

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 934/2015, 935/2015 and 32/2016****WRIT PETITION NO. 934 OF 2015**

1. Mrs. Sunita Devendra Deshprabhu,
major, landlady, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa.
 2. Mrs. Rupa Jitendra Deshprabhu,
major, landlady, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa.
- ... Petitioners

Versus

1. Mrs. Sitadevi Deshprabhu also
known as Jaia Valaucar
Raghunathrau Vassudev Prabhu
Dessai Deshprabhu Rau Raje, 89
years old, landlady, presently
residing at 60 Keluskar Road,
Shivaji Park, Opposite Shivaji
Park Gymkhana, Dadar, Maumbai-
400 028 (Expired).
2. Mrs. Anjalika Raghunathrau Prabhu
Dessai Deshprabhu Rau Raje also
known as Mrs. Shilpa Satish
Ugrankar, 62 years old, landlady,
married to,
3. Mr. Satish Shripad Urgankar, 69
years old, Orthopedic Surgeon,
Both residents of House No. 2A,
Ram Mahal, J.N. Tata Road,
Mumbai-20, through his Attorney,
Mrs. Shilpa Satish Urgankar.

4. Mrs. Achaladevi Raghunathrau Prabhu Dessai Deshprabhu Rau Raje also known as Mrs. Devika Dilip Kulkarni, 59 years old, landlady, married to,
5. Mr. Dilip Mahabal Kulkarni, 65 years old, businessman, Both residents of House No. 23B, New Neelsagar Co-operative Housing Society, 2A/B-Perry Cross Road, Bandra (W), Mumbai - 400 050, through his Attorney, Mrs. Devika Dilip Kulkarni.
6. Mr. Devendra Raghuraj Deshprabhu, son of late Raghunathrau Prabhu Dessai Deshprabhu Rau Raje, aged 63 years, Indian National, resident of Viscount Palace House, Nanerwada, Pernem-Goa.
7. Mr. Jitendra Raghuraj Deshprabhu, son of late Raghunathrau Prabhu Dessai Deshprabhu Rau Raje, aged 59 years, Indian National, resident of Viscount Palace House, Nanerwada, Pernem-Goa. Respondents

Shri Parag Rao, Advocate for the Petitioners.

Shri Fredun E De Vitre, Senior Advocate with Shri Ashwin N. Ramani, Advocate for Respondent Nos. 2 to 5.

WRIT PETITION NO. 935/2015

Mr. Devendra Raghuraj Deshprabhu, son of late Raghunathrau Prabhu Dessai Deshprabhu Rau Raje, aged 63

years, Indian National, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa.

... Petitioner

Versus

1. Mrs. Sitadevi Deshprabhu also known as Jaia Valaucar Raghunathrau Vassudev Prabhu Dessai Deshprabhu Rau Raje, 89 years old, landlady, presently residing at 60 Keluskar Road, Shivaji Park, Opposite Shivaji Park Gymkhana, Dadar, Maumbai-400 028 (Expired).
2. Mrs. Anjalika Raghunathrau Prabhu Dessai Deshprabhu Rau Raje also known as Mrs. Shilpa Satish Ugrankar, 62 years old, landlady, married to,
3. Mr. Satish Shripad Urgankar, 69 years old, Orthopedic Surgeon, Both residents of House No. 2A, Ram Mahal, J.N. Tata Road, Mumbai-20, through his Attorney, Mrs. Shilpa Satish Urgankar.
4. Mrs. Achaladevi Raghunathrau Prabhu Dessai Deshprabhu Rau Raje also known as Mrs. Devika Dilip Kulkarni, 59 years old, landlady, married to,
5. Mr. Dilip Mahabal Kulkarni, 65 years old, businessman, Both residents of House No. 23B, New Neelsagar Co-operative Housing Society, 2A/B-Perry Cross Road, Bandra (W), Mumbai - 400 050, through his Attorney, Mrs. Devika Dilip Kulkarni.

6. Mrs. Sunita Devendra Deshprabhu,
major, landlady, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa.
7. Mrs. Rupa Jitendra Deshprabhu,
major, landlady, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa.
8. Mr. Jitendra Raghuraj Deshprabhu,
son of late Raghunathrao Prabhu
Dessai Deshprabhu Rao Raje, aged
59 years, Indian National,
resident of Viscount Palace
House, Nanerwada, Pernem-Goa. Respondents

Shri Surendra G. Dessai, Senior Advocate with Ms.
Ketki Pednekar, Advocate for the Petitioner.

