

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.283 OF 2016**

Shri Thomas Aloysious Ranjit
Sales Pontes alias Ranjit
Sales Pontes, Son of late
Thomas Anthony Sales Pontes,
Major in age, unmarried,
service, resident of House
No.J-15, Reliance, Park,
Seraulim, Salcete-Goa.

.... Petitioner

V/s

- 1 Shri Isidoro Caetano
Martins
son of late Jose
Francisco Emitterio
Hilario Martins, aged 68
years, unmarried,
- 2 Miss Eliza Divina Pastora
Martins (expired)
Daughter of late Jose
Francisco
Emitterio Hilario Martins
Aged 65 years, spinster,
- 3 Smt. Angela Martins,
Aged 48 years, housewife,
- 4 Miss Rosinha Consolacao
Martins
Daughter of Minguel
Arcanjo Martins,
Aged 24 years, spinster,
teacher,
- 5 Shri Adolpho Joseph

Martins
Son of Minguel Arcanjo
Martins, aged 23 years,
service, and

- 6 Shri Silvestre Cruz
Martins,
Son of Minguel Arcanjo
Martins,
aged 22 years, service,

The Plaintiff No.2
represented herein by her
attorney the Plaintiff
No.6,
all residents of House
No.90, Candelem, Orlim,
Salcete, Goa.

- 7 Shri Francisco Simao
Fernandes alias Simon
Fernandes, son of Rosario
Fernandes, major in age,
married, service and his
wife,

- 8 Smt. Elizabeth Fernandes,
major in age,

Both residents of House
No.10, Chadvaddo, Varca,
Salcete, Goa.

.... Respondents

Shri Preetam Talaulikar, Advocate for the
Petitioner.

Shri Vinoj Daniel, Advocate for Respondents
No.1,3 & 4.

CORAM : C.V. BHADANG, J.

DATE : 2nd AUGUST, 2016

ORAL JUDGMENT :

Rule made returnable forthwith. The learned Counsel for the respondent nos.1,3 & 4 waives service. In this case, notice for final hearing was issued. None appears for the rest of the respondents. Heard finally with the consent of the parties.

2. The petitioner is the original defendant no.3 in Special Civil Suit No.138/2006/A pending on the file of the learned Senior Civil Judge at Margao. That is a suit filed by the respondent nos.1 to 6 against the respondent nos.7 & 8 and the petitioner. The respondents/plaintiffs are seeking declaration and restoration of possession in which the petitioner has raised a counter claim seeking specific performance of an Agreement of Sale dated 6/01/1999. It appears that the petitioner moved an application for amendment (Exhibit D-54) for amending the written statement/counter claim by correcting the date of the agreement as 6/02/1999 in the

place of 6/01/1999. The learned Trial Court by order dated 20/12/2012 has rejected the application on the ground that it is hit by the proviso to Rule 17 of Order 6 of Civil Procedure Code, as the same was filed, when the defence evidence was going on.

3. It appears that the respondents/plaintiffs filed an application styled as a memo (Exhibit 63) stating that the evidence of the petitioner to the effect that the actual date of agreement is 6/02/1999 and the date mentioned as 6/01/1999 is by way of typographical error was, beyond pleadings and, therefore, requesting the Court to strike off the said part from the affidavit-in-evidence of the petitioner. The learned Trial Court by order dated 6/07/2015 allowed the said application-Exhibit 63 and the part of the examination-in-chief was struck off.

4. It further appears that the petitioner filed an application Exhibit 66 for review of the said

order which has been dismissed on 16/12/2015. In the last mentioned order, the Trial Court has found that once the amendment of the written statement/counter claim, was disallowed the evidence on the aspect of the discrepancy of the date, cannot be permitted to be led and, thus, there was no error apparent on the face of the record by which the part of the affidavit-in-evidence was struck off. All the aforesaid three orders, are subject matter of challenge in this petition.

5. I have heard the learned Counsel for the petitioner and the learned Counsel appearing for the contesting respondent nos.1,3 & 4.

6. During the course of the hearing at bar, the petitioner has produced the affidavit of the concerned notary Jose Joey Rodrigues dated 12/07/2016 enclosing a copy of the notarial register containing the entry at serial no.85 which is dated 6/02/1999 under which the

Agreement of Sale was notarised.

7. The respondent no.1 Shri Isidoro Caetano Martins has filed counter affidavit-in-reply.

8. The learned Counsel for the petitioner states that there was an inadvertent error while recording the date on the agreement as 6/01/1999 when in fact the agreement was notarised on 6/02/1999. He submits that this would be apparent from the affidavit sworn by the notary which is also supported by the relevant entry in the notarial register. He submits that it being a bonafide error arising out of oversight and/or accidental slip or omission needs to be corrected. The learned Counsel submits that all such amendments, which are necessary for deciding the controversy in dispute, have to be allowed and the Court can permit any such amendment at any stage of the suit. The learned Counsel points out that it was on account of the inadvertence that the said error has cropped in

and this would be sufficient for the Court to have exercised jurisdiction to allow the amendment as the petitioner inspite of due diligence could not bring the said amendment earlier.

9. The learned Counsel for contesting respondents has strenuously urged that the amendment cannot be allowed. The learned Counsel has referred to the evidence led by the parties in which the petitioner/DW2 has been extensively cross-examined on the point of the said agreement. It is submitted that the application for amendment was belated and has been rightly dismissed. The learned Counsel also points out that the petitioner did not challenge the order passed on 20/12/2012 and cannot be permitted to do so at a belated stage. The learned Counsel submits that the impugned order does not demonstrate any jurisdictional error and, therefore, this Court may not interfere with the same.

10. I have carefully considered the rival circumstances and the submissions made. It is now well settled that the Court can allow all such amendments which are necessary for deciding the real controversy in the matter. In the present case, the issue about the date of the agreement arose inasmuch as the details of the Deed of Partition dated 3/02/1999 were incorporated in the agreement, which according to the learned Counsel for the respondent could not have been done, if the agreement was executed on 6/01/1999. It was because of this, that the petitioners moved an application for amendment. The subsequent orders are only consequential to the order by which the application Exhibit D-54 was rejected. Be that as it may, in my considered view, the petitioner has now produced the affidavit of the concerned notary along with the copy of the relevant entry of the notarial register which prima facie shows the date of notarisation as 6/02/1999. In such

circumstances, I find it appropriate that the learned Trial Court reconsiders the application for amendment in accordance with law.

11. In that view of the matter, the following order is passed:

(i) The petition is partly allowed.

(ii) The impugned orders dated 20/12/2012, 6/07/2015 and 16/12/2015 are hereby set aside.

(iii) The application Exhibit D-54 is remitted back to the Trial Court for deciding it afresh after hearing the parties in accordance with law.

(iv) The petitioner shall be entitled to produce the copy of the affidavit dated 12/07/2016 along with the copy of the relevant entry in the notarial register, before the Trial Court.

(v) Needless to mention that this Court has not expressed any opinion on the rival contentions, which are left open.

(vi) Rule is partly made absolute in the aforesaid terms with no order as to costs.

C.V. BHADANG, J.

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