

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 339 OF 2015**

SHRI.KASHINATH SURYAKANT
MANERKAR @ KISHOR SURYAKANT
MANERKAR AND ANR.

... Petitioners

Versus

SMT. JYOTI SHAMSUNDAR SAWANT @
SMT. JYOTI HEMANT BHAGAT GUDEKAR
AND 3 ORS.

... Respondents

Shri Ashwin D. Bhobe, Advocate for the Petitioners.

Shri Shambhu S. Kakodkar, Advocate for Respondents No.1 & 2.

Shri Nikhil Vaze, Advocate for Respondent No.3.

Shri J.J. Mulgaonkar, Advocate for Respondent No.4.

Coram:- C. V. BHADANG, J.

Date:- 22nd September, 2015

ORAL ORDER :

By this petition, the petitioners/plaintiffs are challenging the order dated 27/01/2015 passed by the learned Senior Civil Judge, Margao in Regular Civil Suit no.398/2010. By the impugned order, the application filed by the petitioners for amendment of the plaint has been rejected.

2. The brief facts are that the plaintiffs filed the suit inter alia seeking a permanent injunction against the respondents no.1 & 2 or anybody on

their behalf from creating third party interest and also for a declaration that the petitioners are co-owners of the suit house/suit plot. The petitioners also claim that they are entitled to all movables lying in the suit house and the two lockers one each with respondents no.3 & 4. It appears that during the pendency of the suit, the petitioners initiated inventory proceedings claiming to be exclusively entitled to the suit property. The inventory proceedings have been decided in favour of the petitioners on 21/01/2010. Indisputably, the respondents no.1 & 2 were not parties to the inventory proceedings. In so far as the suit is concerned, the same was instituted in the year 2005. It appears that earlier there was another application for amendment of the plaint filed incorporating certain subsequent developments about the initiation of the inventory proceedings. That application was filed on 25/01/2011. The said application was allowed on 20/03/2014. It is undisputed that the petitioners have led their evidence and when the respondent no.1 was under cross-examination, the instant application for amendment came to be filed seeking to add paras 11, 22A, 37F, 40AA and 40F in the plaint. Perusal of the proposed amendment would show that the petitioners now want to seek a declaration that they are exclusive owners of the suit property and there is also a challenge raised to the Will dated 19/05/2003 executed by Sarojani Sawant who is the aunt of the petitioner no.1. That Will is executed in favour of the respondent no.1.

3. The application was opposed on behalf of the first and second respondent on the ground that the amendment is belated. That the petitioners were aware of the Will right from 30/11/2005 and that the proposed amendment would change the nature of the suit as also the cause of action.

4. The learned Trial Court by the impugned order has rejected the application.

5. I have heard Shri Bhobe, the learned Counsel appearing for the petitioners and Shri S.S. Kakodkar, the learned Counsel appearing for respondents no.1 & 2. I have also heard Shri Nikhil Vaze, the learned Counsel for respondent no.3 and Shri J.J. Mulgaonkar, the learned Counsel for respondent no.4.

6. It is submitted by Shri Bhobe, the learned Counsel for the petitioners that the Trial Court has erroneously observed that the ground that the amendment was necessitated on account of some inadvertence on behalf of the petitioners is not taken in the application for amendment. It is submitted that the said ground and the reason is mentioned in the application. Secondly, it is submitted that the Trial

Court has come to the conclusion in para 19 of the impugned order that the petitioners can file a fresh suit for declaration of exclusive ownership. The submission is that as such the amendment would be necessitated in order to avoid multiplicity of litigation/proceedings. It is further submitted that respondents no.1 & 2 are yet to close their evidence and, as such, they would get appropriate opportunity to contest the suit and no prejudice is likely to be caused to them if the amendment is allowed. He, therefore, submitted that the impugned order needs to be set aside.

7. Shri S.S. Kakodkar, the learned Counsel for the respondents no.1 & 2 submits that from the plaint allegations itself it is clear that the petitioners were aware of the Will at least from 30/11/2005. He submits that thus the petitioners could have challenged the Will, if so advised, right at the inception of the filing of the suit. It is submitted that even when the plaint was amended previously no such amendment was sought for. It is submitted that the learned Trial Court has rightly come to the conclusion that the proposed amendment would change the nature of the suit.

8. The learned Counsel for respondents no.3 & 4 had nothing much to add as the dispute is essentially between the petitioners and the

respondents no.1 & 2.

9. I have considered the rival circumstances and the submissions made by the parties. With the assistance of the learned Counsel for the parties I have perused the plaint, the application for amendment along with the proposed amendment, so also the impugned order. On hearing the learned Counsel for the parties, I do not find that any case for interference is made out in exercise of extra ordinary jurisdiction of this Court under Article 227 of the Constitution of India.

10. Indisputably, the suit as was initially filed was seeking injunction based on possession as a co-owner. The amendment now proposed, seeks to incorporate the declaration of exclusive ownership as also a challenge to the Will. The learned Trial Court after considering the decision of the Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers V/s. Narayanaswamy and Sons*** reported in ***2009 (6) ALL MR 986*** has analysed the rival circumstances and the submissions made and has come to the conclusion that the amendment was belated and thus was hit by the proviso to Rule 17 Order 6 of Civil Procedure Code. The learned Trial Court also came to the conclusion that the proposed amendment would change the nature of the suit and would cause prejudice to the respondents no.1 & 2.

11. A perusal of para 21 of the plaint would show that the petitioners had applied for the certified copy of the Will and got the same on 30/11/2005. If that be so, the learned Trial Court has rightly found that the petitioners had multiple opportunities to stake a challenge to the Will right from the inception of the suit, thereafter, when the inventory proceedings had commenced and they were decided and also when the plaint was previously amended. The petitioners did not avail of the opportunity. The said lapse cannot be brushed aside on the ground that it was on account of some inadvertence. Even assuming that the said ground is raised in the application, the same to my mind, has rightly been rejected by the learned Trial Court in the given circumstances. Although, the need to avoid multiplicity of proceedings is one of the considerations while granting amendment, that cannot always take precedence over other well established considerations which enter into the exercise of judicial discretion. The question is one of weighing different considerations, in the context of the facts and circumstances of each case.

12. In that view of the matter, merely because the Trial Court has found that the petitioners could file a separate suit, would not be sufficient to grant the amendment particularly, when it has been found,

and to my mind rightly so, that the amendment would change the nature of the suit and would cause prejudice to the respondents no.1 & 2. In that view of the matter, no case for interference is made out, in the absence of any jurisdictional error, in the impugned order. In the result, the Writ Petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

NH/-