Shri Fredun E De Vitre, Senior Advocate with Shri
Ashwin N. Ramani, Advocate for Respondent Nos. 2
to 5.

WRIT PETITION NO. 32/2016

Mr. Jitendra Raghuraj Deshprabhu,
son of late Raghunathrao Prabhu
Dessai Deshprabhu Rao Raje, aged 59
years, Indian National, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa. Petitioner

Versus

1. Mrs. Sitadevi Deshprabhu also
known as Jaia Valaucar
Raghunathrao Vassudev Prabhu

Dessai Deshprabhu Rau Raje, 89 years old, landlady, presently residing at 60 Keluskar Road, Shivaji Park, Opposite Shivaji Park Gymkhana, Dadar, Maumbai-400 028 (Expired).

2. Mrs. Anjalika Raghunathrau Prabhu Dessai Deshprabhu Rau Raje also known as Mrs. Shilpa Satish Ugrankar, 62 years old, landlady, married to,
3. Mr. Satish Shripad Urgankar, 69 years old, Orthopedic Surgeon, Both residents of House No. 2A, Ram Mahal, J.N. Tata Road, Mumbai-20, through his Attorney, Mrs. Shilpa Satish Urgankar.
4. Mrs. Achaladevi Raghunathrau Prabhu Dessai Deshprabhu Rau Raje also known as Mrs. Devika Dilip Kulkarni, 59 years old, landlady, married to,
5. Mr. Dilip Mahabal Kulkarni, 65 years old, businessman, Both residents of House No. 23B, New Neelsagar Co-operative Housing Society, 2A/B-Perry Cross Road, Bandra (W), Mumbai - 400 050, through his Attorney, Mrs. Devika Dilip Kulkarni.
6. Mrs. Sunita Devendra Deshprabhu, major, landlady, resident of Viscount Palace House, Nanerwada, Pernem-Goa.
7. Mr. Devendra Raghuraj Deshprabhu, son of late Raghunathrau Prabhu Dessai Deshprabhu Rau Raje, aged

63 years, Indian National,
resident of Viscount Palace
House, Nanerwada, Pernem-Goa.

8. Mrs. Rupa Jitendra Deshprabhu,
major, landlady, resident of
Viscount Palace House, Nanerwada,
Pernem-Goa. ... Respondents

Shri Shrihari Aney, Senior Advocate with Mr.
Julius Nayak, Advocate for the Petitioner.

Shri Fredun E De Vitre, Senior Advocate with Shri
Ashwin N. Ramani, Advocate for Respondent Nos. 2
to 5.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 1st SEPTEMBER, 2016

PRONOUNCED ON:- 4th OCTOBER, 2016

JUDGMENT:

Rule in all the petitions. The learned
Counsel for the contesting respondent nos. 2 to 5
waives service. Heard finally by consent of the
parties.

2. All these petitions arise out of the
common order passed in Special Civil Suit No.
89/2006/B between the parties. As such, they are
being disposed of by this common judgment.

3. The brief facts necessary for the disposal of the petitions may be stated thus:

Raghunathrao alias Raghuraj Deshprabhu was married to plaintiff no. 1-Sitadevi Deshprabhu on 09.05.1951. Prior to that, the parties had entered into a prenuptial agreement dated 07.05.1951, by which they had agreed for regime of separation of assets. Raghunathrao Deshprabhu died on 10.11.1987. The plaintiff no. 1-Sitadevi Deshprabhu has expired after filing of the suit. Raghunathrao Deshprabhu and Sitadevi Deshprabhu have two sons, Devendra and Jitendra and two daughters, Anjalika and Achaladevi. Anjalika is married to Satish Urgankar, while Achaladevi is married to Dilip Kulkarni. Sunita is the wife of Devendra, while Rupa is the wife of Jitendra.

4. Special Civil Suit No. 89/2006/B is filed by Sitadevi Deshprabhu (now deceased) alongwith her two daughters Anjalika and Achaladevi and two sons-in-law, in which Devendra alongwith his wife Sunita and Jitendra and his wife Rupa are the

defendants. The suit is filed for permanent injunction restraining the defendants from interfering in any manner in the suit properties or from disposing or alienating the same. That suit is pending on the file of the learned Civil Judge Senior Division at Mapusa in which PW-1-Anjalika is stated to be under cross examination.

