

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 513 OF 2017**

1. Mr. Lawrence Christoper Fernandes,
Son of Mr. Joao Fernandes, aged 56 years,
Occupation business, Proprietor of Eden Estates
Having office at 51/2, 'Bhagya', Vakola
Police Station Road,
Santa Cruz (East), Mumbai 55.

2. Mrs. Dipti Fernandes,
Wife of Mr. Lawrence Fernandes,
aged 50 years, Occupation housewife,
Residing at 51/2, 'Bhagya', Vakola
Police Station Road,
Santa Cruz (East), Mumbai 55.
Represented by POA holder,
Petitioner No.1.

.... Petitioners/Applicants
(Original Defendants)

V e r s u s

Mr. Errol F. Mc Mahon,
Son of late Robert Me Mahon,
aged 60 years, Indian National,
Residing at Flat No.23/24,
Takshila Building No.29/B, Mahakali Caves Rd,
Andheri (East) Mumbai – 93
Presently residing at A-301, Tangerine Dream,
Diwan Bhatti, Arpora Bardez-Goa.

.... Respondent
(Original Plaintiff)

Shri S. N. Joshi with Ms. A S. Pai Bir, Advocates for the Petitioners.

Shri V. Rodrigues, Ms. Sharon Albuquerque and Shri Vithal Naik,
Advocates for the Respondents.

CORAM: C. V. BHADANG, J.
RESERVED ON :26TH SEPTEMBER, 2017
PRONOUNED ON: 3RD OCTOBER, 2017.

JUDGMENT:

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

2. By this petition, the petitioners are challenging the order dated 20/4/2017 passed by the learned Senior Civil Judge, Mapusa in Special Civil Suit No.19/2011/A. By the impugned order, application (Exhibit D-33) filed by the petitioners seeking leave to produce additional written statement and for condonation of delay has been rejected.

3. The case made out in the plaint is that; the respondent has made huge investment to the tune of Rs.1,24,66,300/- for the construction of the project known as “Tangerine Dream” situated at village Arpora, Bardez Goa. That the said amount of Rs.1,24,66,300/- was paid towards the construction of flat nos. A-201, B-302, C-101, C-201, C-202, C-301 and C-302, shops/office areas including other constructed areas such as stilt, terrace, as more specifically described in Annexure-II to the plaint (referred to as the 'suit constructed premises', in the plaint).

4. This according to the respondent is excluding the amount of Rs.1,00,08,000/- paid by the respondent towards flat nos. A-202, A-301, A-302, B-101, B-201, B-202 and B-301.

5. It was contended that the petitioner no.1 avoided to transfer the title and possession of the suit constructed premises or to refund the amount of Rs.1,24,66,300/- along with interest and has cheated him. As the petitioner no.1 failed to transfer the title and deliver possession of the suit constructed premises, the respondent filed the aforesaid suit.

6. It is a matter of record that the petitioners filed their written statement on 22/11/2011 and resisted the suit on various grounds including the ground of limitation. It was contended that the aforesaid amount has already been adjusted as per agreement dated 17/11/2006 between the parties, settled long back. It was denied that the amount of Rs.1,24,66,300/- was paid towards the 'suit constructed premises'. It is contended that a major part of the amount i.e Rs.1,14,91,300/- was adjusted towards furniture, fixtures, amenities etc. and the remaining amount is towards the balance of the expenses/sales consideration.

7. It was further contended that there was a proposal to run a resort on the

project for which a loan was applied for from EDC Ltd.. The respondent although initially agreed, subsequently backed out, out of ulterior motive causing heavy business losses to the petitioners.

8. On 12/1/2016, the respondent filed an application for amendment of plaint seeking introduction of para 12A as under:

“12A: That the Passport copy of the plaintiff on record clearly shows the entry and exit of the plaintiff into and from India, as the case may be during the relevant periods indicated therein. It is also the case of the plaintiff that the plaintiff was not present in India on 17/11/2006 and 15/9/2010 as per the passport copy placed on record and hence no document could have been signed by the plaintiff on 17/11/2006 and 15/9/2010, as alleged by the defendant no.1, without prejudice to the fact that the alleged Agreement dated 17/11/2006 and receipt dated 15/9/2010 besides other such documents relied by the defendants are totally manipulated in nature, in order to put forth and support various false pleas, including that of an alleged loan mentioned in the written statement.”

