

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 238 OF 2015

M/s. Costa Pinto and Associates,
a duly registered partnership firm
having its office at 8, Durga Apartments,
Second floor, Luis Miranda Road,
Margao, Goa represented herein by its
Managing Partner Mr. Joseph Alfred D'Costa,
Son of Miguel D'Costa, businessman,
r/o 201 A, Saldel Apts, Pajifond,
Margao, Goa 403 601.

.... Petitioner

V e r s u s

M/s. Prestige Holiday Resorts Ltd.,
A company incorporated in India
Under the Indian Companies Act, 1956
having its regd. Office at “Haathi Mahal”,
Mobor, Cavelossim, Salcete,
Goa 403731.

..... Respondent

Mr. R. G. Ramani, Advocate for the Petitioner.

Mr. A. F. Diniz with Arlendo D'Souza, Advocates for the Respondents.

CORAM: C. V. BHADNAG, J.
DATE: 27TH OCTOBER, 2015.

ORAL ORDER:

By this petition, the petitioner/original plaintiff is challenging the order dated 21/11/2014 passed by the learned Civil Judge Senior Division, Margao in Regular Civil Suit No.330/2010/III by which the application (Exhibit D-69) filed by the petitioner has been dismissed. That

was an application seeking direction to the respondents to file an affidavit in terms of the order dated 29/3/2014 below (Exhibit 24).

2. The brief facts are that the petitioner had filed application (Exhibit 24) under Order 11 Rule 12 of C.P.C. for discovery of the document by the respondent no.1 (defendant no.1). In particular, as per para 4 of the application, the following discovery was sought for :

- (a) The records/documents in possession of Respondent, on the basis of which the above statements were made.
- (b) The records of the Agreements of Purchase of Timeshare of each of the “over 2600” Mundkar Block timeshare purchasers referred to herein above; and
- (c) The records of the Timeshare Membership Certificate issued to each of the “over 2600” Mundkar Block timeshare purchasers referred to above, and
- (d) Register of the above referred timeshare purchasers containing details of the timeshare purchasers in the Mundkar Block, maintained by Respondent.”

3. It appears that by an order dated 29/3/2014, the application (Exhibit 24) was allowed and the respondent was directed to make discovery

on oath of the documents mentioned in para 4 of the application. Subsequently the application (Exhibit D-69) came to be filed, alleging non compliance with the order dated 29/3/2014. The learned Trial Court by the impugned order has found that there was already an affidavit filed which fact was not recorded in the roznama correctly. It was also found that the affidavit filed in response to the order of the discovery was not given any exhibit. Having found that the affidavit existed in the record, the learned Trial Court held that nothing survived in the application and it was accordingly dismissed.

4. It is submitted by Mr. Ramani, the learned counsel for the petitioner that the petitioner had alleged in the application (Exhibit D-69) that the affidavit filed is not in consonance with the order dated 29/3/2014. It is submitted that the Trial Court erroneously proceeded on the assumption that the petitioner had claimed that there was no affidavit filed. Mr. Ramani, the learned counsel for the petitioner further submitted that in the written statement which was filed way back in the year 2003, the respondent no.1 had alleged about allotment of more than 2600 mundkar blocks. However, when the affidavit came to be filed, in compliance to the order dated 29/3/2014, the position as may be existing on the date of filing of the affidavit is set out. It is submitted that the respondent was obliged to file the affidavit of discovery of the documents as on the date of the filing of the

written statement. He submitted that thus, the respondent having failed to file the Affidavit, in compliance with the order dated 29/3/2014, the Trial Court ought to have issued a direction for appropriate compliance of the same.

5. On the contrary it is submitted by Mr. Diniz, the learned counsel for the respondent that Order 11 of C.P.C does not contemplate any application for compliance with the order of discovery. It is submitted that the application (Exhibit 24) was filed by the petitioner on 12/11/2003 and the same was pending for about ten years, when it was decided on 29/3/2014. It is submitted that during this period, there were several changes on account of the cancellation/revocation of the membership and thus, it was not expected nor possible for the respondents to give the details as were existing on the date of the filing of the written statement. It is submitted that in the affidavit in- reply to the discovery as also in reply (Exhibit-70) to the application (Exhibit-69) it was claimed that the timeshare purchasers who were initially allotted mundkar block apartments, were all issued provisional membership certificates. He submitted that the petitioner has failed to point out as to under which provision the application is filed. It is submitted that the impugned order does not require any interference as the affidavit was already filed in compliance with the order of discovery.

6. On hearing the learned counsel for the parties, I find that the

only consequence of non compliance with the order of discovery is provided for in Order 11 Rule 21 of C.P.C. It was not disputed during the course of arguments at bar that Exhibit D-69 was not filed under Order 11 Rule 21 of C.P.C. Be that as it may, in the absence of any specific provision under which application Exhibit D-69 was filed, I do not find that the impugned order dismissing the same needs interference. At this stage, Mr. Ramani, the learned counsel for the petitioner has submitted that the petitioner would file an application under Order 11 Rule 21 of C.P.C. I find that if such application is filed the learned Trial Court would be in a better position to consider the rival contentions of the parties and then to decide whether there is non-compliance with the order of discovery requiring the consequences as provided in Order 11 Rule 21 C.P.C..

7. In such circumstances, the following order is passed:

- i) Petition is dismissed.
- ii) However, the petitioner would be at liberty to file an application under Order 11 Rule 21 of C.P.C.
- iii) If such application is filed, the Trial Court shall decide the same in accordance with law after hearing both the parties.

- iv) All rival contentions of the parties are kept open.
- v) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

Ap/-