5. The case made out in the plaint is that defendant no. 1-Devendra Deshprabhu had filed Special Civil Suit No. 10/1975 against his father Raghunathrao Deshprabhu, Sitadevi Deshprabhu, Jitendra Deshprabhu, Anjalika alias Shilpa Ugrankar and Achaladevi alias Devika Kulkarni. That was a suit for declaration and dissolution of Hindu Undivided Family (HUF). It appears that the said suit was decreed in view of the consent terms on 26.02.1976, under which the assets were divided amongst the parties vide Schedule-A to Schedule-F.

6. As per the plaint allegations, the plaintiff no. 1 namely, Sitadevi Deshprabhu (now deceased) became the sole and the exclusive owner of 126 properties as shown in Schedule-B, while plaintiff no. 2 became the sole and exclusive owner of 128 properties enrolled in Schedule-E, while plaintiff no. 4 became the sole and exclusive owner of 118 properties enrolled in Schedule-F. Special Civil Suit No. 89/2006 is based on the consent decree passed in Special Civil Suit No. 10/1975.

7. The defendant nos. 2 and 4 have filed written statement contending that the plaintiffs have suppressed several material facts including the prenuptial agreement dated 07.05.1951, a will dated 28.05.1975 left by late Raghunathrao Deshprabhu and a deed of succession cum deed of renunciation dated 08.04.1993. It is the specific defence that there never existed any legally constituted Hindu Undivided Family (HUF) or Joint Family. It is contended that the consent decree

dated 26.02.1976 is a nullity and was never acted upon by any of the parties. It is contended that the consent decree having not been registered under the Indian Registration Act, it cannot be relied upon. It is contended that there were no pre-existing rights in view of the prenuptial agreement dated 07.05.1951 and as such, the consent decree would not create any right, title or interest to the properties, as referred to therein.

8. Similar defence is raised by the other defendants.

9. When PW-1, Anjalika was under cross examination, three separate applications came to be filed on behalf of the defendants being applications Exhibit-247 (a), (b) and (c) for amendment of the written statement. The amendment sought is identical. The defendants intend to introduce the following pleas:

"This suit is thus baseless and ought to be dismissed, since, as outlined above, the present plaintiff no. 1 and Raghunathrao Deshprabhu suppressed material documents from the Court in the said Special Civil Suit No. 10 of 1975. Among such documents, in the prenuptial agreement dated 7th May, 1951, they chose separation of property, including of acquired property, and repeated the incommunicability clause from the gift deeds of 1927 and 1929. They, thus fraudulently got the said Court to pass a consent decree which it would not and could not have otherwise passed in law. The said consent decree is thus vitiated by fraud and is a nullity."

10. The defendants opposed the said applications *inter-alia* on the ground that the proposed amendment is hit by proviso to Order VI, Rule 17 of the Civil Procedure Code (CPC). It is contended that the defendants had applied for framing of additional issues, which was rejected

on 05.10.2013 and this is an attempt to introduce the same pleadings. The applications for amendment are not maintainable in view of Order XXIII, Rule 3A of CPC and the amendment is not bonafide.

11. The learned Trial Court by impugned order dated 30.10.2015 has dismissed the said applications, which is subject matter of challenge, in these petitions.

12. I have heard Shri Parag Rao, the learned Counsel for the petitioners in Writ Petition No. 934/2015, Shri Dessai, the learned Senior Counsel for the petitioner in Writ Petition No. 935/2015 and Shri Aney, the learned Senior Counsel for the petitioner in Writ Petition No. 32/2016. I have also heard Shri De Vitre, the learned Senior Counsel appearing for the respondent nos. 2 to 5. With the assistance of the learned Counsel for the parties, I have gone through the plaint, written statements and application for amendment as also the impugned order passed.

