

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.26 of 2016**

1. Shri Pundalik V. Verlekar,
Son of Shri Venkatesh
Verlekar, Major of age,
Businessman,
Resident of G-1, OIjoan,
Henriques Apartments,
Mangor, Vasco-da-Gama,
Goa. .. Petitioner

V/s

Smt. Swarnima Thackur,
Wife of Capt. Santosh Thackur,
Major of age, resident of C-2/2,
Block-C, Anand Residency,
Airport road, Chicalim,
Marmagao-Goa. .. Respondent

Mr. Abhijeet Kamat, Advocate for the petitioner.

Mr. R. G. Ramani and Mr. S. Raikar, Advocates for the respondent.

Coram:- C. V. BHADANG, J.

Date:- 21st April, 2016

ORAL ORDER :

By this petition, the petitioner, who is defendant no.1 before the Trial Court, is challenging the order dated 07/12/2015 passed by the learned Civil Judge, Senior Division at Vasco in Regular Civil Suit No.25/2015/A, by which the application filed by the petitioner for deletion of the original defendant no.2, who

happens to be the wife of the petitioner, has been dismissed.

2. The brief facts are that the respondent has filed the aforesaid civil suit for recovery of an amount of Rs.12 Lakhs against the petitioner and his wife. The case made out in the plaint is that the amount was advanced to the petitioner out of friendly relations between the parties. It is contended that the petitioner and his wife (defendant no.2) are married under the regime of communion of assets. It is further contended that the petitioner is engaged in business of Real Estate. As the petitioner failed to repay the amount, the suit came to be filed seeking a decree against both the defendants.

3. The petitioner filed an application purportedly under Order I, Rule 10 of C.P.C. for deletion of defendant no.2. The Trial Court has found that the petitioner has admitted that he has married with the defendant no.2 under regime of communion of assets and as such, the defendant no.2 was a necessary party for recovery of the amount and in order to pass an effective decree. In such circumstances, the Trial Court has refused to strike out the name of the defendant no.2.

4. The learned Counsel for the petitioner has placed

reliance on Article 1114 of Family Law, Volume I, in order to submit that in such a case, even assuming that the parties have married under the Communion of Assets, (in which the wife may be holding a moiety), it is only the share of the petitioner which would be liable for satisfaction of the decree. He submits that the Trial Court has failed to consider the provisions of Article 1114 of Family Law Volume I.

5. It is submitted that the transaction, even according to the respondent, was purely a business transaction between the petitioner and the respondent and original defendant no.2 has no concern with the same. It is submitted that the defendant no.2, in such a case, cannot be asked to go through the rigour of the trial of the suit.

6. On the contrary, it is submitted by the learned Counsel for the respondent that where the husband obtains a business loan, it will be deemed to be for the common benefit of the spouses. Reliance is placed on the Division Bench Judgment of this Court in the case of **Antoneta Fernandes Vs. Rita Fernandes**, reported in 1995(2) GLT 309 and in particular, para 7 thereof. It is submitted that Article 10 of Commercial Code lays down that the payment of commercial debt of the husband, which

have to be made from his moiety of the common properties, may be demanded before the marriage is dissolved or before there is a separation. The learned Counsel further points out that Article 15 of the Commercial Code in which debts, originating from the commercial acts contracted solely by the businessman husband, even without the consent of wife, shall be presumed for the common gain of the couple. The learned Counsel submits that the respondent being the plaintiff is *dominus litis* and it is also pointed out that the defendant no.2 is not challenging the order refusing to delete her and in any case, the petitioner cannot seek deletion of another defendant in the suit. It is pointed out that it is the case made out in the plaint that the amount was advanced for the business purpose which is not denied in the written statement except raising a contention that the amount was Rs.6 Lakhs and not Rs.12 Lakhs as contended by the respondent.

7. In reply, it is submitted by the learned Counsel for the petitioner that if the amount is advanced by way of "friendly loan", then, it would be a civil liability and not commercial liability and the provisions of commercial code would not apply. It is also submitted that the commercial code has since been repealed, is no longer in force.

8. I have considered the rival circumstances and the submissions made.

9. At the outset, it is necessary to mention that the respondent being the plaintiff, is *dominus litis* and as such, can decide who should be parties to the suit. Albeit this is subject to the provisions of Order I, Rule 10(2) of C.P.C., in which the Court derives jurisdiction to strike out or add parties. Rule 10(2) of Order I of C.P.C. envisages that the Court may direct addition of the party whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

10. It may be further mentioned that it is the defendant no.1, who is challenging the refusal by the Trial Court to delete the defendant no.2. The defendant no.2 has neither sought her deletion, nor is challenging the order refusing to delete her.

11. Article 1114 of the Family Law Volume I reads thus :

"The exclusive properties of the husband are liable for the payment of the debts incurred by the husband without consent of the wife during the subsistence of the marriage."

Paragraph 1. *In the absence of exclusive properties of the husband, the said debts shall be paid through his moiety in the common properties. However, in this case the said payment may be obtained only after dissolution of the marriage or separation of the properties between the spouses. Nevertheless the creditor may, for the sake of his guarantee, proceed with the suit and execution up to the stage of the attachment of the right and interest of the husband in the common properties of the couple.*

Paragraph 2. *But in case the debts have been used for the common benefit of the spouses or incurred in the absence of or impediment of the wife in case the purpose for which they were incurred did not permit him to wait until her return or cessation of the impediment the common properties shall be liable for the payment."*

12. It can thus be seen that paragraph 2 appended to Article 1114 prescribes that where the debts have been used for the common benefit of the spouses, the common property would become liable. The following observations of the Division Bench in the case of **Antoneta Fernandes** (supra) may be reproduced with profit.

"This is regarding the civil liability incurred by any of the partners of a marital society under their personal law. So far the commercial law is concerned, Article

10 of the Commercial Code lays down that the payment of commercial debts (emphasis supplied) of the husband which have to be made from his moiety of the common properties may be demanded before the marriage is dissolved or before there is a separation, the wife however, having to be given notice to seek in this separation within ten days immediately after the date. In its turn Article 15 lays down that the debts originating from the commercial acts (emphasis supplied) contracted solely by the businessman husband without the consent of the wife shall be presumed to be for the common gain of the couple."

13. Thus, having regard to the fact that according to the respondent, the amount was advanced for the business purpose of the petitioner, at this stage, no exception can be taken to the order passed by the learned Trial Court. It is needless to mention that the petitioner and the defendant no.2 shall be entitled to raise all such contentions as may be available in law and the Trial Court shall decide the same in accordance with law. At this stage, the only question is whether the name of the defendant no.2 needs to be deleted. The petitioner has not demonstrated any prejudice by

virtue of refusal to delete the name of defendant no.2. Thus, in the absence of any manifest injustice or prejudice, no case for interference in the order passed by the Trial Court is made out.

14. In the result, the Writ Petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

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