

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 212 OF 2018**

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.
- 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

(The addresses of the parties given are their respective registered addresses).

Shri S. N. Joshi, Advocate for the Petitioners.

Shri V. Rodrigues, Advocate for the Respondent.

CORAM: C. V. BHADANG, J.
RESERVED ON: 5/6/2018
PRONOUNCED ON: 6/06/ 2018.

JUDGMENT:

Rule, made returnable forthwith. The learned counsel for the respondent waives service. This is second round of litigation between the parties before this Court, on the point of amendment of the written statement.

2. The respondent/plaintiff has filed Special Civil Suit No.19/2011/A against the petitioners which is pending before the learned Senior Civil Judge at Mapusa. The case made out by the respondent 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 in survey no.121/6 of village Arpora, Bardez, Goa. That the said amount was paid towards the construction of Flat Nos. A-201, B-302, C-101, C-201, C-202, C-301, C-302, Shops/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.

3. It is 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 the respondent. It is in these circumstances that the aforesaid suit is filed for recovery of a sum of Rs.6,06,74,285/- along with interest from the petitioners.

4. The petitioners filed their written statement on 22/11/2011 and have resisted the suit on various grounds including the ground of limitation. It is contended that the aforesaid amount has already been adjusted as per the agreement dated 17/11/2006 between the parties. 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 said amount i.e. Rs.1,14,91,300/- was adjusted towards furniture, fixtures, amenities etc. and the remaining amount is towards the balance of expenses/consideration.

5. 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?

6. On 12/1/2016, the respondent filed an application for amendment of the plaint seeking introduction of para 12-A which was allowed by the trial court by order dated 30/8/2016.

7. It appears that pursuant to the said amendment, the petitioners filed “additional written statement” to the amended plaint on 23/2/2017 along with an application for condonation of delay, as the additional written statement was filed beyond the period of 90 days. The learned trial court by an order dated 20/4/2017 rejected the said application, against which the petitioner had filed Writ Petition no.513/2017. This Court by a judgment and order dated 3/10/2017 had partly allowed the petition permitting amendment of the written statement to the extent of incorporation of para 11A and part of para 11-B being of a consequential nature to the amendment to the plaint. In the said judgment and order this Court had observed that under the garb of a consequential amendment, the defendant cannot be allowed to bring some new facts/pleadings on record which would essentially be governed by the prayer for amendment under Order VI Rule 17 of C.P.C.

8. It further appears that the respondent filed an application (Exhibit D-31) seeking framing of certain additional issues while a similar application (Exhibit D-34) was filed by the petitioners for framing of the following 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”?

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?”

9. The learned trial court by an order dated 29/4/2017 had allowed the application Exhibit D-31 while rejecting the application Exhibit D-34 filed by the petitioners. That was challenged by the petitioners in Writ petition no.514/2017. This Court dismissed the said petition by a judgment and order dated 3/10/2017. It may be mentioned that in so far as the application Exhibit

D-34 is concerned, this Court found that part of the amendment raising a defence on the basis of the Goa Money Lenders Act 2001 and/or the Bombay Money Lenders Act 1946, could not be allowed as it was not found to be consequential in nature and the learned trial court having found in para 6 of the order, that there were no pleadings that the amount was advanced on interest which is the requirement under section 2 (c) of the Goa Money Lenders Act which defines “loan” to be an advance on interest, this Court found that application (Exhibit D-34) was rightly rejected.

10. It appears that taking a cue from the order passed in W.P. No.513/2017, the petitioners filed yet another application (Exhibit D-59) for amendment of the written statement seeking to add the following paras:

12-A- The defendants further submit that they are willing to bear the costs in case this Hon'ble Court seeks opinion of Handwriting experts to confirm the handwriting/signatures of the plaintiff on the relevant documents. The allegations made by the plaintiff that the documents relied by the defendants are manipulated and false are hereby specifically denied. It is reiterated that the defendant no.1 has always been a genuine person and has been victimized by the plaintiff taking advantage of the simplicity of the said defendant. The defendant craves the leave of this Hon'ble Court to make an appropriate application for reference of the relevant documents to the handwriting

expert during the defence evidence.