13. It is submitted by Shri Dessai, the learned Senior Counsel for the petitioner that the gift deeds dated 17.01.1927 and 20.06.1929 are from the grandfather of Raghunathrao, containing a non communicability clause. It is submitted that the prenuptial agreement dated 07.05.1951 between Raghunathrao and Sitadevi would show that the parties had agreed for regime of separation of assets. The learned Senior Counsel pointed out that after the Income Tax Act and the Wealth Tax Act, became applicable to Goa, in order to save the properties, Special Civil Suit No. 10/1975 was filed by Devendra Deshprabhu, in which the consent decree was obtained. It is submitted that the concept of HUF, is in conflict with the prenuptial agreement and the Portuguese law. He therefore submits that the decree obtained in Special Civil Suit No. 10/1975 is tainted with fraud.

The learned Senior Counsel pointed out that in view of Order VIII Rule 2 of CPC, fraud has to be specifically pleaded. It is submitted that all the necessary ingredients which can form

the basis of the plea of fraud, are already there in the written statement. The learned Senior Counsel has pointed out that on 24.07.2015, the defendants had obtained legal advice, in which it transpired that a plea about the consent decree being tainted with fraud has to be specifically raised in the written statement and in that view of the matter, the applications for amendment came to be filed on 20.08.2015. He submits that the defendants have acted with due diligence and merely because the applications have been filed after commencement of the trial, the same cannot be rejected. It is submitted that due diligence as set out in the applications and the submission although noted in para 9 of the impugned order, has not been considered.

14. The learned Senior Counsel has submitted that Order VI, Rule 17 of CPC has two parts. The second part consisting of the proviso cannot govern or control the main provision, which permits the Court to allow all such amendments

which are necessary for deciding the real controversy between the parties. The learned Senior Counsel has pointed out that the written statement was filed by the defendants hurriedly, therefore a specific plea based on fraud remained to be incorporated and there is no prejudice, caused to the plaintiffs, if the amendment is allowed.

The learned Senior Counsel then placed reliance on Section 44 of the Evidence Act. In the submission of the learned Senior Counsel a conjoint reading of Section 4 of CPC and Section 44 of the Evidence Act would show that Section 44 of the Evidence Act would override the provisions of Order VI, Rule 17 of CPC. He submits that under Section 44 of the Evidence Act, a party has a statutory right to raise a plea of fraud, which cannot be whittled down by the proviso to Order VI, Rule 17 of CPC.

15. It is next submitted that the Trial Court has ample jurisdiction under Section 151 read with

Section 153 of CPC to allow amendment, if it is found necessary. Lastly, it is submitted that fraud vitiates everything and thus, the petitioners ought to be granted a fair opportunity to establish that the consent decree, which is the very basis of the suit filed by the respondents, is vitiated by fraud. On behalf of the petitioners, reliance is placed on the decision in the case of **Kashiram Wadgu Mundale Vs. Mansaram Tulshiram Mundale, 2016(4) ALL MR 927** and **Hamza Haji Vs. State of Kerala, (2006) 7 SCC 416.**

16. Shri Aney, the learned Senior Counsel for the petitioner has submitted that the consent decree is a fictitious decree and material to show and establish fraud is already there on record. He submits that all the necessary pleadings, which would support the proposed amendment based on fraud are already pleaded in the written statement and all that the petitioners are trying to introduce is to incorporate a specific plea based on fraud, as fraud has to be specifically pleaded,

in view of Order VIII, Rule II of CPC. It is submitted that the proposed amendment is in the nature of a jurisdictional plea, which strikes at the very root of the matter.

17. The learned Counsel has also referred to Section 44 of the Evidence Act. Strong reliance is placed on the decision in the case of **Hamza Haji** (supra) in order to submit that the provisions of Section 44 of the Evidence Act give "jurisdiction and authority", to the Court to consider and decide the question, where prior adjudication is vitiated by fraud.

It is next submitted that in an appropriate case, this Court may permit any such amendment, being a Court of record under Article-215 of Constitution of India, which may not be fettered by considerations as contained in the proviso to Order VI, Rule 17 of CPC.

18. Shri Rao, the learned Counsel appearing for the petitioners in addition to adopting the

arguments aforesaid, has submitted that necessary particulars of fraud are already there in the record as well as the written statement and all that is sought is a specific plea of the consent decree, being vitiated by fraud, which could not have been disallowed.

