 04.01.2019 this Court received the records of RCA No.67/2018. On 22.01.2019 the Appellant filed an application to sent file to any other Court on the ground that the Presiding Officer has framed the issues in the suit and conducted the part of the mater when presiding officer was functioning as a Trial Judge. Thereafter the Appellant took time for making necessary application for transfer of the Appeal and later on, on 22.2.2019 informed that the application has been made to the District Court to transfer the Appeal. Thereafter, on 11.3.2019, 26.3.2019, 5.4.2019, 29.4.2019, 10.6.2019, 16.7.2019, 30.7.2019, 28.08.2019 and 24.09.2019 several opportunities, including last and final opportunities were given to the Appellant to proceed with the matter or to take steps. On 09.10.2019 the Appellant so also the Respondent remained absent till 12.00 noon. Hence the Appeal came to be dismissed for default."

10. The record, however, shows that even the Respondent or his Advocate were not present on some occasions, including on 09.10.2019 when the Appeal came to be dismissed for default.

11. Considering the entire material on record, it does appear that the Appellant and his Advocate under the Legal Aid Scheme were not quite diligent in pursuing the Appeal. However, the Appellant, on affidavit, explained why he could not remain present on 09.10.2019. The Court rejected that explanation mainly by referring to a lack of antecedent diligence on the Appellant's part.

12. The Appellant's Advocate under the Legal Aid Scheme should also have been more diligent in handling the matter. When the matter is accepted under the Legal Aid Scheme, the appointed Advocate must diligently attend to the matter. The excuse of being engaged in some other Court should not be put forth; in any case, it should not be continuously put forth. Priorities have to be given by the Advocate to the matters under the Legal Aid Scheme, even though the payment schedule for such matters may not be commensurate to the fees such an Advocate would possibly command in other matters. Ultimately, this is the service that not only the legal community but also the judiciary owes to the litigating member of the public who may not be able to afford the services of an Advocate. The litigants should not get the impression that quality legal services are not provided to them merely because they are not in a position to afford the services of Advocates by paying substantial fees. Access to justice can never be denied to the litigant based upon their economic capacity. Therefore greater responsibility is placed on those who appear under the legal aid scheme.

13. Further, Advocates appointed under the Legal Aid Scheme, or others, should not unnecessarily involve themselves in making allegations of bias against the Presiding Officers unless the situation clearly warrants it and the facts support such a course. They must attend to the case and conduct it to the best of their ability. In a given case, where the situation genuinely requires seeking a transfer, it would no doubt be open to the Advocate under the Legal Aid Scheme to

advise the litigant accordingly. However, it would not be proper for any lawyer, much less the lawyer appointed under the Legal Aid Scheme to avoid appearing before a particular Presiding Officer or keep seeking adjournments based upon some fanciful notion entertained by the litigant about the bias of the Presiding Officer.

14. Mr Pravin Naik, the Appellant, is present in the Court. He tenders an apology and states that henceforth he will not make any allegations against the Judges without any basis. However, he requests that another chance be granted to him to pursue his Appeal against the money decree. To the Court's query about whether he will pay any costs, he states that he will pay the costs of ₹10,000/- for readmission or restoration of his Appeal. He says that he has deposited a portion of the decretal amount before the executing Court and is serious about the Appeal.

15. Considering the peculiar circumstances, the Appellant deserves an additional opportunity, mainly because some explanation was offered for the absence on 09.10. 2019. This explanation was not considered and accepted primarily because of the lack of antecedent diligence. Nevertheless, granting such an opportunity would undoubtedly occasion some prejudice to the Respondent. However, this prejudice can be minimized if not eliminated by awarding costs and further directing the Appeal Court to dispose of the Regular Civil Appeal No.67/2018/FTC-I as expeditiously as possible and in a time-bound manner.

16. Although, in several cases, the Hon'ble Supreme Court has held that the party should not be made to suffer for the fault of his Advocate. However, the same does not mean that the opposite party should be made to suffer for the fault of the Advocate. The interest of all the parties must be balanced to the extent possible. The antecedent diligence is not entirely irrelevant, but that could not have formed the chief basis not even to consider or reject the cause shown for absence on 09.10.2019.

17. Accordingly, this Appeal is disposed of by the following order:

(a) The impugned orders dated 09.10.2019 and 12.02.2020 are set aside; this is subject to the Appellant paying the offered costs of ₹10,000/- within four weeks from today.

(b) Regular Civil Appeal No.67/2018/FTC-I is restored/readmitted to the file of the Appeal Court for disposal;

(c) The Appellant and the Respondent are to appear before the Appeal Court on 19.06.2023 at 2.30 p.m. and file an authenticated copy of this order;

(d) Along with the authenticated copy of this order, the Appellant must file proof of payment/deposit of costs of ₹10,000/-;

(e) The above relief is granted subject to the Appellant paying the Respondent ₹10,000/- within four weeks from today;

(f) The amount may either be directly paid to the Respondent or deposited before the Appeal Court;

(g) If the amount is deposited before the Appeal Court, then the Respondent will have the liberty to withdraw the same unconditionally;

(h) If there is a failure to deposit the amount of the costs, then this Appeal shall be deemed to have been dismissed without any further reference to this Court;

(i) This Court has not gone into the rival contentions of the parties on the merits of the Appeal, and therefore, the Appeal must be decided on its own merits and in accord with law;

(j) The Appeal Court to either hear the final arguments on the above date or fix some clear date for hearing the final arguments;

(k) The learned counsel for the parties assured this Court that no adjournments would be applied unless for pressing reasons;

(l) Mr Pravin Naik also assured this Court that he would not delay the matter;

(m) The Appeal Court must dispose of the Regular Civil Appeal No.67/2018/FTC-I as expeditiously as possible and in any case not later than 30.09.2023.

18. Ms Swati Kamat Wagh has appeared in this Court ProBono. This Court acknowledges the efforts put in by her. Further, at the Appellant's request, Ms Swati Kamat Wagh has agreed to appear for the Appellant before the Appeal Court in Margao. This is appreciated by the Court and the Appellant who is present in the Court.

19. Similarly, Mr Bhandankar appeared for the Respondent under the Legal Aid Scheme before this Court. Again, he discharged his

duties with diligence and fairness. This is greatly appreciated. The GSLSA must pay his fees according to the rules.

20. The Appeal is disposed of in the above terms with costs. All concerned are to act on an authenticated copy of this order.

M. S. SONAK, J.