

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 313 OF 2015

SHRI GANGARAM KAMAT, THROUGH POA
SAKHARAM KAMAT AND 2 ORS., ... Petitioners

Versus

MRS. TITA D'MELLO AND 16 ORS., ... Respondents

Mrs. Anarkali Agni, Senior Advocate with Ms. Kalpa Govekar,
Advocate for the Petitioners.

Mr. Valmiki Menezes, Advocate for the Respondent Nos. 1 to 8.

None appeared on behalf of the other respondents.

CORAM:- C. V. BHADANG, J.

DATE : 19th OCTOBER, 2015

ORAL ORDER:

By this petition, the petitioners/defendants are challenging the order dated 19.03.2015 below application (Exhibit-26) passed by the learned Civil Judge Junior Division, Panaji in Regular Civil Suit No. 267/2000/D. By the impugned order, the application (Exhibit-26) filed for amendment of the written

statement has been dismissed.

2. The brief facts are that the respondents herein filed a suit for eviction and possession of the petitioners (original defendant nos. 1, 2, 3) and one Mr. Vaman Sawant-(defendant no. 4) from the suit house and for other reliefs. That suit, is filed on 06.09.1991.

3. It appears that the defendant nos. 1 to 4 resisted the suit *inter alia* on the ground that one Mr. Madhukar G. Kamat, who was the uncle of defendant nos. 2, 3 and 4 and brother-in-law of defendant no. 1 was also residing in the suit house alongwith the father of defendant nos. 2, 3 and 4 as an elderly member. It was denied that there was a lease of the suit house executed in favour of Madhukar G. Kamat as contended on behalf of the plaintiffs. It was also denied that there was any renewal of the lease agreement as on 01.10.1988. Thus, while denying the case set up by the plaintiffs about Madhukar G. Kamat being a tenant, a specific defence was raised that defendant nos. 1 to 4 are the mundkars in respect of the suit house and they were residents

thereof, for the last more than 19 years.

4. It appears that the mundkarial issue was referred to the learned Mamlatdar, who rejected the claim of defendant nos. 1 to 4 on 16.03.2004. This was unsuccessfully challenged by the defendants before the learned Deputy Collector in appeal, thereafter before the learned Administrative Tribunal and finally before this Court in Writ Petition No. 733/2009, which was dismissed on 04.10.2013. This Court found that the defendants failed to establish that they were mundkars in possession of the house bearing No. E-119. It was also found that the defendants could not prove that they were in possession/occupation of the disputed premises, with the consent of the plaintiffs, from the year 1993. Be that as it may, after the dispute about the defendants being in possession of the suit house as mundkars, attained finality, the petitioners filed application (Exhibit-26) for amendment of the written statement on 19.11.2014 proposing to add paras 10 A and 10 B as under:

"10 A - The defendants state that their possession is adequate in continuity. It is clear that their possession became adverse qua the

plaintiff in the month of December 1973, itself, when the plaintiff tried to forcibly dispossess the defendants and the defendants rendered their attempts to do so futile. The defendants continued to have long and uninterrupted adverse possession for several years and for definitely more than the twelve years. The plaintiffs filed the present suit against them, only in the year 1991. The defendants therefore claim alternatively that they have perfected their title to the suit house by way of adverse possession as their continuous and uninterrupted possession to the suit house has ripened into title and the plaintiff who are barred by the law of limitation for not taking steps to disturb the possession of the defendants, stand dispossessed and they cannot sue the defendants to obtain possession. The defendants have been residing in the suit premises since the year 1973 and the plaintiffs were very well aware of the fact that they were in possession of the suit house. The defendants further state that sometime in the year 1973 the plaintiffs had attempted to forcibly remove the defendants from the suit premises, with the help of hired goons and the defendants, resisted this

attempt made by the plaintiffs. The defendants further state that thereafter the plaintiffs made no attempt whatsoever to evict these defendants from the suit premises.

10 B - The defendants further state that it is the claim of the plaintiffs that late Madhukar Kamat was the tenant of part of the suit house. The defendants further state that upon the death of late Madhukar Kamat, the present defendants have inherited his tenancy rights. The defendants therefore state that they are also tenants of part of the suit house and as such they cannot be dispossessed at the instance of the plaintiffs."