19. On the contrary, it is submitted by Shri De Vitre, the learned Senior Counsel for the respondent nos. 2 to 5 that the Trial Court has rightly dismissed the application on the ground that the trial had commenced and that the petitioners have not shown due diligence. The learned Senior Counsel pointed out that by virtue of the amendment in the year 1999, the power of the Court to allow all kinds of amendment was taken away. However, in the year 2002 power to allow, amendment has been reintroduced, with certain safe guards to ensure that the trial proceeds expeditiously. He has pointed out that the proviso is one such balancing act, which ensures that no amendment shall be allowed after

the commencement of trial, unless the party demonstrates that inspite of due diligence the amendment could not have been brought earlier. In the submission of the learned Senior Counsel, due diligence is a jurisdictional fact which alone can clothe the Trial Court, power to allow the amendment. The learned Senior Counsel has pointed out that in the present case, obtaining of legal opinion cannot stand the test of the petitioners showing due diligence. The learned Senior Counsel submits that the petitioners were claiming that the Special Civil Suit No. 10/1975 was filed as per the instructions and out of reverence towards Raghunathrao Deshprabhu and now, the petitioners want to label both their parents as fraudsters, which cannot be permitted. The learned Senior Counsel has submitted that plea/defence of fraud, if at all available, to the petitioner was since prior to filing of the written statement. The legal opinion cannot form the basis of the amendment or to demonstrate due diligence. It is submitted that the jurisdiction available to the

Court under Article-227 of the Constitution of India is aimed at ensuring that the Courts and Tribunals below operate within the bounds of their authority. It is submitted that unless and until the impugned order exhibits any manifest error or perversity resulting in manifest injustice, no interference is called for.

On behalf of the respondents, reliance is placed on the following decisions:

(a) *Vidyabai and Others Vs. Padmalatha and Others*, (2009) 2 SCC 409;

(b) *AjendraPrasadji N. Pandey and Another Vs. Swami Keshavprakeshdasji N. and Others*, (2006) 12 SCC 1;

(c) *Shri Uttam Ratnakar Pandurang S. Hodarcar Vs. Shri Premanand Fotu Fadte*, 1996 (2) Goa L.T. 58;

(d) *India Pipe Fitting Co. Vs. Fakruddin M.A. Baker and Another*, AIR 1978 SC 45;

(e) *Radhey Shyam Vs. Chhabi Nath and Others*, AIR 2015 SC 329 and

(f) *V. Thiagarajan Vs. Mohammad Umar Sait and Another*, AIR 1978 MAD 223.

20. The learned Senior Counsel has submitted that the petitioners cannot get out of the rigour of proviso to Order VI, Rule 17 of CPC by placing reliance on Section 151 and Section 153 of CPC or Section 44 of the Evidence Act read with Section 4 of CPC. It is submitted that the requirement of Order VI, Rule 17 of CPC are mandatory and cannot be watered down by taking recourse to other provisions in the CPC or the Evidence Act. The learned Counsel submitted that Section 44 of the Evidence Act provides for "relevancy of facts" and it cannot be read to mean that it confers any statutory right on a party, to plead fraud. He therefore submits that the petitions be dismissed.

21. I have carefully considered the rival circumstances and the submissions made. The issue in the present petition is short and simple, though it belies the extent of narration of facts. The issue is whether the petitioners can be justifiably allowed to amend the written statement

by incorporation of plea about the consent decree in Special Civil Suit No. 10/1975 having been obtained or tainted with fraud. The Trial Court has dismissed the applications solely on the ground that it is hit by proviso to Order VI, Rule 17 of CPC.

22. This is sought to be countered on behalf of the petitioners in three ways, (i) by saying that there are other provisions, such as Section 44 of the Evidence Act and Section 151 read with Section 153 of CPC, which would permit such amendment being carried out, notwithstanding the provisions of Order VI, Rule 17 of CPC, (ii) the requirement of the proviso have been complied with, in as much as the amendment is sought immediately after the legal advice was obtained and (iii) in claiming that in appropriate case this Court can allow such amendment being a Court of record under Article-215 of the Constitution of India.

23. There cannot be any dispute with the proposition that fraud vitiates everything. The learned Counsel for the petitioners have relied upon several decisions in this regard. (See **A.V. Papayya Sastry and Others vs. Govt. Of A.P. and Others**, (2007) 4 SCC 221, **S.P. Chengalvaraya Naidu vs. Jagannath (dead) by LRs and Others**, AIR 1994 SC 853, **Gram Panchayat of Village Naulakha Vs. Ujagar Singh and Others**, AIR 2000 SC 3272, **Ganpat Vs. Smt. Ram Devi and Others**, AIR 1978 (P&H) 137, **Indian Bank Vs. M/s Satyam Fibres (India) Pvt.**, AIR 1996 SC 2592, **United India Insurance Co. Ltd. Vs. Rajendra Singh**, AIR 2000 SC 1165 and **Hamza Haji Vs. State of Kerala**, (2006) 7 SCC 416).

