

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.509 of 2017**

Shri Agnelo Francisco Xavier De
Maria Mascarenhas and 2 others. .. Petitioners

Vs.

Shri Dickson Delfino Almeida
alias Dicson Roque Leandro Almeida
and 11 others. .. Respondents.

Shri R. G. Ramani and Shri P. Kakodkar, Advocates for the
petitioners.

Shri Valmiki Menezes, Advocate for the respondent nos.1 to 4.

CORAM :- C. V. BHADANG, J.

Date : 6th September, 2018

ORAL ORDER :

The petitioners are the original defendant nos.8, 9 and 14 in Special Civil Suit No.124/2006 filed by the respondent no.1 (plaintiff), which is pending before the learned Senior Civil Judge at Margao. There are as many as 14 defendants arrayed in the said suit. The respondent no.1 has filed the aforesaid suit, for a declaration that the Deed of Gift dated 03/03/2005 executed by the petitioner nos.1 and 2 along with the respondent nos.2 to 12 (except the respondent no.4) in favour of the petitioner no.3 is null and void. This is on the ground that the respondent no.1 and his wife respondent no.2 were married under the regime of

Communion of Assets and the respondent no.2 alone along with the other donors could not have executed Gift Deed to the exclusion of the respondent no.1.

2. The suit was resisted by the petitioners and some of the other defendants. The defendant nos.12 and 13 filed a Written Statement. Para 7 of the Written Statement, which is relevant for the purpose reads thus :

“7. With still further reference to the said para 7 of the plaint it is submitted that the Defendant No.12 and 13, who are both persons of Goan origin, married one another on 29/12/1998, in Goa and in fact their marriage was religiously solemnized on the said date, in the Church of Our Lady of Assumption at Sarzora, Salcete, Goa and further the said marriage is found registered in the Office of the Civil-Registrar of Salcete at Margao, Goa. These Defendants further submit that by operation of law, the Defendant No.13 is entitled to the properties belonging to the Defendant No.12 as the said marriage between the Defendant Nos.12 and 13 was under the regime of communion of assets. The Defendant No.13 is not a signatory to the said deed of gift referred to in the said para 7 of the plaint.”

3. When the evidence on behalf of the defendant nos.12 and 13 was being led, para 8 of the affidavit in evidence was disallowed by the Trial Court on the ground that it was not part of

the pleadings. This prompted the defendant nos.12 and 13 to file an application for amendment (Exh.D-72) seeking to incorporate, the following para to be numbered as para 7A, after the existing para 7 :

“7A. It is submitted that in the Gift Deed in question i.e. on page 7 a fraudulent statement is made by the executants of the same stating that... “the defendant no.12 (Walter Mascarenhas) herein married the defendant No.13 (Rashmi Gama) outside Goa and as such not governed by the regime of Communion of Assets”. Such statements are totally false as the marriage between the defendants No.12 and 13 herein was solemnized on 29th December 1998 in Goa and was also registered in Goa that is in the Office of the Civil Registrar of Salcete at Margao Goa.”

4. The application was resisted on behalf of the petitioners, inter alia on the ground that the proposed amendment is not necessary for determining the real question in controversy between the parties and the amendment having been sought after the commencement of trial and without showing any due diligence, was not competent.

5. The learned Trial Court, by the impugned order dated 17/12/2016 has allowed the amendment application, on the ground that the amendment to the Written Statement has to be

considered in a more liberal manner than the amendment of the plaint. The learned Trial Court also found that the proposed amendment was in the nature of clarification and will not “seriously affect or prejudice” the case of the plaintiff or the other defendants. Feeling aggrieved, the petitioners have approached this Court.

6. I have heard Shri Ramani, the learned Counsel for the petitioners and Shri Menezes, the learned Counsel for the respondent nos.1 to 4. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned order passed.

7. It is contended by Shri Ramani, the learned Counsel for the petitioners that by the proposed amendment, the defendant nos.12 and 13 are trying to support the case of the plaintiffs. The learned Counsel has referred to the issues framed in the suit, in order to submit that the proposed amendment is not necessary for deciding the real controversy in the matter and no due diligence has been shown, particularly in view of the fact that the amendment is brought after the commencement of the trial. It is submitted that the amendment is sought after the plaintiffs have concluded their evidence and is only an attempt to supplement the case of the plaintiffs.

8. Shri Menezes, the learned Counsel for the respondent nos.1 to 4 has supported the impugned order. It is submitted that the substantive part of the amendment about the defendant nos.12 and 13 being married under the regime of Communion of Assets has already been incorporated in para 7 and the Trial Court has rightly found that the amendment is only of a clarificatory nature. Shri Menezes, the learned Counsel for the respondent nos.1 to 4, on instructions, states that the respondents do not intend to claim that the statement in the Gift Deed about the defendant nos.12 (Walter Mascarenhas) and the defendant no.13- (Rashmi Gama) being married outside Goa and not being governed by regime of Communion of Assets is 'fraudulently' mentioned in the Gift Deed. The learned Counsel submits that according to the respondents, the said statement was 'erroneously' made by the executants in the Gift Deed. He, therefore, submits that he will replace the word 'fraudulent' by the word 'erroneous' in the proposed para 7A of the amendment.

9. I have considered the circumstances and the submissions made.

10. A bare perusal of the para 7 of the Written Statement would make it clear that the defendant nos.12 and 13 had claimed

that both of them are of Goan origin and were married on 29/12/1998 in Goa and their marriage is registered in the office of Civil Registrar of Salcete at Margao, Goa. Not only that these defendants had also pleaded that by operation of law, the defendant no.13 is entitled to the properties belonging to the defendant no.12 as the marriage between the parties was solemnised as per the regime of Communion of Assets. If the contents of para 7A of the Written Statement are juxtaposed with the proposed amendment in para 7, the only thing, which the defendant nos.12 and 13 want to introduce is about a recital in the Gift Deed to the contrary, being incorporated 'erroneously'. In that view of the matter, I find that the amendment would indeed be of either clarificatory nature or by way of amplification of the pleadings already made.

11. Under the proviso to Order VI, Rule 17 of CPC, a party is precluded from “raising any matter”, after commencement of the trial, which has not already been “raised”, prior to such commencement, unless the party is able to show that in spite of due diligence, the party could not have raised the matter before such commencement. On a reading of para 7 of the Written Statement, it does appear that the defendant nos.12 and 13 have already raised the matter about they being of Goan origin, having been married in Goa and their marriage being governed by the

regime of Communion of Assets in the Written Statement. Thus, in my considered view, the proviso to Order VI, Rule 17 of CPC may not come in the way of allowing the amendment.

12. For the aforesaid reason, I do not find that the impugned order suffers from any infirmity, so as to require interference. Thus, subject to the word 'fraudulent' being replaced by the word 'erroneous' in the proposed para 7A of the amendment, no exception can be taken to the order allowing such amendment. The petition is, accordingly, disposed of, with no order as to costs.

13. The learned Counsel for the respondents undertakes that the word 'fraudulent' shall be substituted by the word 'erroneous' in para 7A of the Written Statement of the defendant nos.12 and 13. The learned Trial Court shall permit the respondent nos.3 and 4 (defendant nos.12 and 13) to correct para 7A by substituting the word 'erroneous' in the place of word 'fraudulent'. Necessary correction shall be carried out within two weeks.

C. V. BHADANG, J.

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