12-B- It is further submitted that the loan Rs.1,14,91,300/- (Rupees One Crore Fourteen lakhs Ninety One thousand three only) advanced by the plaintiff in favour of the defendant no.1 is in contravention of Goa Money Lenders Act, 2011. It is also in contravention of Bombay Money Lenders Act, 1946. The plaintiff does not possess any licence for grant of loans or advancing money on interest. Being illegal transaction, plaintiff has no right to claim the said amount illegally advanced by him in favour of the defendant no.1.

11. The respondent opposed the application on the ground that the trial has already commenced wherein the suit is posted for cross examination of the respondent. It was contended that for this reason alone the application deserves to be dismissed. It was contended that there was no liberty given by this Court to the petitioners in the judgment in W.P. no.513/2017 to move such an application. It is submitted that the said defence ought to have been taken at the time of filing of the written statement and not after a period of six years and the amendment is by way of an afterthought. It was contended that this Court had already found that there were no pleadings in the written statement that the amount was advanced on interest and it is not the case set up either in the application for amendment (Exhibit D-59).

12. The learned trial court by the impugned order dated 17/1/2018 has dismissed the application, which brings the petitioners to this Court.

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 perused record and the impugned order passed.

14. It is submitted by Shri Joshi, the learned counsel for the petitioners that in the earlier round of litigation the question was whether the amendment was of a consequential nature. It is submitted that in the present petition, the issue is whether the amendment can be independently allowed, which is governed by Order VI Rule 17 of C.P.C.

15. The learned counsel has pointed out the preliminary objection as raised in the written statement in which the petitioners have claimed that the amount was advanced as a loan and has nothing to do with the construction of the project “Tangerine Dream” of the petitioners. It is thus submitted that the plea now sought to be introduced is not at all a new plea and the Court can always examine whether the transaction is one which is hit by the provisions of the Goa Money Lenders Act, 2011 or the Bombay Money Lenders Act,

1946.

16. The learned counsel has submitted that at this stage the merits of the amendment cannot be gone into. The learned counsel has pointed out the observations in para 9 of the impugned order, in which the trial court has held that the money was not advanced on interest, which is not permissible. It is submitted that all such amendments which are necessary for deciding the real controversy in dispute are required to be allowed and the learned trial court was in error in refusing to allow the amendment.

17. On behalf of the petitioners strong reliance is placed on the decision of the Supreme Court in the case of **Andhra Bank Vs. ABN AMRO BANK N. V. and others (2007) 6 SCC 167** and on the decision of this Court in the case of **Olga Rodrigues and others Vs. Christopher Pinto and others 2017 (4) Bom CR 755**. Reliance is also placed on the decision of this Court in the case of **Bharat Petroleum Corporation Ltd. Vs. Precious Finance Investment Pvt. Ltd. 2006 (6) Bom. CR 510** and in particular paras 16 and 17 thereof, in order to submit that the provisions of the Code are for the purpose of “guidance of procedure and it is not to be followed technically and strictly”. It is submitted that the rules of procedure are the hand maid of justice and cannot be called in aid to scuttle the cause of justice itself. The

learned counsel has pointed out that in the additional written statement filed after the amendment to the plaint itself, the plea based on the Money Lenders Act was raised, which was prior to the filing of an Affidavit in lieu of the Chief examination and thus the proviso to Order VI Rule 17 of C.P.C in the opinion of Mr. Joshi will not come in the way of allowing the amendment.

18. On the contrary, it is submitted by Shri Rodrigues, the learned counsel for the respondent that the proposed amendment is hit by the proviso to Order VI Rule 17 of C.P.C. It is submitted that the application for amendment has been filed after the framing of issues which would be the date on which the trial had commenced and the petitioners have failed to aver or demonstrate due diligence, as is required by the proviso to Order VI Rule 17 of C.P.C. Reliance is placed on the the decision in the case of **Mohinder Kumar Mehra Vs. Roop Rani Mehra and others (2018) 2 SCC 132**, in order to submit that the trial would commence, when the Affidavit in lieu of the chief examination is filed.