24. It may be mentioned that there is no necessity to go into the case, whether the consent decree is indeed vitiated on account of any fraud. In other words, it is neither necessary nor permissible to go into the merits of the proposed amendment. For the present purpose, the only question is whether the amendment based on plea of

fraud can be allowed to be introduced.

25. In the case of **Kashiram s/o Wadgu Mundale and Another Vs. Mansaram s/o Tulshiram Mundale and Others, 2016(4) ALL MR 927**, it has been held that the Limitation Act does not extinguish the defence, but only bars the remedy. It may be mentioned that the Trial Court has not dismissed the application on the ground that the plea of fraud, is barred by limitation. In such circumstances, this question does not arise in this petition.

26. Let us now turn to the merits of the challenge.

SECTION 44 OF THE EVIDENCE ACT READ WITH SECTION 4
OF CPC:

Section 4(1) of CPC provides that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law not in

force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

The contention is that by virtue of Section 4(1) of CPC, nothing in the Code shall limit or otherwise affect the operation of Section 44 of the Evidence Act, which is a special law. It is contended that under Section 44 of the Evidence Act, a party has a statutory right to raise a plea based on fraud. The submission, in my considered view cannot be accepted. There cannot be any dispute that by virtue of Section 4(1) of CPC, nothing contained in the Code can limit or otherwise affect any special or local law, however, the question is whether Section 44 of the Evidence Act indeed confers any such statutory right on a party to plead fraud.

In this regard strong reliance is placed on the decision in the case of **Hamza Haji** (supra). In that case, the appellant had obtained an order for exemption from vesting in the State, a private

forest land, on the basis of a stand that the land was owned and cultivated by him and was within the ceiling limit, although the land was already alienated. The Hon'ble Supreme Court found that the order having been obtained from the Forest Tribunal by deliberately suppressing the fact as to the entitlement of relief, and founding the claim on the basis of a non-existent fact, amounts to practicing fraud on the Court, which vitiates the decision/order. On behalf of the petitioners, reliance is placed on paragraphs 14 and 15 of the judgment, which read thus:

"14. In American Jurisprudence, 2nd Edition, Volume 46, paragraph 825, it is stated,

"Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was

introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe Vs. Kanade [ILR (1882) 6 BOMBAY 148], it was held that:

"It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud."

(Emphasis supplied)

27. It is submitted that the question of prior adjudication being vitiated by fraud is a

jurisdictional fact and a plea to that effect can be allowed to be raised. In my humble view, the judgment in the case of **Hamza Haji** (supra) cannot be read to mean that there is a statutory right conferred under Section 44 of the Evidence Act on a party to raise the plea based on fraud. Basically in that case, the Hon'ble Supreme Court had declined to interfere with the order of the High Court, which in exercise of its jurisdiction under Article-215 of the Constitution of India, had set aside the decision obtained by fraud.

28. That apart, the petitioner cannot conceivably place reliance on Section 44 of the Evidence Act for one more reason. Section 44 of the Evidence Act, which falls in Chapter-II, dealing with relevancy of facts, reads as under:

"44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it,

or was obtained by fraud or collusion."

It can thus be seen that any party to the suit or proceeding may show that any judgment or decree, which is relevant under Section 40, 41 and 42 of the Evidence Act and which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. Section 40 speaks about the previous judgments relevant to bar a second suit or trial, while Section 41 provides for relevancy of certain judgments in "probate etc. jurisdiction". Both these Sections 40 and 41 would not apply to the consent decree, in as much as the said consent decree is neither relied upon to show that the second suit or trial is barred, nor it is a judgment in a probate jurisdiction. Under Section 42, the judgments, orders or decrees other than those mentioned in Section 41 are relevant if, they relate to matters of a public interest. The illustration to Section 42 would make it explicit that the judgments referred therein are the ones

