

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.170 OF 2021

WITH

WRIT PETITION NO.171 OF 2021

1. Mr. Ashok Kumar,
Son of Yadunandan Prasad,
65 years of age, Ro H. No.204/P, G-1,
Subham Apartment, Vasudha Colony,
Alto St. Cruz, Bambolim - Goa.

2. Mr. Sunil Kumar,
Son of late Jagdev Mahto,
58 years of age, r/o H. 257/2B,
Kumar Sadan, Raghuvir Smriti Nagar,
Merces, Ilhas-Goa.

... Petitioners.

Versus

1. Mr. Parasnath Singh,
Son of Mr. Yadunandan Prasad,
Major of age,
r/o Danteshywar Residency,
Kirlawaddo, Chimbhel, Tiswadi,
Post Office Ribandar Goa.

2. Mrs. Manoramadevi Parasnath Singh,
Wife of Parasnath Singh, Major of age,
r/o Danteshywar Residency,
Kirlawaddo, Chimbhel, Tiswadi,
Post Office Ribandar Goa.

3. Charles Barromeu Menezes,
alias Charles Valdimir Menezes,
(Since deceased) through legal heirs,

3(a) Mr. Ambrose Menezes,
Major of age,
r/o Deira, Dubai

3(b) Mrs. Jean Menezes,
Major of age,
r/o Deira, Dubai

3(c) Mr. Brian E. Menezes,
Major of age,
r/o Coral Springs,
Florida - 33065, USA.

3(d) Mrs. Jeanette Lobelle Menezes,
Major of age,
r/o Coral Springs,
Florida - 33065, USA.

3(e) Mr. Desmond Menezes,
Major of age,
r/o Deira Dubai.

3(f) Mrs. Fran Loveleen Menezes,
Major of age,
r/o Peddem, Mapusa,
Bardez - Goa.

4. Mrs. Maria Angelica Maximiana Menezes
alias Maxy Menezes,
major of age,
Peddem, Mapusa,
Bardez - Goa.

5. The Secretary,
Village Panchayat of Tivim,
Having office at Tivim,
Bardez - Goa.

6. The Registrar of Firms
Having office at Panaji Goa
Junta House, Panaji.

7. State of Goa,
Represented by Chief Secretary, ... Respondents.
Government of Goa,
Secretariat, Porvorim Goa.

Mr. Chirag Angle, Advocate for the Petitioners.

Mr. Dinesh Eknath Naik, Advocate for Respondents No.1 and 2.

Mr. Anthony D'Silva, Advocate for L.Rs. of Respondents No.3 and 4.

Mr. Geetesh Ramesh Shetye, Additional Government Advocate for
Respondent No.7 in Writ Petition No.170/2021

Mr. Shivdatt P. Munj, Additional Government Advocate for Respondent
No.7 in Writ Petition No.171/2021.

Coram: M.S. SONAK, J.

Date: 7th July 2021

ORAL JUDGMENT:

Heard Mr. Angle the learned Counsel for the Petitioners, Mr. Dinesh Naik for Respondents No. 1 and 2, Mr. Silva for the Legal Representatives of Respondents No.3 and 4, and Mr. Munj, the learned Additional Government Advocate appearing for Respondent No.7 in Writ Petition No.171/2021.

2. Since common issues are involved in both these petitions, they are disposed of by a common Judgment and Order.

3. Rule in both these petitions. The rule is made returnable forthwith at the request and with the consent of the learned Counsel appearing on behalf of the contesting parties.

4. The challenge in both these petitions is to the orders by which the learned Trial Judge has dismissed the Petitioners' applications for summoning the bank manager of the Punjab National Bank and Registrar of Firms as witnesses to depose in the matter.

5. The record bears out that in this case, the Petitioner failed to file any list of witnesses, much less, name these particular witnesses in the said list. After the trial commenced, these applications were taken out seeking the aid of the Court to summon these witnesses to depose in the matter.

6. The circumstance that no list of witnesses is filed or for that matter, no names of the witnesses that are sought to be examined at the trial are set out therein, cannot be a circumstance to deprive a party, the opportunity for examination of such witnesses in all cases. However, in such a situation, the Court is not obliged to aid such a party in securing the presence of such witnesses. This means that the party cannot, as a matter of right, insist that summons be issued to secure the presence of such witnesses.

7. But that also does not mean that the Court is powerless to issue a summons or extend aid to a party, despite such party explaining the circumstances in which no list of witnesses came to be filed or the names of the witnesses who are now proposed to be examined remained to be set

out in such list of witnesses, if filed. A party can also explain why, now, it has become necessary to examine such witnesses and how the interest of justice warrant the examination of such witnesses. The Court is expected to take into account all such considerations holistically and only thereafter decide whether summons can be issued for examination of the witnesses that the party now proposes to examine. In all such cases, however, the Court can neither forget the prejudice to the opposite parties nor the impact of such requests on the speedy conclusion of the trial in the proceedings. Therefore, even if such requests are to be entertained and summons is to be issued, the party will have to be called upon to pay suitable costs so that the prejudice to the opposite parties as well as the prejudice inherent in delaying such proceedings is at least minimized.