5. This was opposed on behalf of the respondents/plaintiffs. The learned trial Court by the impugned order has dismissed the application on two grounds. Firstly, it was found that the plea sought to be raised, although was not only an inconsistent plea, but was destructive of the original plea and secondly, the amendment was also hit by the proviso to Order 6 Rule 17 of C.P.C. Feeling aggrieved, the petitioners are before this Court.

6. I have heard Mrs. Agni, the learned Senior Counsel for the petitioners and Mr. Menezes, the learned Counsel for the respondent nos. 1 to 8. None appeared on behalf of the other respondents. With the assistance of the learned Counsel for the parties, I have perused the record and the impugned order.

7. It is submitted by Mrs. Agni, the learned Senior Counsel appearing for the petitioners that the findings recorded by the learned trial Court that the application for amendment is hit by the proviso to Order 6 Rule 17 of C.P.C. is not correct. Reliance in this regard is placed on the decision of the Hon'ble Apex Court in the case of **State Bank of Hyderabad Vs. Town Municipal Council**, reported in **(2007) 1 SCC 765**. It is submitted that in view of Section 16(2)(b) of the Amendment Act, 2002, the proviso would not be applicable in respect of the pleadings filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act of 1999 and Section 7 of the Amendment Act of 2002.

8. Insofar as the amendment being inconsistent and/or destructive of the earlier plea is concerned, it is submitted that different principles apply while considering the prayer for amendment of a plaint and a written statement. It is submitted that a prayer for amendment of the written statement may not attract same rigour as a prayer for amendment of the plaint can invite. It is submitted that the Courts have to be more liberal in allowing the amendment of the written statement. Reliance is placed on the decision of the Hon'ble Apex Court, in the case of **Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others**, reported in **(2007) 5 SCC 602**, in order to submit that mere delay may not come in the way of the application being granted, if the Court finds that the amendment is necessary for deciding the real controversy between the parties. The Court has wide discretion in this regard. The learned Senior Counsel has also placed reliance on the decision of the Hon'ble Apex Court, in the case of **Surender Kumar Sharma Vs. Makhan Singh**, reported in **(2009) 10 SCC 626** and a decision of this Court in the case of **Baburao Vishnu Naik Vs. Ramchandra Vishnu Naik and Another**, reported in **1989 (1)**

Goa Law Times (175). It is submitted that in the case of **Baburao Naik** (supra), the defendants in the earlier round, had taken a defence of ownership and then had sought to introduce a claim based on mundkarial rights, which was allowed. It is submitted that the impugned order be set aside and the amendment be granted.

9. On the contrary, it is submitted by Mr. Menezes, the learned Counsel appearing for the respondent nos. 1 to 8 that the amendment is not only belated, but also inconsistent and destructive of the earlier plea and the same would also cause serious prejudice to the respondents/plaintiffs and thus, has rightly been rejected. The learned Counsel has submitted that the amendment is contrary to the findings, recorded by this Court in Writ Petition No. 733/2009, while negating the claim of the petitioners of they being in possession of the suit house as mundkars. It is submitted that the proposed amendment would also amount to allowing a retraction from an admission. In other words, it is submitted that once, the petitioners have raised a plea of mundkarship, it necessarily presupposes that the possession

was permissive and the defence of adverse possession is clearly contrary to the plea earlier raised. He therefore submitted that the petition be dismissed.

10. I have carefully considered the rival circumstances and the submissions made.

11. In the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and sons and Others**, reported in **(2009) 10 SCC 84**, the Hon'ble Supreme Court has held that the first condition which must be satisfied before the amendment can be allowed by the Court is whether such amendment is necessary for the determination of the real question in controversy, this being the basic test which should govern the Court's discretion in grant or refusal of the amendment. It has been further held in para 59 as under:

"59. *The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice*

hardly any Court grants actual costs to the opposite side. The Courts have very wide discretion in the matter of amendment of pleadings but Court's powers must be exercised judiciously and with great care."

12. In para 61 of the judgment, the stage at which the amendment is sought, is found to be one of the relevant considerations.

13. Finally, in paras 63 and 64, it has been held thus:

"63. *On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:*

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case.

(2) Whether the application for amendment is bonafide or malafide.

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.