9. The learned trial court by an order dated 30/8/2016 allowed the application for amendment incorporating para 12A as above. On 23/2/2017 the petitioners filed 'additional written statement' to the amended plaint along

with leave to produce the additional written statement and for condonation of delay as it was filed beyond the period of 90 days. The learned trial court by the impugned order has rejected the application. Hence this petition.

10. I have heard Shri Joshi the learned counsel for the petitioners and Shri Rodrigues, 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.

11. At the outset it needs to be mentioned that there is no provision under the Code of Civil Procedure (C.P.C) for filing an additional written statement as such to the amended plaint. What the law contemplates is the 'consequential amendment', to the written statement, in the event the plaintiff is allowed to carry out an amendment to the plaint. The amendment to the written statement, to the extent it is consequential in nature, has to be allowed. In fact, once the plaint is allowed to be amended, the suit is required to be fixed for carrying out the consequential amendment to the written statement, if any. The roznama as was produced by the parties for perusal during the course of the arguments does not show that after the amendment to the plaint was carried out on 1/9/2016, the suit was fixed for carrying out consequential amendment. The roznama discloses that after 1/9/2016, the suit

was fixed on 16/9/2016 when it was adjourned to 6/12/2016 for filing additional written statement. On 6/12/2016 and 16/12/2016 the suit was adjourned on account of the Presiding Officer being transferred. The suit thereafter was fixed on 27/1/2017 on which date an application (Exhibit D-31) for recasting of the issues was filed by the respondent and the suit was posted on 14/2/2017. After hearing the parties on application Exhibit (D-31) the suit was posted for 8/3/2017 for orders. In the meanwhile, the petitioner no.1 filed the application Exhibit (D-33) on 27/2/2017 along with additional written statement Exhibit (D-34).

12. It can thus be seen that the trial court without adverting to the fact that the amendment to the extent it is consequential in nature has to be allowed, has rejected the application for filing the additional written statement. In fact the normal course would have been to permit consequential amendment to the written statement. Albeit, under the garb of such consequential amendment, the defendant cannot be allowed to bring some new facts/pleadings on record which would essentially be governed by a prayer for amendment under Order VI Rule 17 of C.P.C., if so made.

13. I have carefully gone through the additional written statement and I find that except for para 11A and a part of para 11B, the rest of the part of

the additional written statement cannot be said to be consequential in nature.

Para 11A and a part of 11B reads as under:

“11A: The statement made in para 12A by the plaintiff is denied in toto. It is clarified that as the plaintiff and the defendant no.1 were close friends, it had been their regular arrangement between the plaintiff and the defendant no.1 that the defendant no.1 would go to the house of the plaintiff and leave all the papers at his house wherever his signatures were required. The plaintiff used to be working on Rigs wherein he had to perform duty for 5 weeks and had continuous holidays for 5 weeks. As and when he used to come for the holidays he would sign the papers, which would later be collected by the defendant no.1 in terms of their conversation on phone.”

“The claims made by the plaintiff regarding entries on the passport are denied and this defendant would like to subject the plaintiff to strict proof thereof.”

14. In view of the fact that the para 11A and part of para 11B of the additional written statement is in the nature of consequential amendment the same will have to be allowed to be incorporated in the written statement.

15. In the circumstances I do not propose to go into the question whether such consequential amendment also is governed by the statutory requirement of being effected within a period of thirty days or the extended period of

ninety days as per Order VIII Rule 1 of C.P.C and the proviso appended thereto. Even otherwise, it is well settled that the said requirement is not mandatory and in a given case the Court can allow such amendment beyond the said period if a case is made out. On facts as noticed earlier, from the various dates on which the suit was fixed after the plaint was amended, I do not find that there was any intentional delay or laches on the part of the petitioners. That apart, looking to the fact that para 11A and part of para 11B as above of the written statement is in the nature of a consequential amendment, to that extent it deserves to be allowed. The petition is thus partly allowed. The amendment of the written statement to the extent of incorporation of para 11A and para 11B as above is allowed. Rule is made partly absolute in the aforesaid terms with no order as to costs.

16. The civil application is also disposed off.

C. V. BHADANG, J.

Ap/