19. It is submitted that this Court in the earlier round of litigation has already held that there are no pleadings to show that there was any advance of loan on interest and thus the present amendment is by way of an afterthought which is tried to be introduced by way of back door entry after

the petitioners have failed to plead the ground based on the Money Lenders Act in the earlier round of litigation. The learned counsel also tried to demonstrate that the amount cannot be said to be advanced on loan within the meaning of the Goa Money Lenders Act. It is submitted that for the limited purpose, whether the amendment is necessary for deciding the real controversy in the suit, the Court can look into the provisions of the Goa Money Lenders Act and this may not tantamount to going into the merits of the amendment. On behalf of the respondent reliance is placed on the following decisions:

- (i) **Kailash Vs. Nanhku and others (2005) 4 SCC 480.**
- (ii) **Ajendraprasadhi N. Pandey and anr. Vs. Swami Keshavprakeshdasji N. and others (2006) 12 SCC 1.**
- (iii) **Smt. Vidyabai and others Vs. Padmalatha and another (2009) 2 SCC 409.**
- (iv) **Smt. Jayashree Subhash Kalbande and anr. Vs. Shri Bhaurao Nagorao Derkar and others 2014 (3) ALL MR 605.**
- (v) **Smt. Suryakanta Ishwar Lohkare and others Vs. Smt. Annapurna Nilkanth Shende and anr. 2014 (7) ALL MR 540**

20. I have carefully considered the circumstances and the submissions made.

21. The law governing the prayer for amendment of pleadings is too well settled to be restated. However, the difficulty arises in applying the principles to individual facts of each case. The principles which can be deduced (which are otherwise well settled) from the aforesaid decisions are as under:

(i) That order VI Rule 17 of C.P.C. has two parts. Under the first part, the Court 'may', at any stage of the proceeding allow either parties to alter or amend his pleadings in such a manner and on such terms as may be just. The exercise of power under this part is discretionary. The second part is of a mandatory nature, which mandates that all such amendments which may be necessary for the purpose of determining the real questions in controversy between the parties, have to be allowed.

(ii) Under the later part, the finding that the amendment is necessary for deciding the real controversy between the parties is a *sine qua non* and can be said to be a jurisdictional fact, before the Court can permit such amendment.

(iii) The proviso appended to Order VI Rule 17 of C.P.C is an additional requirement, where the amendment is brought after the commencement of the trial. Thus where the amendment is brought after the commencement of the trial, there is yet another jurisdictional fact, which the Court should record, that the party applying for the amendment could not have, inspite of due diligence raised the matter before the commencement of the trial.

22. Coming to the present case, a perusal of the impugned shows that the application for amendment is not dismissed, either on the ground that it is not necessary for deciding the real controversy in dispute nor on account of non compliance with the proviso of Order VI Rule 17 of C.P.C.. The learned trial court has essentially gone on the amendment earlier sought, which was rejected which order was confirmed by this Court. In the earlier round of litigation the question was one of permitting introduction of paras 11-A and 11-B which was sought to be introduced by way of a consequential amendment. This Court found that only para 11-A and part of para 11-B which were of a consequential nature (to the amendment of the plaint) could be allowed.

23. If the learned trial court, in the present case, has not looked into either of the two requirements, while rejecting the application, normally the application, could have been remitted back to the trial court. However, I find that already this is the second round of litigation between the parties on the point of amendment in a suit which is of the year 2011 and which is stated to be part heard and as the parties have addressed this Court at length, I propose to deal with the contentions on merits as raised by both the parties.

24. All that this Court had said while deciding W.P. No.513/2017 was that the petitioners could not have brought any new material/defense under the garb of a consequential amendment. There was no leave granted to apply under Order VI Rule 17 of C.P.C.

25. It would now be necessary to note a few dates in the matter. The original written statement was filed by the petitioners, as far back as on 22/11/2011. The learned trial court settled the issues on 28/11/2012. The plaint came to be amended some where in January 2016 to which the petitioners filed additional written statement on 23/2/2017 seeking to incorporate the following paras 11-A and 11-B.

“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.”

