

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1030 OF 2015

1. Shri Piedade Fernandes,
Aged 50 years, seaman,

2. Caetani Fernandes,

Both r/o. Ward Collos, H. No. 722,
Chandor, Salcete, Goa.

..... Petitioners

V e r s u s

1. Roque Afonso,
and his wife

2. Charlene Fernandes,
Both H. No. 352/A, Mando,
Benaullim, Salcete, Goa.

..... Respondents

3. Antonio Leitao
and his wife

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}

4. Branca Leitao
r/o. H. No. not known
Mondo Benaullim

}
}
}

... Respondent nos. 3 to 6
deleted by Order dated
05.12.2016.

5. Filomena Leitao,
and her husband

}
}

6. Anthony Fernandes,
Both r/o. H. No. not known
near Maitolem
Curtorim, Salcete, Goa,
(Above all are major in age)

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}
}
}
}

Mr. C. A. Countinho, Advocate for the Petitioners.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. T. Ghanekar, Advocate for the
Respondent nos. 1 and 2.

Coram :-

F. M. REIS, J

Date :

5th December, 2016

ORAL JUDGMENT

At the outset, Shri C. A. Coutinho, learned Counsel appearing for the Petitioners, seeks leave to delete the Respondent nos. 3 to 6.

2. Leave granted. Respondent no. 3 to 6 are permitted to be deleted at the risk of the Petitioners.

3. Heard Mr. C. A. Coutinho, learned Counsel appearing for the Petitioners and Mr. Sudin Usgaonkar, learned Senior Advocate appearing for the Respondent nos. 1 and 2.

4. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondent nos. 1 and 2, waives service.

5. The Petition takes exception to an Order dated 11.03.2015, whereby an application filed by the Respondents under Section 10 of the Civil Procedure Code filed by the Petitioners came to be allowed.

6. Shri C. A. Coutinho, learned Counsel appearing for the Petitioners, submits that the suit filed by the Petitioners against the Respondents is only for injunction wherein no Counter Claim is filed by the Respondents. It is further pointed out that the Petitioners have filed a more comprehensive suit for declaration as well as for cancellation of a Deed of Succession and other documents executed on the assumption that the Respondent no. 2 was the

daughter of the deceased Maria Candida Leitaó and Camilo Hilario Leitaó. Learned Counsel further pointed out that the Respondent no. 2 is not the daughter of the said deceased Maria Candida Leitaó as, according to him, they left no legal descendants. Learned Counsel further pointed out that by fraud, a birth certificate has been created and fraudulently showed that the Respondent no. 2 is the daughter of the said deceased. Learned Counsel further pointed out that in the suit filed by the Respondents, a defence to that effect was taken by the Petitioners. It was further pointed out that thereafter an application for amendment was filed before the Lower Appellate Court which came to be allowed and all the said allegations with regard to the falsity of the claim of the Respondents was introduced in the written statements filed by the Petitioners. Learned Counsel further pointed out that the claim of the Petitioners in the written statement was on the basis of a Will executed by the wife of the said Camilo Leitaó of the shop, however, in the present case, the Petitioners were claiming the right of inheritance being the brother of the deceased sister who had died without leaving any issues and, as such, her rights also devolved on the Petitioners. Learned Counsel further pointed out that the Respondents without filing a written statement, have filed the application under Section 10 of the Civil Procedure Code contending that the issues involved in the present suit are identical to the issues involved in the earlier Suit. Learned Counsel further pointed out that though a Judgment of this Court was cited to contend that the suit cannot be stayed without filing the written statement, the learned Judge proceeded to pass the impugned Order without following the ratio laid down therein. Learned Counsel further pointed out that the learned Judge has acceded its jurisdiction which calls for interference of this Court.

7. On the other hand, Shri Sudin Usgaonkar, learned Senior Advocate appearing for the Respondent nos. 1 and 2, has vehemently argued to contend that there is no bar for the defendant for filing an application under Section 10 of the Civil Procedure Code without filing the written statement. Learned Senior Advocate further pointed out that the defence introduced by the Petitioners are the pleadings in the plaint in the subsequent suit and, as such, according to him, there are identical issues which arise in both the suits and as such there is no jurisdictional error committed by the learned Judge to stay the suit. Learned Senior Advocate further pointed out that though the Petitioners have also claimed for declaration and cancellation, these reliefs would rest on the findings with regard to the claim of the Petitioners that the Respondent no. 2 is not the daughter of the said Camilo Leitao. Learned Senior Advocate as such pointed out that the Petition be rejected.