8. Mr. Angle, the learned Counsel for the Petitioners points out that in the present case, the list of witnesses remained to be filed out of inadvertence. He submits that there was no malafide intention on the part of the Plaintiffs and if the suit is delayed, it is the Petitioners-Plaintiffs, who will suffer the most. He submits that the Petitioners expected the Registrar of Firms, who has been impleaded as a Defendant to appear and contest the matter. Since this has not happened, it is necessary to examine the Registrar of Firms as a witness to establish, inter alia, the existence of the partnership firm and other issues which have been raised in the proceedings.

9. Mr. Angle points out that the examination of the bank manager is also necessary because it is the case of the Petitioners that the funds for

the purchase of the suit property were expended through the accounts of the partnership firm. He submits that examination of these witnesses is quite important and interest of justice required the Court to lend its assistance by issuing summons to these witnesses. He submits that since these are official witnesses, they are unlikely to come at the bidding of the Petitioners. He submits that the Petitioners, are willing to pay costs up to the extent of ₹5,000/- to compensate the opposite parties for the prejudice, if any, that they might suffer. But Mr. Angle submits that there is no question of any prejudice to the Defendants and therefore, no costs or in any case costs beyond ₹5,000/- may be imposed.

10. Mr. Dinesh Naik, Mr. Silva, and Mr. Munj defend the impugned orders based on the reasons reflected therein. They point out that despite the clear provisions of Order XVI Rule 1 of the Civil Procedure Code, neither was any list of witnesses filed nor was any indication given before the commencement of trial that summons would be necessary to some of the witnesses.

11. Mr. Naik and Mr. Silva submit that if the request of the Petitioner is to be granted, the Defendants whom they represent will suffer severe prejudice. They point out that the suit is pending since 2012 and there is some unnecessary cloud being created upon the right, title, and interest of the Defendants whom they represent, on account of the pendency of these proceedings. Accordingly, they submit that both these petitions may be dismissed.

12. As noted earlier, it is not as if the Trial Court has no jurisdiction, in a fit case, to issue summons to witnesses merely because no list of witnesses was filed or because the names of the witnesses now proposed to be examined were not listed therein. There is discretion vested in the Court and no doubt, such discretion has to be exercised for valid considerations and on holistic examination of the circumstances.

13. In this case, the learned Trial Judge has quite correctly observed that this is an old suit and there is a special drive to dispose of old suits. The Trial Judge has quite correctly observed that at least in old suits, the parties, should be more diligent and not attempt to delay the disposal of such suits. Though, this is certainly a valid consideration, based solely upon this consideration, the learned Trial Judge, should not have ignored all other considerations urged on behalf of the Petitioners and dismissed the Petitioners' application seeking summons to the said witnesses.

14. There is some merit in the submissions of Mr. Angle that all the circumstances that were presented on behalf of the Plaintiffs were not considered by the learned Trial Judge. No doubt, this is a case of lapse on the part of the Petitioners. However, the lapse is not of such magnitude as to deny the Petitioners assistance to examine witnesses, that according to the Petitioners are quite important for their case. The lapse indeed appears to be on account of inadvertence, rather than any malafide or the adoption of dilatory tactics. Since these are official witnesses, likely, they will not come to depose at the private bidding of the Petitioners. These aspects have not been considered by the learned Trial Judge and therefore, interference is warranted with the impugned orders. Besides, in this case,

the Petitioners have demonstrated the prejudice that might occasion their case, if, no assistance is granted to examine the witnesses that they propose to examine at this stage. Even the Petitioners, have been prosecuting this matter since 2012, and all these circumstances, warrant the grant of some assistance to the Petitioners.

15. However, the grant of any assistance to the Petitioners or the extension of any indulgence in their favor, certainly, cannot be at the cost of delaying the proceedings before the Court and more importantly, prejudicing the Defendants, who are also required to attend to this litigation for last over nine years. Therefore, the contesting Defendants at least, are required to be suitably compensated in this matter. Some costs are also due because the order which is proposed to be made will delay the disposal of the suit even though there is now a special drive undertaken to dispose of such old suits.

16. Having regard to all the aforesaid circumstances, the impugned orders can be set aside and summons can be issued to the two witnesses, provided, the Petitioners, pay costs of ₹25,000/- to the Defendants No.1 and 2 and further costs of ₹25,000/- to the legal representatives of Defendant No.3 and Defendant No.4 in the suit. If such costs are paid or deposited by the Petitioners before the Trial Court, within four weeks from today, only then, the impugned orders shall stand set aside and the Trial Court will then issue summons to the witnesses, in terms of the prayers made by the Petitioners.

17. However, if the costs are not paid or deposited within four weeks from today, then these petitions shall be deemed to have been dismissed without any further reference to this Court. Such dismissal shall be with costs of ₹10,000/- to be equally divided between Defendants No.1 and 2 on one hand and the legal representatives of Defendant No.3 and Defendant No.4 on the other hand.

18. The Trial Court, is directed to dispose of the suit expeditiously. The learned Counsel for the parties assure this Court that they will cooperate with the learned Trial Judge in the matter of expeditious disposal of this old suit. The Trial Court should endeavor to dispose of the suit within eight months from today.

19. The learned Counsel for the parties to place on the record of the learned Trial Judge an authenticated copy of this order.

20. All concerned to act based on an authenticated copy of this order.

M.S. SONAK, J.

jfd/-