relating to matters of public nature, such as a public right of way. The consent decree does not fall under this category either. For application of Section 44, it has to be shown that the previous judgment/decreed is relevant either under Section 40, 41 or 42 of the Evidence Act. Thus, in my considered view Section 44 of the Evidence Act, which refers to relevancy of judgments, orders or decrees under Section 40, 41 and 42, cannot apply in this case. That apart, all that Section 44 provides, is relevancy of the fact of the earlier judgment being obtained by fraud or collusion. In my considered view, Section 44 cannot be called into aid to hold that it overrides the provisions of Order VI, Rule 17 of CPC. In fact, both these provisions operate in different fields. Section 44 of the Evidence Act is a piece of substantive law providing for relevancy of facts, while Order VI, Rule 17 of CPC is a part of procedural law, governing the grant of amendment of the pleadings. Thus, the contention based on Section 44 of the Evidence Act

has to be refuted.

The contention that the proviso to Order VI, Rule 17 of CPC is not preceded by a non obstante clause and therefore, would not restrict the operation of Section 44 of the Evidence Act, to my mind is misplaced because Order VI, Rule 17 of CPC and Section 44 of the Evidence Act operate in two different spheres. Even otherwise as seen earlier, Section 44 of the Evidence Act cannot be called into aid in this case.

In the case of **V. Thiagarajan Vs. Mohammad Umar Sait and Another**, AIR 1978 MAD 223, the learned Single Judge of the Madras High Court has held that Section 44 of the Evidence Act does not confer any right on the party as such.

SECTION 151/153 OF CPC:

29. Section 151 of the Code provides for saving of inherent powers of the Court. It is now well settled that Section 151 of CPC does not confer any new power on the Court, but declares existence of the powers, which are inherent.

Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court. It is now well settled by several decisions that inherent power cannot be exercised where there is specific provision or prohibition contained in the Code (see **Shipping Corporation of India Ltd. Vs. Machado Brothers and Others, 2004 11 SCC 168**). It is not necessary to multiply authorities on the point. Simply stated, recourse to Section 151 of CPC cannot be taken in the face of a specific provision or a prohibition contained in the Code. Thus, when under the provisions of Order VI, Rule 17 of CPC, there is a specific prohibition from allowing the amendment after commencement of trial if, due diligence is not shown, the same cannot be circumvented by taking recourse to Section 151 of CPC.

30. Section 153 of the Code provides for general powers to amend. It provides that the Court may, at any time, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. It is not possible to accept that Section 153 of CPC is an independent power conferred on the Court dehors of Order VI, Rule 17 of CPC, to permit amendments. Section 2(1) of the CPC defines 'Code' to include rules. It can thus be seen that various Sections in the CPC are to be read in conjunction with the corresponding rules. For instance, Section 96 has to be read alongwith Order XVI and Section 104 has to be read alongwith Order XVIII. Thus, in my considered view Section 153 of the Code cannot be read in isolation. Thus, the submission based on Section 151 and 153 of CPC, in my considered view cannot be accepted.

ARTICLE-215 OF THE CONSTITUTION OF INDIA

31. I now propose to briefly deal with the submission that being a Court of record under Article-215 of the Constitution of India, this Court may allow the amendment. Here again, reliance is placed on the decision in the case of **Hamza Haji** (supra), to which we will have to revert. In that case, the order of the Forest Tribunal, was confirmed by the High Court. When the Tribunal was moved in a statutory review petition, it was dismissed on the ground that the order sought to be reviewed had merged with the order of the High Court. The High Court dismissed the application for review on the ground of delay. This order of dismissal was again sought to be reviewed, which was allowed taking recourse to Article-215 of the Constitution of India and the matter reached the Hon'ble Supreme Court. The Hon'ble Supreme Court found that the Trial Court having chosen to exercise its power as a Court of record to nullify a decision procured by the appellant by playing fraud on the Court, there was

no reason to interfere with the same. It can thus be seen that in the case of **Hamza Haji** (supra), it was established on facts that the judgment of the Forest Tribunal was obtained by practicing fraud. In the present case in hand, as noticed earlier, the question is about permitting an amendment as to introduce a plea that the consent decree is tainted with fraud. That apart, the petitioners, some of whom, are parties to the consent decree (which is claimed to be obtained by practicing fraud), cannot invoke the jurisdiction of this Court under Article-215 of the Constitution of India to urge that the amendment be allowed. In my considered view, the case of **Hamza Haji** (supra) turned on its own facts obtained, and cannot come to the aid of the petitioners.