Learned Senior Advocate in support of his submissions, has relied upon the Judgment passed in **Second Appeal no. 43 of 1997** dated 16.10.2003 in the case of **Gregorio Pereira & ors. vs. Damazio Bento Pereira & Ors., AIR 1987 Gujarat 213** in the case of **M/s. Raunaq International Ltd., vs. Ota Kandla Pvt. Ltd., Kandla & anr., AIR 1957 Calcutta 727** in the case of **Shorab Merwanji Modi & anr. vs. Mansata Film Distributors & anr., AIR 1978 Delhi 221** in the case of **C. L. Tandon, G. S. vs. Prem Pal Singh Rawat & Ors., AIR 1975 Punjab & Haryana 171** in the case of **M/s. Rup Chand Dharam Chand, Kanpur vs. M/s. Basant Lal Banarsi Lal, Dhuri, AIR 1964 Calcutta 373** in the case of **S. K. Rungta & Co. vs. Nawal Kishore Debi Prosad & Ors.** and **AIR 1994 Patna 76 in the case of Shri Ram Tiwary & anr. vs. Bholi Devi & anr.**

8. Shri C. A. Coutinho, learned Counsel appearing for the Petitioners in

answer to the said citations relied upon by the learned Senior Advocate appearing for the Respondents, has submitted that all the Judgments do not take a view that an application under Section 10 of the Civil Procedure Code can be filed without filing the written statements but, however, it is clearly recorded therein that normally such applications are to be examined after the issues are framed. Learned Counsel as such pointed out that there is no substance in the contentions sought to be raised by the learned Senior Advocate appearing for the Respondent nos. 1 and 2.

9. I have carefully considered the submissions of the learned Counsel and I have also gone through the records. The learned Single Judge of this Court in an Oral Judgment dated 21.08.2013 in the case of Mr. Shaikh Hamid Ali Nasir Ali vs. The Municipal Corporation of Greater Mumbai & anr., whilst disposing of Writ Petition no. 2639/2013 at the Principal Seat at Mumbai, after noting the provisions of Section 10 of the Civil Procedure Code, has observed at Para 4 thus :

"4. Perusal of the aforesaid provision shows that the question as to whether the matter in issue is also directly and substantially in issue in a previously instituted suit can be determined only after the issues are framed in both the suits. Unless such issues are framed, the application under Section 10 of the CPC for stay of the suit cannot be entertained. The issues in L. C. Suit no. 104 of 2008 have not yet been framed, and hence, the Court ought not to have entertained the Notice of Motion no. 1685 of 2009. The impugned Order cannot therefore be sustained. The same needs to be quashed and set aside on that count alone."

10. On plain reading of the said observations, it clearly provides that the learned Single Judge of this Court has taken a view that the question as to whether the issues are identical or not has to be considered by the Court only after the issues are framed and in such circumstances, it was not open to the learned Trial Judge to take a contrary view by relying upon the Judgments of different other High Courts on the ground that Judgments of other High Courts were not considered by the learned Single Judge whilst passing such Judgments. As rightly pointed out by Shri C. A. Coutinho, learned Counsel appearing for the Petitioners, the Judgments relied upon by the learned Senior Advocate appearing for the Petitioners clearly provide that in normal circumstances, such applications are to be considered only after issues are framed. In the present case, as pointed out, the Suit filed is for injunction simpliciter whereas the defence of the Petitioners is based on the Will executed by the deceased wife of said Mr. Camilo Leitao. In such circumstances, whether the issues are identical and to what extent the issues would have an effect on the final outcome of the claims put forward by the parties, is a matter which the Court can appreciate only after the written statements are filed and the issues are framed in the suit.

11. Section 10 of the Civil Procedure Code provides thus :

"10. Procedure in case of non-attendance of one or more of several plaintiffs.- Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the

plaintiffs had appeared, or make such order as it thinks fit.”

12. The said provision clearly stipulates that the Court cannot continue the hearing of the suit. The hearing begins only after the trial has commenced. There is no bar in terms of Section 10 of the Civil Procedure Code to stay the suit without framing the issues. The question as to whether the second suit has to be stayed in terms of Section 10 of the Civil Procedure Code can be examined by the learned Judge only after the filing of the Written Statement. In the present case, the learned Judge was not justified to pass the impugned Order and proceed to stay the suit in terms of Section 10. In fact, the learned Judge ought to have kept the application in abeyance and considered the application only after the issues were framed based on the pleadings of the Petitioners herein. Apart from that, the Judgment of the learned Single Judge in the case of **Mr. Shaikh Hamid Ali Nasir Ali vs. The Municipal Corporation of Greater Mumbai & anr.**, (supra) was a binding judicial precedent on the learned Trial Judge. When there are binding decisions judicial comity expects all requirements that the same is to be followed. Judicial comity is an internal part of a judicial discipline and judicial discipline is a cornerstone of judicial integrity. In such circumstances, it was not open to the learned judge to take a contrary view when a judicial precedent was cited before the learned Trial Court on the basis that some Judgments of the other High Court which are not binding on the Trial Judge were not considered whilst passing such Judgment. For the aforesaid reasons, the Judgments relied upon by Shri Sudin Usgaonkar, learned Senior Advocate appearing for the Respondents are not applicable to the facts of the present case. The observations therein are peculiar

facts of each of the cases before the respective Courts. In the present case, considering the nature of the first Suit and the second subsequent Suit, the exercise of examining whether the second Suit is to be stayed in terms of Section 10 of the civil Procedure Code, is a matter which would have to be considered by the learned Judge only after framing of issues.

13. In view of the above, I pass the following :

ORDER

(i) The impugned Order dated 11.03.2015 is hereby quashed and set aside.

(ii) The Application filed under Section 10 of the Civil Procedure Code is kept in abeyance and to be considered by the learned Judge after issues are framed.

(iii) Rule is made absolute in the above terms.

F .M. REIS, J.

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