

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1141 OF 2016.**

1. Shri. Oscar Jeronimo Desouza
(Since deceased through Lrs.)
 - 1.a. Cariene Angelo Desouza,
Son of late Shri Oscar
Jeronimo Desouz,
Age 29 years, bachelor,
 - 1b. Miss Oslina Ezilda Desouza,
Daughter of late Shri Oscar
Jeronimo De Souza
Age 25 years, Spinster,

2. Mrs. Mariene Desouza,
Wife of late Shri Oscar Jeronimo
Desouza, Age 53 years, Widow
All resident of H. No.59,
Camarcazana, Mapusa Goa.

.....Petitioners.

Versus

Late Ratilal Shah (Since deceased
through his L.R.s,)

1. Mr. Navanit Ratilal Shah
aged 74f yrs., and his brothers
sisters;
2. Mr. Mahendra Ratilal Shah
aged 65 years,
3. Mr. Ashwin Ratilal Shah
aged 59 yrs.
4. Mr. Pradip Ratilal Shah
aged 57 yrs.
5. Mrs. Chandrika Mukundrai Sheth
aged 76 yrs.

6 Mrs. Jyoti Rasiklal Shrimankar
aged 67 yrs.

7 Mrs. Aruna Shahikant Anandpura
aged 62 yrs.
All resident of 633, Shantivan,
New Link Road, Oshiwara, Andheri(w),
Mumbai- 400053.

.....Respondents.

Mr. E. Dias, Advocate for the petitioners.

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

CORAM: M. S. SONAK, J.
Date:18th April, 2017.

ORAL JUDGMENT:

Heard Mr. E. Dias, learned Counsel for the petitioners and
Mr. R. G. Ramani, learned Counsel for the respondents.

2. Rule with the consent of the learned Counsel for the parties and at the request of the learned Counsel for the parties, Rule is made returnable forthwith.

3. The challenge in this petition is to the order dated 6.10.2016 by which the learned Trial Judge has dismissed the application at Exh D-48 seeks leave to amend the Written Statement.

4. Mr. Dias, learned Counsel for the petitioners points out that the amendment, mainly seeks to place on record medical condition of the original defendant no.1 Oscar D'Souza since

14.2.2007. He submits that though, Oscar's wife had been impleaded as the defendant no.2 in the suit, in reality, she was not taking any interest in the proceeding in the suit. Oscar expired in December, 2013. The legal representatives were brought on record. It is only thereafter the implications of the Written Statement filed on basis of instructions allegedly issued by Oscar were realised. Amendment in reality is clarificatory in nature and it seeks to explain the medical condition of Oscar from the 2007 onwards. The amendment neither replaces the defence originally set out nor will occasion any serious prejudice to the plaintiffs in such circumstances, Mr. Dias submits that amendment ought to have been allowed. More particularly, since amendment applied was to the Written Statement.

5. Mr Ramani, learned Counsel for the respondents submits that the application seeking leave to amend the Written Statement is malafide and barred by delay and laches. He submits that trial in the suit has already commenced. He submits that Oscar's wife was not only served in the suit, but also represented by the same lawyer as was representing Oscar. He submits that false statements have been made that Oscar was not in a position to even attend the court proceeding when the roznama reflects that on 3 occasions the Oscar had attended the Court proceedings. Mr. Ramani, submits that serious prejudice will occasion to the plaintiffs if amendment is permitted at this stage. He submits that there is neither any jurisdictional error nor error of approach on the part of the learned trial Judge in making the

impugned order.

6. In this case, we are concerned with amendments to the Written Statement. If the schedule of amendment is perused then clause 1(a) to 1(k) basically refer to medical condition of the defendant no.1 from the year 2007. In para 1(l), this is what is set out at paragraph 1(l) thus:-

“It is stated that some amount in the sum of Rs.2,50,000/- and Rs. 1,55,000/- was borrowed from Mr. Ratilal Shah somewhere in the year 1992-1993 and the other amount arrived by him is interest overcharged, which is barred by law. “

7. At this stage Court is really not concerned with the veracity or otherwise of the medical condition of Oscar as projected in the schedule to amendment application. In para 1(l), it is admitted that a sum of ₹4,05,000/- (Rupees four lakhs five thousand only) was borrowed from the original plaintiffs sometime in the year 1992/93. It is then pleaded that rest of the amount is interest. It is stated that there is over charging of interest and therefore same is barred by law. Such amendment, if permitted, will really not change the defence, if any, drastically. In particular, it is noted that no amendment is applied for to para 2(xi) of the original written statement.

8. It is true that there is delay in seeking leave to amend the

Written Statement. The deposition of PW1 is presently on. Mr. Ramani points out that substantial cross examination of PW1 was recorded when Oscar was alive. It is explained that Oscar expired in December, 2013 and thereafter legal representatives were brought on record. The legal representatives have now applied for this amendment to place on record the condition of Oscar's health, as the averments in original Written statement will now be regarded as averments made by the legal representatives.

9. Considering the nature of the amendment applied for, same can always be permitted subject of course, to the petitioner, paying substantial costs.

10. Mr. Dias, is not right in his submission that no prejudice would occasion to the respondents. Admittedly, on account of delay as attributable to the petitioners, suit instituted by the respondents for recovery of amount which they claim as due has been delayed. Therefore, this is a fit case for imposition of costs if the application for leave to amend the Written Statement has to be allowed.

11. Amendment, if permitted, will perhaps reduce the multiplicity of proceedings as well. The petitioners, at least will have an opportunity to place on record the medical condition of Oscar. The effect of such medical condition to the merits of the case, is entirely a different matter. The respondents, will be entitled to lead evidence in

the context of amended Written Statement. In case the PW1 desires to file an additional affidavit in lieu of examination in chief, the learned Trial Judge shall permit PW1 to do so. Besides, directions can also be issued for expeditious disposal of the suit itself.

12. This petition is accordingly disposed of with the following:-

ORDER

- (a) The impugned order dated 6.10.2016 is set aside.
- (b) The Petitioners application at Exh. D-48 seeking leave to amend the Written Statement is allowed. Such amendment to be carried out within a period of four weeks from today.
- (c) Leave to amend is subject to the petitioners paying/depositing costs of ₹20,000/-(Rupees twenty thousand only) to the respondents within a period of four weeks from today.
- (d) Costs can be deposited before the learned Trial Judge and the respondents will have liberty to withdraw the same unconditionally.
- (e) Payments/deposits of costs shall be condition precedent.
- (f) In case there is delay in payment/depositing of costs, this petition shall deemed to have been dismissed without any further reference to this Court. The respondents shall be entitled to file additional affidavit in lieu of examination of chief of the PW1, in the context of amended Written

Statement.

- (g) Circumstance that leave to amend is granted, will not even remotely construed as acceptance of the defence raised by the defendants by way of amendment, by this Court.
- (h) All contentions of the parties on merits are left open for determination of the learned trial Judge.

13. Rule is made absolute to the aforesaid extent.

14. All concerned to act on the duly authenticated copy of this order.

M. S. SONAK , J.

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