IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.120 OF 2017

Shri Auduth Timblo ..Petitioner/Org. Plaintiff

Vs.

Shri Kedar Ramakant Kakodkar ..Respondent/Org. Defendant

Mr. Sudesh Usgaonkar with Ms. R. Pereira for the Petitioner.
Mr. Rajendra V. Pai with Mr. Nikhil Vaze and Mr. N. Thakker for the Respondents.

CORAM : C. V. BHADANG, JJ.

RESERVED ON : 16th MARCH 2017

PRONOUNCED ON : 26th APRIL 2017.

(Through Video conferencing)

JUDGMENT

. Rule made returnable forthwith. The learned counsel for Respondent waives service. Heard finally by consent of parties.

2. The petitioner is challenging the order dated 17.11.2016 by which application (Ex.D-39) filed by the Petitioner/Plaintiff for amendment of plaint is rejected by the learned Trial Court.

3. The brief facts necessary for the disposal of the petition may be stated thus-

The petitioner, who has described himself as a businessman, has filed a suit against the respondent for recovery of Rs 49,41,169.24ps along with further interest. The case made out in the plaint is that, the respondent had sought 'money loan' from the petitioner on account of which the petitioner had advanced various amounts to the petitioner under agreements dated 4.5.2001, 4.2.2002, 15.11.2002, and 27.1.2003. The terms of these agreements are more or less similar, in which the the respondent had agreed to repay the loan by a stipulated date, along with interest @ 18 % pa. In the event of failure to repay the loan by the stipulated date the respondent was to pay compound interest @ 2 % per month. The respondent defaulted in the matter of repayment of the loan. The Respondent however addressed letters to the petitioner on 24.1.2004, and 25.9.2004 interalia confirming that he had borrowed the various sums from the petitioner. As the respondent failed to make the repayment the petitioner filed the suit for the recovery of the amount as aforesaid along with interest.

4. The respondent contested the suit interalia on the ground that there was no 'loan transaction', between the petitioner and the respondent. The various amounts were by way of part payment of the consideration towards sale of a plot by the respondent to the petitioner. The respondent raised a counter claim seeking specific performance of the said agreement.

5. The petitioner filed written statement to the counter claim denying that the money paid to the respondent was towards part payment of the consideration for purchase of a plot from the respondent.

6. On 18.10.2008 the respondent filed an application under Or. 7 Rule 11(d) of the Code of Civil Procedure (CPC, for short) seeking rejection of the plaint claiming that it is barred by the provisions of the Goa Money Lenders Act 2001 (Act, for short). It was contended that the petitioner is carrying on business as a money lender without a license under the Act. That the suit claim arises out of a series of usurious money lending transactions which are squarely hit by the provisions of the Act. The petitioner opposed the said application contending that neither the petitioner is a money lender nor the subject transactions are money lending transactions, within the meaning of the Act.

7. The learned trial court by an order dated 17.9.2009 rejected the application filed by the respondent. The respondent challenged the said order before this court in Civil Revision Application no.17/2009. This court by an order dated 5.2.2010 remitted the application back to the learned trial court for deciding it afresh in accordance with law. This was unsuccessfully challenged by the petitioner before the Hon'ble Supreme Court as the special leave petition filed by the petitioner against the said order, was dismissed on 26.4.2010, stipulating that the learned trial court shall decide the application uninfluenced by the observations of this Court in the judgment and order dated 5.2.2010.

8. On 3.8.2010 the petitioner filed an application Ex. D-39 for amendment of plaint seeking addition of following portion at the end of para 1 of the plaint which reads thus:

> *"The Plaintiff is the Chairman and Managing Director of the Fomento group of companies, an established business house in Goa, which is in the business of export of iron ore.The Plaintiff and the Defendant were neighbours for over thirty years inasmuch as both were residents of La Marvel Colony, Dona Paula, Goa and regularly visiting and metting each other. The Plaintiff continues to reside at La Marvel Colony, though the Defendant has recently shifted from La Marbel Colony and presently resides at Taleigao, Goa, at the address stated in the cause title. Since the Plaintiff had known the Defendant for several years, the Defendant approached the Plaintiff for monies claiming to be in dire straits. The Plaintiff is not a money lender and/or in the business of advancing loans and/or doing any activity of lending of any finance, as already stated in Para 4.2 of the Plaintiff's Written Statement to the Defendant's counter-claim. Nonetheless, in view of the long neighbourly relations between the Plaintiff and the Defendant as stated above and in view of the great financial difficulties that the Defendant expressed to be in, the Plaintiff parted with monies to the Defendant as detailed hereinafter."*

