

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.514 OF 2017

1. Mr. Lawrence Christopher 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 Mc 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. The challenge in this petition is to the order dated 29/4/2017 passed by the learned Senior Civil Judge at Mapusa in Special Civil Suit No.19/2011/A. By the impugned order, application (Exhibit D-31) filed by the respondent for recasting of issues has been allowed, while application (Exhibit D-34) filed by the petitioner no.1 for framing of an additional issue has been rejected.

3. The case made out by the respondent/plaintiff is that he has made huge investment to the tune of Rs.1,24,66,300/- for the construction of a 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, shop/office areas including other constructed areas such as stilt, terrace, as set out in Annexure-II to the plaint. (referred to as the 'suit constructed premises', in the plaint).

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.

4. 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.

5. The petitioner filed 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.

6. On the basis of the rival pleadings the learned trial court framed the following issues on 28/11/2012:

(i) Whether the plaintiff is entitled to recover from the

defendant no.1 a sum of Rs.6,06,74,285/- as on 31/3/2011 with interest at 8% p.a. till its realization?

(ii) Whether the suit is barred by limitation?

(iii) Whether the defendants prove that defendant no.2 is not necessary of property to the suit?

(iv) What relief? What order?

7. On 12/1/2016, the respondent filed an application for amendment of plaint seeking introduction of para 12-A 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.”

8. The learned trial court by an order dated 30/8/2016 allowed the

application for amendment, permitting incorporation of para 12-A as above.

9. It may be mentioned that on 23/2/2017, the petitioners filed “additional written statement” to the amended plaint along with leave to produce the additional statement and for condonation of delay, as it was filed beyond the period of 90 days. The learned trial court by an order dated 20/4/2017 rejected the application, against which the petitioners filed writ petition no.513 of 2017. That petition has been partly allowed by the order of even date permitting the consequential amendment to the written statement by incorporating para 11A, and a part of para 11B which 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.”

10. The respondent filed an application (Exhibit D-31) seeking framing of the following additional issues :

(a) Whether the plaintiff proves that he was not in India on 17/11/2006 in order to sign the alleged said agreement dated 17/11/2006 relied by the defendant no.1?

(b) Whether the plaintiff proves that the last installment of Rs.5,00,000/- (Rupees Five lakhs only) was paid in favour of Eden Estates a proprietary concern of the defendant no.1 on 28/6/2010 in connection to the suit project by name “Tangerine Dream”?

11. The petitioners filed an application (Exhibit D-34), seeking framing of the following issue:

“a. Whether the defendant proves that the loan transaction as referred to in para 1 of the Written Statement filed by the defendant no.1 are hit by the provisions of Goa Money Lenders Act, 2001 and/or The Bombay Money Lenders Act, 1946 and whether the plaintiff is not entitled to recover the said amount either with interest or otherwise?”

12. The learned trial court by the impugned order has allowed application (Exhibit D-31) filed by the respondent, while rejecting the

application (Exhibit D-34) filed by the petitioner. Hence this petition.

13. 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.

14. It would not be necessary to make a detailed reference to the submissions made at the bar, inasmuch as the same are referred to while deciding writ petition no.531 of 2017 and the matter about framing of issues ultimately depends upon the extent to which the amendment of the pleadings has been allowed. In view of the fact that the learned trial court has already allowed incorporation of para 12A and the consequential amendment, permitted by this Court to the extent of incorporation of para 11-A and part of para 11-B in the written statement, the additional issues as referred to in application (Exhibit D-31) would arise in the suit.

15. In so far as the framing of an additional issue as to the bar under the Goa Money Lenders Act 2001 and/or the Bombay Money Lenders Act 1946, that part of the amendment has not been allowed as it is not found to be consequential in nature. The learned trial court has found in para 5 of the

impugned order that there are no pleadings that the amount was advanced on interest which is the requirement under section 2(k) of the Goa Money Lenders Act which defines 'loan' to be an advance on interest. In that view of the matter, the framing of the additional issue as sought for in application (Exhibit D-34) has rightly been rejected. The impugned order does not suffer from any infirmity. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

ap/-