IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 896 OF 2015

1. Mrs. Nashville Gonsalves
Daughter of Francisco Xavier Luizinho,
Major in age, service,

2. Miss Dyshat Noelia Fernandes
Represented by her ext friend and mother
the petitioner no. 1 abovenamed
Both residing at House no. 204,
Deao Copella Bhat, Ambaulim,
Quepem, Goa. …... Petitioners

Versus

1. Mrs. Laura Braganza e Fernandes,
Housewife, residing at
House no. 11/B, New corner,
Sarzora, Salcete, Goa.

2. Max Life Insurance Company Limited
(formerly Max New York Life Company Limited)
Max Life Insurance, 3rd floor, E-Wing,
Osia Commercial Arcade,
S.G.P.D.A. Complex, Margao, Goa. …... Respondents

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

Mr. Balkrishna Sardessai, Advocate for the Respondent no. 1.

Coram :- **C. V. BHADANG, J**

Date : **04.05. 2016**

ORAL JUDGMENT

Rule, made returnable forthwith. Learned Counsel for the Respondents waives service. Heard finally by consent of the parties.

2. By this Petition, the Petitioners are challenging the Order dated 28.07.2015 passed by the learned Senior Civil Judge, at Margao, in Regular Civil Suit no. 70/2014/F by which, the application exhibit 24 filed by the Petitioners for rejection of the plaint has been dismissed with costs of Rs.500/-.

3. Danzil Fernandes, died on 07.06.2013 leaving behind the Petitioners/Plaintiffs who are respectively the widow and the daughter of the deceased and the first Respondent/original Defendant no. 1, who is the mother of the deceased as heirs. The deceased had taken out an insurance policy from the second Respondent in which the first Respondent was a nominee. The first Respondent is said to have received an amount of Rs.3,12,642/- and Rs.76,201/- from the second Respondent. The Petitioners filed the aforesaid suit seeking recovery of the said amount along with interest. In that suit, the first Respondent filed a counter claim stating that the deceased was suffering from cancer and was looked after by the first Respondent. It was contended that the first Respondent had incurred amount in excess of Rs.15,00,000/- on the treatment, of the deceased, part of which amount was withdrawn by the first Respondent from her Bank account and the rest was raised from her relatives including her son in law. It was contended that the Petitioners who are stalling a claim to the insurance proceeds are also liable to share amount extended on the treatment of the deceased. In such circumstances, by way of counter claim, the first Respondent had sought a Decree against the Petitioners in the sum of Rs,15,62,000/-.

4. The Petitioners filed an application (exhibit 24) before the Trial Court for rejection of the counter claim on the ground that the same does not disclose cause of action. Although the application does not mention any provision under which it was filed, learned Counsel for the Petitioner submits that it was under Order 7 Rule 11 of the Civil Procedure Code.

5. The learned Trial Court by the impugned Order has found that a question of law and fact arises for trial in the counter claim and, as such, refused to reject the counter claim which, is subject matter of challenge in this Petition.

6. Learned Counsel for the Petitioners points out that the counter claim does not disclose any cause of action. as the first Respondent has not shown as to how the Petitioners would be liable to share the expenditure allegedly incurred by the first Respondent on the treatment of the deceased. He submits that the learned Trial Court has failed to give any reason as to how the counter claim discloses any cause of action and in that view of the matter, the impugned Order is liable to be set aside.

7. Learned Counsel for the first Respondent supports the impugned Order. It is submitted that if the Petitioners as legal heirs claim to inherit the amount of insurance proceeds, they would be correspondingly liable to share the expenditure on the treatment. Learned Counsel also points out from the Counter claim that according to the first Respondent, the amount of Rs,.2,50,000/- out of the insurance proceeds, is kept in deposit for the benefit of the Petitioner no. 2. He,

therefore, submits that the counter claim apart from disclosing the cause of action has also to be tried along with the suit.

8. I have considered the rival circumstances and the submissions made. Under Order 7 Rule 11 of Civil Procedure Code, it has to be shown that the plaint as it stands (in this case the counter claim), either does not disclose any cause of action or is barred by any law. In the present case, the Petitioners are claiming the insurance proceeds in the capacity of legal heirs of the deceased and thus, prima facie, at this stage, it cannot be accepted that they won't be liable to share the expenditure incurred on treatment. As noticed earlier, the first Respondent has also set up a claim that a part of the amount of the insurance proceeds has been kept in the deposit in the name of the Petitioner no. 2. It is not necessary to go into the aspect whether the parties would be able to substantiate their respective contentions which will have to be gone through at the trial. The limited question is whether the counter claim can be rejected at the threshold.

9. I find that having regard to the nature of the pleadings in the counter claim, prima facie, at this stage, it cannot be said that it does not disclose cause of action. In my considered view, the Petitioners have not demonstrated that the impugned Order results into any manifest injustice, as the Petitioners would get an opportunity to contest the counter claim. Thus, no case for interference is made out. However, at the same time, the learned Trial Court has not given any reason for imposing cost of Rs.500/- which will have to be set aside.

10. In such circumstances, the following Order is passed :

ORDER

(i) The Petition is partly allowed.

(ii) The part of the impugned order imposing costs of Rs.500/- is hereby set aside.

(iii) The Order dismissing application (Exhibit 24) is hereby confirmed.

(iv) Rule is made absolute in aforesaid terms with no Order as to costs.

C. V. BHADANG, J.

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