9. According to the petitioner almost all facts now sought to be introduced are already pleaded in the written statement filed by the petitioner

to the counter claim of the respondent. However the petitioner desires to include these facts in the plaint so that the respondent is not taken by surprise and no prejudice is caused to him. The petitioner further claimed that the proposed amendment does not introduce new cause of action and the amendment is necessary to determine the real controversy between the parties.

10. The respondent opposed the application claiming that the application is malafide. It was contended that the petitioner by the proposed amendment is seeking to cloak the commercial and usurious loan transactions as 'naïve friendly loans', which is an attempt to introduce a new cause of action defeating the vested right of the respondent to seek rejection of plaint. It was contended that the proposed amendment is contradictory to the original claim made in the plaint. The respondent prayed for deciding the application for rejection of plaint, before considering the application for amendment of plaint filed by the petitioner.

11. The learned Trial Court by an order dated 16.2.2012 ordered that the application for amendment shall be decided first. The respondent challenged the same before this court in WP No. 217/2012. This court by an order dated 26.6.2012 dismissed the writ petition. The special leave petition filed by the respondent against the said order has been dismissed on 5.2.2016. The learned Trial Court then took up the application for amendment and dismissed the same, on 17.11.2016, which order is subject matter of challenge in this petition.

12. I have heard Shri Usgaokar the learned counsel for the petitioner and Shri Pai the learned counsel for the respondent. With the assistance of the learned counsel for the Parties, I have gone through the record and the impugned order passed.

13. It is submitted by Shri Usgaonkar, learned counsel for the petitioner that the learned trial court has not addressed the issue properly in the context of settled legal principles in this behalf. It is submitted that the learned trial court failed to address itself as to whether the proposed amendment is necessary for deciding the real controversy in the suit. It is submitted that the petitioner has already incorporated the necessary averments in the written statement to the counter claim and as such the proposed amendment only formally seeks to include those averments in the plaint. It is submitted that the proposed amendment can not be said to be contradictory or diametrically opposite to the case already made out in the plaint. It is submitted that thus the amendment ought to have been allowed. The learned counsel has placed reliance on the decision of this court in ***Gangamal Ramchand vs. The Hongkong & Shanghai Banking Corporation, AIR (37) 1950 Bom 345,*** decision of the Calcutta High Court in ***Ahmed Hussein vs. Chebelli and Ors., AIR (38) 1951 Calcutta 262*** and two decisions of the Hon'ble Supreme Court in Joshna Gouda vs. Brundaban Gouda & Anr., (2012) 5 Supreme Court Cases 634 and ***Rajesh Kumar Aggarwal & Ors. vs. K. K. Modi & Ors., AIR 2006 Supreme Court 1647.***

14. On the contrary, it is submitted by the learned counsel for the respondent that the application seeking amendment is clearly malafide as it is aimed at overreaching the application for rejection of plaint filed by the respondent. It is submitted that the amendment seeks to withdraw or take away a categorical admission in the pleadings, which is not permissible. It is submitted that the amendment has rightly been disallowed.

15. The learned counsel has referred to the definition of 'loan' as contained in section 2(k) (xii) of the Act in order to submit that by the proposed amendment the Petitioner is trying to bring the transaction within the exception as provided for in the said section. He places reliance on the decision of the Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers vs. Narayanaswamy and Sons and Others, (2009) 10***

Supreme Court Cases 84 in order to submit that an amendment which is not bonafide and which seeks to take away a categorical admission, causing potential prejudice to the adversary, cannot be allowed.

