

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.659 OF 2015**

1) Shri Prabhakar V. Dabholkar,
son of Vithal Babaji Dabholkar,
service, married to,

2) Smt. Kanchan Dabholkar,
major, housewife,
Both residents of 484, Vagator,
Bardez-Goa.

3) Shri Kishore V. Dabholkar,
son of Vithal Babaji Dabholkar,
businessman, major,

Resident of 484, Vagator,
Bardez-Goa.

..

Petitioners

V/s

1) Ms. Jennifer Jane Gomes,
of major age, resident of 399,
"Tin-Dan", Danua, Tivim,
Bardez-Goa.

2) Smt. Tassim Kandolkar,
daughter of Vithal Babaji
Dabholkar, major, married
to,

3) Shri Ashok Kandolkar,
service, major,

Both residents of Chimbél,
Ribandar, Ilhas-Goa.

4) Smt. Devta Dabholkar,
daughter of Vithal Babaji
Dabholkar, spinster, resident
of 484, Vagator, Bardez-Goa.
Major.

..

Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar, Advocate for the petitioners.

Ms. S. Walwaikar, Advocate for the respondent no.1.

Coram:- C. V. BHADANG, J.

Date:- 13th October, 2015

ORAL ORDER :

By this petition, the petitioner /original defendant is challenging the order dated 28/04/2015 passed by the learned Civil Judge, Senior Division, Mapusa in Special Civil Suit No.497/1989/A. By the impugned order, the application filed by the respondents/ plaintiffs for amendment of the plaint is allowed.

2. The brief facts, necessary for the disposal of the petition, may be stated thus :

That one Adelia Albuquerque and two others filed Special Civil Suit No.497/1989/B against Vithal Dabholkar and seven others for eviction and possession of the suit house. That suit was filed on 15/12/1989. It appears that on the death of all the three plaintiffs, the present respondents came on record on the basis of a will. The petitioners are the original defendant nos.2, 3 and 4 before the Trial Court. It appears that on behalf of

the original defendants, a contention about the dwelling house, being in possession, in the capacity of mundkars was raised and accordingly, the learned Trial Court framed an issue and the said issue was referred to the competent authority. The matter ultimately came to this Court, in which the issue was remanded to the learned Mamlatdar for deciding it afresh, in accordance with law. It appears that on account of death of some of the parties, an application was moved before the Mamlatdar for bringing the legal representatives, when the learned Mamlatdar held that the proceedings have already abated. Indisputably, that order is subject matter of challenge in appeal before the Deputy Collector.

3. It is undisputed that on account of the fact that the issue about Mundkarial rights was referred to a Competent Authority and was pending there, the proceedings in the suit were stayed, awaiting the decision of Competent Authority. An application came to be moved on behalf of the original plaintiffs on 01/04/2015 for amendment of the plaint. As per paragraph 5(I) of the application, paragraph nos.29(a) to 29(m) were proposed to be incorporated in the plaint. As per paragraph 5(II), the following portion was proposed to be added at the end of paragraph 32 :

*“Further the prayer (b) is valued for Rs.1000/- and
prayer (c) for Rs.75 lakhs and advalourem court fees*

is paid herewith."

4. Lastly, as per paragraph 5(III), the following prayer clauses (b) and (c) were proposed to be added :

" (b) The defendants, their agents, servants, family members or any person acting on their behalf be restrained from doing any damage to the suit house and the compound wall of the suit property and or carrying out any construction whatsoever in the suit property and/or changing the nature of the suit property in any manner whatsoever by passing decree of permanent injunction.

(c) The Hon'ble court be pleased to pass a decree ordering the defendants jointly and severally to pay damages of Rs.75 Lakhs to the plaintiffs."

5. It appears that the application was opposed on behalf of the present petitioners, *inter alia*, on the ground that the amendment seeks to enlarge and widen the scope of the suit and that too, after about 25 years of the institution of the same. It was also contended that by the proposed amendment, an entirely new cause of action is sought to be included, which is inconsistent with the existing claim.

6. The learned Trial Court, after hearing the parties, by the impugned order dated 28/04/2015 has allowed the application.

Feeling aggrieved, the petitioners are before this Court.

7. I have heard Shri Lotlikar, the learned Senior Counsel for the petitioners and Ms. Walwaikar, the learned Counsel for the respondent no.1. With the assistance of the learned Counsel for the parties, I have perused the copies of the relevant record as also the impugned order.

8. It is submitted by Shri Lotlikar, the learned Senior Counsel for the petitioners that once the proceedings in the suit were stayed on account of mundkarial issue being referred to the Competent Authority, the amendment application could not have been filed and entertained. It is next submitted that although the petitioners may not have any objection for incorporating paragraphs 29(a) and 29(b), the rest of the amendment has the effect of changing the nature of the suit, for which, the plaintiffs have to file a separate suit. It is further submitted that a perusal of the proposed amendment would show that it is based on subsequent cause of action, which is said to have arisen on 02/04/2014 i.e. much after the institution of the suit. It is next submitted that by the proposed amendment, the suit for eviction is sought to be converted into a suit for permanent injunction, which is not permissible. The learned Senior Counsel would also submit

that the observations of the learned Trial Court that the suit was at a pretrial stage, is not correct, in as much as, in the reference before the Mamlatdar, the evidence was already recorded and thus, in a sense, the trial in the suit had already started.

