

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 139 OF 2019**

CHINKARA MOTORS PVT. LIMITED
(BOAT DIVISION), THR. DIRECTOR
& 2 ORS.,

.... PETITIONERS

Versus

INDIAN OCEAN CRUISES AND
CHARTERS PVT. LTD., REP. THR. ITS
DIRECTORS & 2 ORS.,

.... RESPONDENTS

Mr. Sandesh D. Padiyar, Advocate for the Petitioners.

Mr. Premanand A. Kholkar, Advocate for the Respondent No. 1.

CORAM : C.V. BHADANG, J.

DATE : 12th March, 2019

ORAL ORDER:

By this petition, the petitioners/defendants, are challenging the order dated 05.09.2018, passed by the learned Trial Court, by which, an application (Exhibit 133-D) for amendment of the counter claim, filed by the petitioners, has been dismissed.

2. The brief facts are that, a suit is filed by the respondents against the petitioners, for recovery of money, damages, compensation and other consequential reliefs, in which, the petitioners have raised a counter claim for recovery of an amount of Rs.1,48,71,749/- alongwith interest and other reliefs.

3. The learned Trial Court framed issues on 26.11.2015 and the parties went to trial. The respondents closed their evidence on 12.12.2017, after which the suit was fixed for evidence of the petitioners on 18.01.2018, on which date the petitioners sought time and the suit was posted on 08.02.2018 and thereafter on 13.03.2018. On both these dates, the petitioners sought time to file affidavit in evidence. On 03.04.2018, the petitioners filed an application for production of additional documents, which was allowed by the learned Trial Court on 05.05.2018. Eventually, the petitioners filed the affidavit in evidence of their witness on 07.06.2018, after which the suit was fixed for cross examination by the respondents on 28.06.2018 and 31.07.2018. On both these dates, the petitioners sought time on the ground that their Lawyer is unwell. When the suit was fixed on 23.08.2018, the petitioners filed application Exhibit 133-D for amendment of the counter claim seeking to introduce paras 73A to 73Q.

4. The petitioners tried to explain the delay in filing the application, on the ground that the counter claim was prepared in a hurried manner and under severe mental stress. This is why, they could not fully incorporate the facts, while preparing

the written statement/counter claim. Secondly, it is contended that some of the facts sought to be introduced have arisen and have come to the knowledge of the petitioners, subsequent to the filing of the written statement/counter claim. Lastly, it is contended that the proposed amendment is necessary for deciding the real controversy in the matter and it does not in any manner change the nature or cause of action of the counter claim or seeks to introduce different reliefs. It was contended that no prejudice would be caused, to the respondents, if the proposed amendment is allowed.

5. The application was opposed on behalf of the respondents by setting out various dates as aforesaid. It was denied that the counter claim was prepared in a hurried manner, in as much as the suit was filed in March, 2013 and the petitioners filed their written statement/counter claim in September, 2013. It was contended that some of the incidents narrated in the proposed amendment are prior to the filing of the suit and are vague. It was contended that the amendment sought is not necessary for deciding the real controversy in the matter and the application is one more attempt to delay the suit.

6. The learned Trial Court by the impugned order has dismissed the application, on the ground that it is nothing, but an attempt in disguise to delay the suit. The learned Trial Court has also found that in the evidence of PW-1, the respondents have relied upon the documents pertaining to the FIR in the criminal case and PW-1 has been cross examined at length on the said aspect. The respondents have also examined the investigating officer of the criminal case as PW-2, who has also been cross examined at length. The learned Trial Court has also found that by virtue of para 73G, the petitioners are trying to incorporate an incident of November, 2012, which is much prior to the filing of the suit and the criminal case. Insofar as the proposed amendment at para 73P is concerned, it is found that the pleadings are irrelevant.

7. I have heard Mr. Padiyar, the learned Counsel for the petitioners and Mr. Kholkar, the learned Counsel for the respondent no. 1. With the assistance of the learned Counsel for the parties, I have perused record and the impugned order passed.

8. Mr. Padiyar, the learned Counsel for the petitioners has submitted that the documents pertaining to the criminal

case, filed by the respondents against the petitioners, are already on record and thus, no prejudice would be caused to the respondents, if the proposed amendment is allowed. The learned Counsel submitted that the petitioners shall not press for the amendment as proposed in para 73G (pertaining to November, 2012 incident) and para 73L (pertaining to some case filed under the Consumer Protection Act) by the respondent nos. 2 and 3. The rest of the amendment, in the submission of the learned Counsel for the petitioners, is explanatory/formal in nature and it neither changes the nature of the counter claim nor cause of action or affects the claim made therein. Insofar as the aspect of due diligence is concerned, it is submitted that the same has been properly explained in the application.

9. Mr. Kholkar, the learned Counsel for the respondent no. 1 has supported the impugned order. The learned Counsel has taken me through the chronology of the dates in order to point out that the application for amendment is not at all bonafide and is yet another attempt to delay the disposal of the suit, as has been held by the learned Trial Court. It is submitted that the amendment is neither necessary for deciding the real controversy in the suit nor it is clarificatory in nature,

as claimed. It is submitted that the petitioners have not demonstrated the circumstances to show that inspite of due diligence, the petitioners could not have brought the amendment prior to the commencement of the trial.

10. I have considered the submissions made and I do not find that any case for interference is made out. The first circumstance which the Court should find in order to allow the amendment is that the proposed amendment is necessary for deciding the real controversy in the matter. This is the first jurisdictional fact, which should exist and should be demonstrated. In a case where the amendment is sought, after the commencement of the trial, as in the present case, there is a second jurisdictional fact, which has to be established, namely, the party should demonstrate that inspite of due diligence, the party could not have brought the amendment prior to the commencement of the trial. None of these two jurisdictional facts can be found in this case. As noticed earlier, the suit was filed in March, 2013, while the written statement and counter claim is filed in September, 2013. The Trial Court framed the issues in November, 2015 and the suit is now for the evidence of the petitioners. After the conclusion of the evidence, on behalf of the respondents, the petitioners initially

sought time and thereafter, filed an application for production of documents, which was allowed on 05.05.2018. The petitioners thereafter filed the affidavit in evidence of their witnesses on 07.06.2018 and on two subsequent dates, the petitioners sought time, on the ground of sickness of their Lawyer and thereafter, filed an application for amendment on 23.08.2018, seeking extensive amendment by introduction of paras 73A to 73Q, in the counter claim.

11. I have carefully gone through the proposed amendment sought and the learned Trial Court in my considered view, is right in holding that certain part of the amendment is superfluous and refers to circumstances much prior to the commencement of the trial. The learned Trial Court has found that the petitioners have also not satisfactorily explained the aspect of due diligence, as provided under the proviso to Order VI Rule 17 of CPC. On facts, it cannot be accepted that the written statement/counter claim was filed hurriedly and even assuming that it was so, the petitioners after the filing of the written statement/counter claim, cross examined the plaintiff's witness, produced documents and even filed the affidavit in evidence of their witness and thereafter, sought time on two occasions, after which, the application for

amendment came to be filed. Thus, there is total lack of due diligence, on the part of the petitioners.

12. Reliance placed on the decision of this Court in the case of **Gregory Basil Fernandes Vs. Angelina Correia & Others** (Writ Petition No. 1030/2018 decided on 02.02.2019) is misplaced. It was a mere case of deficient pleadings, which this Court, placing reliance on the decision of the Hon'ble Supreme Court in the case of **M/S Ganesh Trading Co. Vs. Moji Ram (1978) 2 SCC 91**, found to be curable. The case clearly turned on its own facts.

13. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to require interference. The petition is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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