11B: 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. It is submitted that the signatures of the plaintiff on all the documents relied on by the defendant in the present suit including the Agreement dated 17/11/2006 and the document dated 15/09/2010 are the original signatures of the plaintiff. After the plaintiff disputed his signatures on the documents, this defendant had obtained opinion of handwriting experts namely Potentio Graphy Spa dated 17/3/2012, wherein their Graphologist Analyst Harmon S Batra had certified the signatures on the Deed of Sale dated 22/6/2005 was tally with the signatures of Mr. Erral C. Mahon with the photocopy of the receipt dated 15/09/2010 in terms of the flow pattern as well as physical plus tracing strokes points.

Annexed hereto is a copy of the Certificate dated 17/03/2012 issued by Potentio Graphy Spa and the same is annexed as Exhibit D-1.

26. This Court while deciding Writ petition no.513/2017 had only allowed para 11-A and part of para 11-B to be incorporated by way of consequential amendment. The respondent has filed an affidavit in lieu of chief examination on 5/6/2017 after which the present application for amendment was filed on 7/10/2017.

27. There was some debate at the bar as to whether it is the date of framing of the issues or filing of the affidavit in lieu of chief examination which amounts to the commencement of trial. It would not be necessary to go into this aspect, in the present case, inasmuch as admittedly the application for amendment is filed after the affidavit in lieu of chief examination was filed and thus the application was filed after the commencement of trial. It was thus necessary for the petitioners to aver and demonstrate that they could not raise the matter earlier inspite of due diligence, I find that there is not even a whisper of any such averment made in the application for amendment. Shri Joshi, the learned counsel for the petitioners submitted that the matter was raised in the additional written statement, which was prior to the commencement of the trial. I have carefully gone through the amendment which was sought earlier by way of additional written statement by introduction of paras 11-A and 11-B and the plea based on the Money Lenders Act is not raised therein. Thus this is a case where the petitioners have failed to show that inspite of due diligence they could not raise the matter prior to the commencement of the trial. For this reason alone the amendment could not be allowed.

28. Coming to the aspect of the amendment being necessary for deciding the real controversy between the parties, although it is true that the Court

cannot at this stage go into the merits of the amendment, the amendment needs to be examined for limited purpose whether it is necessary for deciding the real controversy between the parties. As noticed earlier, even in the present application, the petitioners have not claimed that the amount has been advanced on interest much less, at any specific rate of interest. Thus for this reason also the amendment as proposed in para 12-B cannot be allowed. A careful perusal of the impugned order also does not show that the Court has recorded any finding on merits of the amendment. All that the learned trial court has said in para 9 is that the money was not advanced on interest “according to the plaintiff”

29. In so far as paras 12-A is concerned, the learned trial court has rightly come to the conclusion that para 12-A does not deal with any pleadings on facts. The learned counsel for the petitioners had pointed out that a part of para 12-A seeks to deny the allegations of the respondent that the documents relied upon by the petitioners are manipulated and false. However, it would be significant to note that this aspect has already come on record in para 11-A of the earlier amendment wherein the petitioners have denied in toto the statement in para 12-A of the plaint.

30. The judgments relied upon by the learned counsel for the petitioners in

my considered view turned on their own facts. There cannot be any manner of dispute with the proposition that the procedural rules are handmaid of justice. However, the consideration of a prayer for amendment has, none the less, to be within the parameters and ambit of Order VI Rule 17 of CP.C. including the proviso wherever applicable.

31. In the case of **Olga Rodrigues and others (supra)**, this Court had noticed the decision of the Supreme Court in the case of **Rajesh Kumar Aggrawal and others vs. K. K. Modi**, in which it has been inter alia held that the Court ought to take notice of subsequent events in order to shorten the litigation and to preserve and safeguard the rights of both parties and to subserve the ends of justice. Unlike in that case, the amendment in the present case is not based on any subsequent events.

32. Lastly coming to the decision in the case of **Andhra Bank (supra)**, it does not appear that the amendment in that case attracted the proviso to Order VI Rule 17 of C.P.C as in the present case. For the aforesaid reasons no case for interference is made out. The petition is accordingly dismissed. Rule is discharged with no order as to costs.

C. V. BHADANG, J.

Ap/