9. On the contrary, it is submitted by the learned Counsel appearing for the contesting respondent that the amendment is necessitated on account of the events subsequent to the filing of the suit. It is submitted that the proposed amendment is based on the acts of the petitioners, who are trying to effect certain construction and alterations in the suit house. It is also submitted that the amendment does not have any effect of changing the nature of the suit and on the contrary, it is aimed at avoiding multiplicity of the proceedings. Lastly, it is submitted that recording of evidence, in the reference before the Mamlatdar cannot have the effect of “commencement of the trial” in the suit. Thus, the Trial Court has rightly observed that the suit was at a pretrial stage.

10. I have considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. At the outset, it needs to be mentioned that the suit is for eviction and possession of a dwelling house, in respect of

which, the petitioners/ contesting defendants have raised an issue of mundkarship, which is pending before the Competent Court. It is also undisputed that on account of the referral of such an issue, the proceedings in the suit are stayed. However, merely because the hearing/ proceedings of the suit are stayed, would not preclude a party from filing an application or taking steps, which may be merely in the nature of steps-in-aid, for keeping the *lis* alive. For instance, in a suit, which is stayed, if there is death of any of the parties, it cannot be said that the plaintiff would be precluded from filing an application for bringing the legal representatives on record. On the contrary, such acts or steps-in-aid would be necessary to keep the *lis* alive. In my considered view, if on account of some subsequent events, some amendments are necessitated, the mere fact that the proceedings in the suit are stayed, would not preclude the party from filing any such application for amendment and the Court entertaining the same. Stay of the proceedings of the suit, in such cases, is essentially on account of the fact that a particular issue arising in the suit (in the present case about the mundkarial rights) cannot be decided by the Civil Court and has to be relegated to the Competent Authority. Thus, the hearing of the suit in so far as the main controversy is concerned has to wait till the result of such reference to the Competent Authority. But that may not have any

effect in so far as a party filing an application for amendment is concerned. In that view of the matter, in my humble opinion, the submission that because the proceedings in the suit are stayed, no application for amendment could have been made or entertained, cannot be accepted.

11. This takes me to the submission about the amendment having the effect of changing / enlarging the scope of the proceedings. As noticed earlier, the suit is for eviction of a dwelling house. In so far as the proposed amendment by incorporation of paragraph nos.29(a) and 29(b) is concerned, the learned Senior Counsel appearing for the petitioners has fairly submitted that he may have no objection for the same. Thus, it will have to be seen whether the proposed amendment by incorporation of paragraphs 29(c) to 29(m) and the proposed amendment in paragraphs 5(II) and 5(III) as above, can be said to have either enlarged or changed the nature of the suit. A bare perusal of the proposed amendment would show that according to the plaintiffs, on 02/04/20014, it was noticed that the defendants had demolished a substantial part of the existing compound wall and were digging trenches with the intention of carrying out some construction. At this stage, it is not necessary to go into the correctness or otherwise of the allegations, which can be only

gone into at the trial of the suit. Suffice it to mention that according to the respondents/ plaintiffs, the amendment was necessitated on account of certain developments, which were noticed on 02/04/2014. I have carefully gone through the paragraphs, which are proposed to be added, including the prayer clause and I am unable to accept that the proposed amendment will have the effect of changing the nature of the suit as such, so as to cause embarrassment and/ or to stifle the trial. It is needless to mention that the respondents/ plaintiffs shall get every opportunity to contest the amendment on all grounds, as may be available to them on facts and on law.

12. In so far as the stage, at which the amendment application is filed is concerned, undoubtedly, the application is filed in a suit, which is instituted in the year 1989. However, the fact remains that the evidence of the parties is yet to start in the suit. I am unable to persuade myself to accept the submission that because in the proceedings in the reference of the mundkarial issue, the parties had led evidence, the trial in the suit can be said to have commenced. In fact, such an interpretation would be contrary to the requirement that the proceedings in the suit have to be stayed and have to await the determination of the issue by the Competent Authority. In that view of the matter, the trial of

the material issues in the suit only can commence after the Competent Authority answers the reference on the mundkarial issue. Thus, in my considered view, no exception can be taken to the finding recorded by the learned Trial Court that the suit was at a pretrial stage, when the application for amendment came to be filed.

13. The scope and ambit of the discretionary power available to the Court under Order VI, Rule 17 of Code of Civil Procedure fell for consideration of the Hon'ble Supreme Court in the case of ***Revajeetu Builders and Developers Vs. Narayan Swami and sons and others***, reported in (2009)10 SCC 84.

The Hon'ble Apex Court, after taking a survey of the decisions holding the field, in paragraph 63 of the judgment, has set out the factors, which have to be taken into consideration while considering a prayer for amendment, which are as under :

“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 bona*

fide or mala fide;

(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 VI Rule 17. These are only illustrative and not exhaustive."

14. In the present case, amendment would be imperative for proper and effective adjudication of the case as also refusal of the same, would lead to multiplicity of the litigations, which has to be avoided. I find that the proposed amendment is only aimed at preserving the status-quo as to the dwelling house and in that view of the matter, has been rightly allowed by the learned Trial Court. In that view of the matter, I do not find that any case for interference is made out in the exercise of extraordinary jurisdiction of this Court. The Writ Petition is without any merits

and is hereby dismissed.

The petitioners would be entitled to file additional written statement, if any, to the proposed amendment, within a period of six weeks.

C. V. BHADANG, J.

SMA