

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 646 OF 2016**

Mrs. Oujilvie Fernandes, 31 years of age, d/o Francisco Manuel Piedade Fernandes, resident of H. No. 360, Costavaddo, Majorda, Salcete-Goa.

.... Petitioner

Versus

1. Mr. Joaquim Maria Salvador Coutinho de Figueiredo, son of Jose Sebastiao dos Remedios Figueiredo, major of age, married,
2. Mrs. Maria Filomena Wanda Coelho da Cruz e Figueiredo, d/o late Antonio Daniel Alfredo Joaquim da Cruz,

Both Portuguese Nationals of Indian Origin, represented by their duly constituted power of attorney, Mr. Oswaldo Jose Coelho Velho, major age, having office at Coelho Velho, 1st Floor, Velho Building, Panaji, Ilhas, Goa.

3. Ms. Maria Leopoldina Margarida Do Rosario Figueiredo alias Maria Leopoldina Figueiredo, d/o Jose Sebastiao dos Remedios Figueiredo, major of age, Indian National, r/o H. No. 63, Abade Faria Road, Margao, Salcete-Goa.

4. Mrs. Antoneita Piedade da Conceicao Figueiredo Andrade e Souza alias Antonieta Figueiredo Souza, g/o Jose Sebastiao dos Remedios Figueiredo, major of age, Indian National, r/o H. No. 63, Abade Faria Road, Margao, Salcete-Goa.
5. Mr. Antonio Bernardo Constancio Domingos Espirito Santo Francisco Gabriel de Figueiredo, major of age, Indian National, r/o H. No. 63, Abade Faria Road, Margao, Salcete-Goa.
6. Ms. Graca Maria de Faria Figueiredo, daughter of Antonio Bernardo Constancio Domingos Espirito Santo Francisco Gabriel de Figueiredo, major of age, Both Portuguese Nationals of Indian Origin, Resident of Portugal but with address for service at H. No. 63, Abade Faria Road, Margao, Salcete-Goa.
7. Mr. Anacleto Xavier dos Remedios Figueiredo, son of Jose Sebastiao dos Remedios Figueiredo, major of age, and his wife,
8. Mrs. Maria de Fatima Rosario Brito Miranda Figueiredo, d/o Constancio do Rosario Miranda, major of age,

Both Portuguese Nationals of
Indian Origin, Both
residents of United Kingdom
of Great Britain, with
address for service at H.
No. 63, Abade Faria Road,
Margao, Salcete-Goa.

9. Mrs. Maria de Fatima Flores
da Silva Figueiredo alias
Fatima Silva e Figueiredo,
w/o late Fortunato Joaquim
Da Paixao Figueiredo,
10. Mr. Jose Gabriel do
Figueiredo Coutinho, s/o
late Fortunato Joaquim Da
Paixao Figueiredo, major of
age,
11. Mrs. Ana Carolina Piedade de
Figueiredo, d/o late
Fortunato Joaquim Da Paixao
Figueiredo, major of age,
and her husband,
12. Mr. Raul Eduardo Santana da
Silva Jaques, s/o Olegario
Jose Jacques, major of age,
13. Ms. Eugenia Maria Aurora da
Silva Figueiredo, d/o late
Fortunato Joaquim Da Paixao
Figueiredo, major of age,
14. Ms. Maria do Rosario da
Silva Figueiredo, d/o late
Fortunato Joaquim Da Paixao
Figueiredo, major of age,

15. Mr. Paulo Bernardo Figueiredo Coutinho, s/o late Fortunato Joaquim Da Paixao Figueiredo, major of age,

All Portuguese Nationals of Indian Origin, r/o Macau and Portugal with address for service at H. No. 63, Abade Faria Road, Margao, Salcete-Goa.

16. M/s Pravin Developers, A Partnership Firm, Having its office at Nuvem, Salcete-Goa.

Represented by its partners:

- 16(a) Mr. Vincent Rodrigues, s/o Late Mariano Remedios Rodrigues, major of age, r/o Dongorim, Nuvem, Salcete-Goa.

- 16(b) Mr. Francisco Pereira, s/o late Minguel Pereira, major of age, r/o Quirbhat, Nuvem, Salcete-Goa.

.... Respondents

Mr. Ashwin D. Bhobe, Advocate for the Petitioner.

Mr. Carlos A. Ferreira, Advocate for Respondent Nos. 1 and 2.

CORAM:- C.V. BHADANG, J.

DATE:- 20th SEPTEMBER, 2016.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. The learned Counsel for respondent nos. 1 and 2 (who are the original plaintiffs and the only contesting respondents), waives service. Heard finally by consent of the parties. The service of notice on the other respondents is dispensed with.

