

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.413 OF 2015**

1. Mr. Robert Lobo
major of age, married,
2. Mrs. Milagrina Lobo
major of age,
Both presently r/o. Dhamede,
Tivim, Bardez, Goa.
H.No. not known. .. Petitioners

Versus

1. Mr. Alwyn Rodrigues,
(now since deceased)
through Legal Representatives
- (a) Mat. Xylon Alwyn Rodrigues,
minor in age, student,
- (b) Ms. Xenia Rodrigues,
minor in age, student,
and herein represented by their
guardian Mrs. Natty Rodrigues,
All r/o. H. No.1503, Piquen Chivar,
Anjuna, Bardez-Goa.
2. Mrs. Natty Rodrigues,
Major of age, widow,
r/o. H.No. 1503, Piquen Chivar,
Anjuna, Bardez-Goa. .. Respondents.

Mr. Ressano De Noronha, Advocate for the petitioners.

Mr. R. G. Rivankar, Advocate for the respondents.

CORAM :- F. M. REIS,J.

DATE : 9th June, 2015

ORAL JUDGMENT :

Heard Shri Ressano De Noronha, the learned Counsel appearing for the petitioners and Shri R. G. Rivankar, the learned Counsel appearing for the respondents.

2. Rule. Heard forthwith, by consent.

3. The learned Counsel appearing for the respondents waives service.

4. The above petition, *inter alia*, seeks to challenge the order passed by the Civil Judge, Junior Division at Bicholim dated 18/10/2014, whereby the application for amendment of written statement filed by the petitioners came to be dismissed.

5. Upon hearing the learned Counsel appearing for the respective parties, I find that a suit for injunction and restoration of possession in respect of the suit property Survey No.424/0 situated at village Tivim came to be resisted by the petitioners on the ground that the disputed construction has been put up in the property Survey No.426/0 of the same village. It is pointed out by the learned Counsel appearing for the petitioners that on

29/06/2013 and 04/04/2014, the petitioners came to know about the existence of the Tombo plan and other relevant documents from the concerned Comunidade, which according to the petitioners, *inter alia*, disclose that the disputed structure is in fact located in the property bearing Lote No.405 of the said village and as such, the Written Statement was being amended accordingly. The amendment application was resisted by the respondents on different counts and the learned Judge, by the impugned order dated 18/10/2014, has rejected the application for amendment.

6. On perusal of the impugned order, I find that the learned Judge has not at all applied his mind and given any reason for rejecting the application for amendment. It is expected of the learned Judge when rival contentions are raised, to examine such contentions and after appreciating such submissions, pass a reasoned order by recording findings therein. Such failure itself is an error of jurisdiction committed by the learned Judge, while passing the impugned order.

7. Be that as it may, in order not to delay the proceedings further, I heard both the learned Counsel with regard to the application for amendment filed by the petitioners.

The application for amendment essentially relies upon the Tombo plan and Tombo register and the report of a Surveyor in support of their contentions. Tombo plan and the Tombo register are public documents and as such, the authenticity thereof cannot be disputed. As far as the report is concerned, the petitioners point out that the concerned private surveyor would be examined and as such, the respondents would have an ample opportunity to cross-examine such Surveyor.

8. The fact, which remains to be examined is whether by the proposed amendment, the case of the respondents would be displaced. As pointed out by the learned Counsel appearing for the respondents, the suit property is survey no.424/0 of Tivim Village. The suit property is not being changed by the proposed amendment. The only aspect, which is sought to be claimed by the petitioners, is that the Tombo plan reflects that the suit property Survey No.424/0 is a part and parcel of the property of the Comunidade. Whether the petitioners would succeed to establish the said aspect, would be considered after recording of evidence. But, however, raising a defence of such nature by itself does not displace the case of the respondents. The question of showing due diligence for not filing such an application for amendment before the commencement of trial

would not arise in the present case as it is the contention of the petitioners that they learnt about such document in April, 2014, much after the trial started and there is no material to the contrary. In any event, considering that the defence sought to be raised is based on public documents, I find that the learned Judge was not justified to pass the impugned order, refusing the application for amendment as it is pointed out that such amendment is necessary for effectually deciding the dispute on merits. In view of the above, the learned Judge was not justified to refuse the application for amendment. No doubt, prejudice caused to the respondents by allowing such an amendment application at this stage, would have to be taken care of, while granting leave to amend the Written Statement.

9. In this connection, this Court while disposing of Writ Petition No.697/2012, by Judgment dated 19th October, 2012, relying upon a Judgment of the Apex Court, has observed at para 7, thus :

7. The next contention of the learned Counsel appearing for the Respondent is that there was no due diligence on the part of the Petitioner in pursuing their remedy to seek such relief before the trial started. No doubt, after the amendment of the

*Civil Procedure Code, in the year 2002, the discretion of the Court granting an amendment is curtailed, nevertheless, it is well settled that all amendments which are necessary to decide the dispute are to be allowed. In this connection, a recent Judgment of the Apex Court dated 27.09.2012 in **Civil Appeal no. 7043 of 2012** in the case of **Abdul Rehman & Anr vs. Mohd. Ruldu & Ors.**, after considering the amendment to Order 6 Rule 17 of the Civil Procedure Code, has observed at paras 7, 8 and 15, thus :*

“7) It is clear that parties to the suit are permitted to bring forward amendment of their pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them. The Courts have to be liberal in accepting the same, if the same is made prior to the commencement of the trial. If such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

8) The original provision was deleted by Amendment Act 46 of 1999, however, it has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The above proviso, to some extent, curtails absolute discretion to allow amendment at any stage. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of allowing the amendment is to minimize the litigation and the plea that the relief

sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case. The above principles have been reiterated by this Court in J. Samuel and Others vs. Gattu Mahesh and Others, (2012) 2 SCC 300 and Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd. and Others, (2012) 5 SCC 337. Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment. (emphasis supplied)

15) We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties."

Taking note of the said observations and, as it is pointed out by the petitioners that the proposed amendment would be necessary to decide the controversy in the suit and corroborates the alleged defence raised in the original written

statement, the learned Judge was not justified to refuse the leave to amend the written statement.

10. It is pointed out by the learned Counsel for the respondents that the evidence of the respondents has already been closed. In such circumstances, the respondents will be entitled to lead rebuttal evidence in answer to the amendment sought by the petitioners as well as on the documents, which are sought to be relied upon. Reserving the right of the respondents to rebut the evidence, I find that the application for amendment filed by the petitioners deserves to be granted, subject payment of costs. The costs are quantified at Rs.5,000/-, to be paid by the petitioners to the respondents as condition precedent. Hence, I pass the following order :

ORDER

- (i) The impugned order dated 18/10/2014 is quashed and set aside.
- (ii) The application for amendment filed by the petitioners is allowed, subject to payment of costs of Rs.5,000/- as condition precedent.
- (iii) Needless to say that the respondents are entitled to lead rebuttal evidence and produce any

further material or documents in answer to the documents produced as well as amended pleadings of the petitioners, after the evidence of the petitioners is closed.

(iv) Rule is made absolute in the above terms.

F. M. REIS, J.

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