(4) *Refusing amendment would in fact lead to injustice or lead to multiple litigation.*

(5) *Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case and*

(6) *As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.*

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

64. *The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bonafide, legitimate, honest and necessary amendments and should never permit malafide, worthless and/or dishonest amendments."*

(Emphasis supplied)

14. Turning to the present case, it was not in dispute that in

view of Section 16 of the Amendment Act, 2002, the proviso to Order 6 Rule 17 of C.P.C. would not apply to the present case. Thus, the reason articulated and the finding reached by the learned trial Court based on the proviso to Order 6 Rule 17 of C.P.C., cannot be sustained. However, it is necessary to bear in mind that even prior to introduction of the proviso to Order 6 Rule 17 of C.P.C., the Courts were looking at the question of delay and laches as one of the relevant considerations while dealing with the prayer for amendment. The proviso to Order 6 Rule 17 of C.P.C. can at the best be seen as a legislative recognition of this well known consideration. Thus, although the proviso to Order 6 Rule 17 may not apply, the consideration of delay and laches cannot become entirely irrelevant or superfluous. It may be mentioned that the suit was filed in the year 1991, claiming that defendant nos. 1 to 4, inspite of the receipt of the notice dated 06.07.1991 had failed to vacate the suit house and even after the period of two years mentioned in the undertaking had elapsed. Insofar as the front and the back portion is concerned, it was claimed that the defendant nos. 1 to 4 had trespassed on the same on 15.08.1991. The defendant nos. 1 to 4 filed their written

statement in the suit some time in the year 1992. It was not disputed by the learned Counsel for the respondent nos. 1 to 8 that when the written statement was filed in the said suit, the plea which is now sought to be introduced, was very well available to the petitioners. If that be so, the prayer for amendment is grossly belated and without any explanation for not incorporating the said prayer in the written statement or seeking amendment at an earlier stage, except the contention that the mundkarial issue was pending before the competent authority.

15. In the case of **Usha Balashaheb Swami and Others** (supra), it has been held that the prayer for amendment of the plaint and the prayer for amendment of the written statement stand on different footing and the later prayer can be more liberally considered than the former one. It has been held in para 18 as under:

"18. *It is now well-settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer*

for amendment was not a bonafide one. In this connection, the observation of the Privy Council in Ma Shew Mya Vs. Maung Mo Hnaung may be taken note of. The Privy Council observed:

"All rules of courts are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit." "

(Emphasis supplied)

16. In the case of **Surender Kumar Sharma** (supra), it has been held that an application for amendment is not liable to be rejected, merely on the ground of delay. If the Court finds that in allowing the application, the real controversy between the parties may be resolved, the Court can allow such application where opposite party can be compensated by costs or otherwise.

17. The question whether there is delay/laches and if yes,

the quantum thereof, the circumstances in which the delay has occasioned or the reasons for such delay and whether such reasons are sufficient, as also the question whether the prayer itself is bonafide, would always be questions to be decided in the context of the facts and circumstances of each case.

18. Coming back to the present case, the petitioners initially contended that they are in possession of the suit house under independent mundkarial rights. The petitioners even denied the case of there being a lease and Madhukar G. Kamat being a tenant. By virtue of the proposed amendment, the petitioners are seeking to introduce a plea that they have become owners by adverse possession or have inherited the tenancy rights of Madhukar G. Kamat. On a careful consideration of the circumstances, it can clearly be seen that the amendment is not bonafide. There are at least two decisions namely, the cases of **Usha Balashaheb Swami and Others** and **Revajeetu Builders and Developers**, which would indicate that the Courts shall discourage such amendments, which are not bonafide and which are only designed to delay the proceedings. Thus, although as a

general principle, the prayer for amendment of written statement may be considered more liberally than a prayer for amendment of the plaint, the fact remains that the plea was available and could have been raised by the petitioners in the year 1992 itself. It is also significant to note that in the written statement, the petitioners have denied that Madhukar Kamat was a tenant. Now apart from the plea of adverse possession, a plea is also tried to be introduced that the respondents have inherited the tenancy rights of Madhukar Kamat. Thus, I do not find that the proposed amendment, which is now sought to be introduced after the petitioners have lost on the issue of they being in possession as mundkars, is bonafide. The case of **Baburao Vishnu Naik** (supra), would be distinguishable on the ground that the plea there was not found to lack bonafide. Furthermore, the proposed amendment would also cause serious prejudice to the respondents. These are some of the considerations, which have been held to be relevant in paragraph 18 of the judgment in the case of **Usha Swami and others** (supra). Thus, I find that the impugned order, refusing the amendment, will have to be sustained, albeit for reasons other than the one articulated by the

learned Trial Court.

19. In the result, the petition is without merits and is hereby dismissed, with no order as to costs.

C. V. BHADANG, J.

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