2. The challenge in this petition on behalf of original defendant no. 14 is to the order dated 18.01.2016 passed by the learned Trial Court in Regular Civil Suit No. 150/2013/II, by which the application for amendment of the written statement, by which the petitioner seeks to raise a counter claim, has been rejected.

3. The brief facts are that the respondent nos. 1 and 2 have filed the aforesaid suit for declaration that the respondent nos. 1 and 2 and the original defendant nos. 1 to 13 are the co-owners in title and in possession of the suit property and for declaration that sale deed dated

23.07.2009 executed by the original defendant nos. 1 to 13 in favour of the petitioner is null and void. The respondent nos. 1 and 2 are also seeking mandatory injunction directing the petitioner to demolish the entire construction carried out in the suit property as also permanent injunction restraining the defendants or anybody on their behalf from alienating the suit property or creating any third party interest.

4. The petitioner filed a written statement in the suit on 07.11.2013 *inter-alia* contending that respondent nos. 1 and 2 were aware of the partition deed and the amount of consideration was also shared by the plaintiffs and the plaintiffs had invested the said consideration in REC bonds. The petitioner filed an application for amendment of the written statement, by which the petitioner wants to raise a counter claim seeking a declaration that the plaintiffs have received their share of the consideration through their constituted attorney-defendant no. 1.

5. The application was opposed by the respondent nos. 1 and 2.

6. It may be mentioned that in the application for amendment and the counter claim, the petitioner has claimed that the cause of action for filing the counter claim has arisen in July, 2015, when the petitioner was advised by his lawyer to rectify the deed of sale. The learned Trial Court has found that this cause of action has arisen after filing of the written statement and as such, the amendment cannot be allowed in view of Order VIII, Rule 6-A of CPC. The learned Trial Court has also noticed that the counter claim is barred by limitation and in view of the statutory bar, the amendment cannot be allowed.

7. I have heard Mr. Bhobe, the learned Counsel for the petitioner and Mr. Ferreira, the learned Counsel for respondent nos. 1 and 2.

8. It is submitted by Mr. Bhole, the learned Counsel for the petitioner, that under Order VIII, Rule 6-A of CPC, there is no bar from raising the counter claim after filing the written statement or after the time for delivery of the defence expires. It is submitted that the only requirement of Order VIII, Rule 6-A of CPC is that the cause of action for such counter claim, has to arise either before or after the filing of the suit, till the filing of the written statement or till the time for delivery of defence expires.

Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Mahendra Kumar and Another Vs. State of Madhya Pradesh and Others, (1987) 3 SCC 265**. It is thus, submitted that the Trial Court was in error in finding that the counter claim was barred in view of the provisions of Order VIII, Rule 6-A of CPC. The learned Counsel in all fairness did not dispute that the furnishing of the legal advice cannot form the basis of a cause of action. It is submitted that the sale deed of the petitioner is

brought under cloud, on the date on which the suit is filed and in that view of the matter, the cause of action having accrued prior to delivery of defence, the counter claim cannot be said to be barred. It is submitted that no prejudice would be caused to the respondent nos. 1 and 2, if the counter claim is allowed to be raised, as they would get opportunity to contest the same. He therefore submits that the impugned order be set aside.

9. On the contrary, it is submitted by Mr. Ferreira, the learned Counsel for respondent nos. 1 and 2 that the ground about the cause of action having accrued on the date of filing of the suit was neither raised before the Trial Court nor it is raised in this petition. It is submitted that the Trial Court has rightly gone by the cause of action as mentioned in the application for amendment, which is after filing of the written statement. He therefore submits that the cause of action having accrued after filing of the written

statement, the learned Trial Court was justified in dismissing the application for amendment.

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

11. In the case of **Mahendra Kumar** (supra) in para 15 of the judgment, the Hon'ble Apex Court has clearly held that Order VIII, Rule 6-A of CPC does not on the face of it, bar the filing of the counter claim by the defendant after he had filed the written statement. What Rule 6A(1) lays down is that a counter claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired. Thus, in a given case, the counter claim can be raised even after filing of the written statement, provided cause of action to file such counter claim accrues prior to filing of the written statement. In the present case, it appears that in the application for amendment, the

petitioner has mentioned that the cause of action arose in July, 2015, which is after filing of the written statement. The learned Trial Court has considered the fact that cause of action has accrued after the filing of the written statement and has dismissed the application. Although it is now claimed that such cause of action was inadvertently mentioned and cause of action had accrued on filing of the suit. Such a ground was neither raised before the Trial Court nor before this Court in the petition. In my considered view, it is not possible to accept the same. In that view of the matter, no case for interference is made out. The petition is dismissed, with no order as to costs.

C.V. BHADANG, J.

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