16. I have carefully considered the rival circumstances and the submissions made. The learned trial court has held that on the basis of the pleadings in the plaint the respondent has drawn a “clear inference” and has accordingly raised an objection as regards the transactions being hit by the provisions of the act. It has been found that the amendment is sought after the supreme court has directed to decide the application seeking rejection of plaint without being influenced by the observations of this court and the petitioner has not come clean in seeking the amendment, which is an attempt to overreach the earlier orders and as a counter blast to the application seeking rejection of the plaint. Sufficient reason are not shown for not seeking the amendment earlier. Finally it has been found that the proposed amendment is inconsistent with the pleadings on record and would “heavily prejudice” the respondent.

17. The law on the point of amendment of pleadings is fairly well settled. It is not necessary to restate the same. The Supreme court in the case of ***Revajeetu Builders (supra)*** after taking a survey of several decisions holding the field has culled out following principles which are illustrative in nature.

> “63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
>
> 1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> 2) Whether the application for amendment is bona fide or mala fide;
>
> 3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

> 4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> 5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
>
> 6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the importance factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

18. In para 36 of the judgment the court has referred to the English case of Cropper V Smith in which the object underlying amendment has been stated thus:

> *"36. In the leading English case of Cropper v. Smith, the object underlying amendment of pleadings has been laid down by Borwen, L. J in the following words:*
>
> *"...it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights. ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Court do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right." (emphasis supplied)*

19. It is further well settled that all such amendments which are necessary for deciding real controversy in the matter, has to be allowed, albeit subject to the other relevant considerations. Notwithstanding the well settled principles, the real difficulty arises in application of these principles to the individual facts of a case, as the discretion in this regard is to be exercised judiciously, in the facts and circumstances of each case.

20. As noticed earlier the suit claim is for recovery of the amount allegedly advanced by the Petitioners as a “money loan”. However, the respondent while contesting the suit has raised a plea that the said transaction is hit by the provisions of Act and as such the question whether the Petitioner is a money lender and/or whether said transaction is a 'loan transaction' within the meaning of the said Act are the material issues which would arise in this case. This would be relevant while deciding the application for rejection of the plaint. Obviously this will have to be considered on the basis of the averments in the plaint as it stands. It is material to note that the Respondent has raised a counterclaim for specific performance and para 4.2 of the written statement filed by the Petitioner to the said counterclaim reads thus:

> *“4.2 The plaintiff states that the Defendant used to approach the plaintiff for loans. Since the Plaintiff knew the Defendant and had known him for several years, the Plaintiff had agreed to advance loans to the Defendant. The Plaintiff is not a money lender and/or in the business of advancing loans. In fact the Plaintiff is the Chairman and Managing Director of the Fomento group of companies, an established business house in Goa which is in the business of export of ore. Nonetheless, in view of the long acquaintance between the Plaintiff and the Defendant, the Plaintiff had agreed to advance loans to the Defendant.”*

21. Let us now consider the proposed amendment in juxtaposition to the aforesaid paragraph No.4.2 of the written statement:

> *“The Plaintiff is the Chairman and Managing Director of the Fomento group of companies, an established business house in Goa, which is in the business of export of iron ore. The Plaintiff and the Defendant were neighbours for over thirty years inasmuch as both were residents of La Marvel Colony, Dona Paula, Goa and regularly visiting and meeting each other. The Plaintiff continues to reside at La Marvel Colony, though the Defendant has recently shifted from La Marvel Colony and presently resides at Taleigao, Goa, at the address stated in the cause title. Since the Plaintiff had known the Defendant for several years, the Defendant approached the Plaintiff for monies claiming to be in dire straits. The Plaintiff is not a money lender and/or in the business of advancing loans*

> *and/or doing any activity of lending of any finance, as already stated in Para 4.2 of the Plaintiff's Written-Statement to the Defendant's Counter-claim. Nonetheless, in view of the long neighbourly relations between the Plaintiff and the Defendant as stated above and in view of the great financial difficulties that the Defendant expressed to be in, the Plaintiff parted with monies to the Defendant as detailed hereinafter."*

22. It can thus be seen that the proposed amendment is by and large on similar lines as that of the contentions raised in the written statement to the counterclaim. The question is whether in such circumstances the amendment could be allowed. In paragraph 1 of the plaint the Petitioner has claimed that both the Petitioner/Plaintiff as well as the Respondent/Defendant are businessmen. It is contended on behalf of the Respondent that by the proposed amendment the Petitioner is trying to take the benefit of the exception as contained in section 2(k) (xii) of the Act which reads thus:

> *"2(k) "loan" means an advance at interest whether of money or in kind, but does not include:-*
> *(i))----*
> *(ii)----*
> *(xii): an advance made bonafide by any person carrying on any business, not having for its primary object the lending of money, if such advance is made in the regular course of his business;"*

23. As noticed earlier in the plaint as well as in the written statement to the counterclaim, the Petitioner has already averred that the parties are businessmen. The question whether the said transaction falls within the exception as contained in section 2 (k) (xii) and/ or whether the petitioner is a money lender within the meaning of the Act cannot be gone into at this stage. It is evident that the merits of the proposed amendment cannot be gone into at this stage. In my considered view the proposed amendment particularly in the context of the contents of the plaint and the written statement to the counter claim cannot be said to be 'diametrically opposite' or one which would have an effect of withdrawing a categorical admission. The definition of 'loan' as contained in section 2 (k) of the Act

would show that an advance at interest is the gist for a particular advance to be a loan. The proposed amendment does not seek to withdraw any averment as to the advance being at interest or being a “money loan”.

24. Insofar, as the application being filed at the stage when an application for rejection of plaint was under consideration for amendment, it is obvious that the order passed by the Trial Court to take up application for amendment prior to the application for rejection of plaint has been confirmed upto the Supreme Court. The Division Bench of this Court in the case of ***Gangamal Ramchand vs. The Hongkong & Shanghai Banking Corporation, AIR (37) 1950 Bom 345*** has interalia held that the power of the Court to allow amendment of pleadings under Order 6 Rule 17 of the CPC is not in any way restricted or controlled by Order 7 Rule 11 of the CPC. Whether in a particular case amendment shall be allowed or not would always be a question dependent upon the facts and circumstances of each case. However, as a general proposition, it cannot be accepted that the power to allow amendment under Order 6 Rule 17 is restricted or controlled by the pendency of the application under Order 7 Rule 11 of the CPC. Thus, one of the reasons given by the Trial Court that the application for amendment is filed when the application for rejection of the plaint was pending, to my mind cannot be accepted and would not be sufficient to reject the application for amendment.

25. As noticed earlier the proposed amendment, particularly in the context of pleadings as originally contained in the plaint and pleadings in the written statement to the counterclaim, cannot be said to be diametrically opposite nor one which would change the nature of the suit claim or have an effect of withdrawing a 'categorical admission'.

26. Reliance placed on behalf of the Respondent on the decision of this Court in the case of ***Mrs. Sulekhabai Yeshwantrao Chowghule v. Shaik Vahid Jahangir, 2015 Cri. L. J. 4824*** and the observations in

paragraph 21 thereof to my mind is misplaced. The decision in the case of ***Kedar Ramakant Kakodkar vs. Avduth Timbo, Civil Revision Application No.17/2009 dated 5/2/2010*** was cited, in that case. While distinguishing the said case this Court has observed that the case of Kedar Kakodkar (that is the present case) was a matter where there were multiple transactions. The said observation cannot be said to be a finding in the present case. Even in the said case i.e. Civil Revision Application 17/2009 this Court has not given any finding that said transaction is a loan transaction or that the Petitioner is a money lender. At the cost of repetition it needs to be stressed that at this stage we are only concerned whether the proposed amendment needs to be allowed and not about merits of the amendment. Reliance on the decision in the case of ***Shambhavi Co-op. Housing Society Ltd. v. Shrikrishna Talak, 2016 SCC OnLine Bom 4791*** also to my mind is misplaced as the said case is distinguishable on facts.

27. In the result, the following order is passed:

i) The Petition is allowed.

ii) The impugned order dated 17/11/2016 (Exh.A) is hereby set aside.

iii) The Application (Exh.39) for amendment is allowed .

iv) Needless to mention that the Respondent shall be entitled to carry out consequential amendment to the written statement/counter claim, if so advised. In the circumstances, there shall be no order as to costs.

. **(C. V. BHADANG, J.)**