ORDER VI, RULE 17 OF CPC

32. This takes me to the contention that the petitioners have established due diligence and therefore, the proviso to Order VI, Rule 17 of CPC will not come in the way.

There is no dispute in this case that the trial has commenced. Thus, the proviso to Order VI, Rule 17 of CPC would apply. Thus, the petitioners will be required to show that inspite of due diligence, they could not have brought the amendment earlier. On behalf of the petitioners, it is contended that a legal opinion was obtained on 24.07.2015, by which the petitioners were advised that a plea about consent decree being nullity (as vitiated by fraud), has to be incorporated in the defence. The submission in my considered view cannot be accepted. It is significant to note that some of the defendants were party to the Special Civil Suit No. 10/1975. Infact, defendant no. 1-Devendra Deshprabhu was the plaintiff in the said suit. Thus, it cannot be accepted that the defendants were not aware of the alleged fraud played by Raghunathrao and Sitadevi Deshprabhu in obtaining the consent decree. The petitioners have claimed that Special Civil Suit No. 10/1975 was filed out of reverence towards Raghunathrao Deshprabhu. Now, they are

claiming that Raghunathrao and Sitadevi Deshprabhu have practised fraud in obtaining the consent decree, to which some of the defendants are parties.

The only basis on which, it is claimed that the petitioners have satisfied the requirement of proviso to Order VI, Rule 17 of CPC is that the legal advice was obtained on 25.07.2015 and inadvertence in including fraud as one of the grounds earlier. The learned Trial Court has found in paragraph 13 of the impugned order that the petitioners were aware of the pre-nuptial agreement and the previous gift deeds at the time when the written statement was filed. They were also aware that these documents were not produced in Special Civil Suit No. 10/1975. It has been found that these facts were within the knowledge of the petitioners and were required to be pleaded when the written statement was filed and thus, it has been found that the petitioners have failed to show any due diligence as to why these facts were not pleaded earlier. I do not

find that any exception can be taken to the finding so recorded. Mere obtaining of legal advice on 24.07.2015 cannot establish due diligence. If such a ground is accepted, it may afford a convenient mode to a party to circumvent the embargo placed by the provisions of Order VI, Rule 17 of CPC. When the amendment is sought at a stage where the trial has commenced, the Court has necessarily to find that the party was prevented, inspite of due diligence to bring the amendment earlier. (See **Vidyabai and Others Vs. Padmalatha and Another**, (2009) 2 SCC 409 and **Ajendraprasadji N. Pandey and Another Vs. Swami Keshavprakeshdasji N. and Others**, (2006) 12 SCC 1). Thus, it is not possible to accept that the petitioners were prevented from bringing the amendment earlier, inspite of due diligence.

33. This takes me to the last contention that the necessary pleading to show fraud are already there in the written statement. However, according to the petitioners in view of Order

VIII, Rule 2 of CPC, fraud has to be specifically pleaded, which necessitates the amendment. In this regard, I have gone through the written statement filed by the petitioners in which they are claiming that the consent decree is a nullity and was never implemented or acted upon. It is also contended that the consent decree having not been registered under the Indian Registration Act, the same can neither be relied upon nor tendered in evidence. It is then contended that there were no pre-existing rights in the plaintiff no. 1 i.e. Sitadevi Deshprabhu (now deceased), in view of the pre-nuptial agreement dated 07.05.1951, which came to be suppressed from the Court and as such, the consent decree cannot create any right, interest or title in the property vested therein. It can thus be seen that the petitioners have claimed that the consent decree is a nullity for the reasons as mentioned in the written statement. A decree may be nullity for variety of reasons such as absence of jurisdiction or competency of the Court. Thus, a plea of nullity cannot always be

equated to include a plea of fraud. To put it otherwise, a decree obtained by fraud, would be a nullity, but the converse may not always be true, for instance a decree which is nullity may not always be the one obtained by fraud. For these reasons, it is not possible to accept that, because the necessary ingredients forming fraud are already there, the amendment be allowed.

34. For the reasons aforesaid, no case for interference is made out in the exercise of the supervisory jurisdiction of this Court under Article-227 of the Constitution of India. The petitions are accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

EV