

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NOS.20 AND 631 of 2016

WRIT PETITION NO.20 of 2016

1. Mr. Francisco Agnelo Soares,
s/o late Justino Soares,
business
2. Mrs. Hycintha Pamela Soares,
wife of Francisco Soares,
Housewife,
3. Mrs. Angela Soares e Souza,
d/o late Justino Soares,
housewife,
4. Mr. Macario Souza,
s/o Lawrence Souza, business,
all major of age, Indian Nationals,
r/o H.No.1015, Primeiro Bairro,
Santa Cruz, Tiswadi, Goa. .. Petitioners

Versus

1. Fabrica de Igreja de St. Cruz
Through its Attorney,
Having office at St. Cruz
Church, Santa Cruz, Tiswadi,
Goa.
2. Mrs. Maria Conceicao Yonne
Mascarenhas e Gonsalves,
wife of Bismark Eugenio Pacelli
Rego Gonsalves, aged 50 years,
married, housewife, Indian
National, resident of St.
Agostinho Wado, Opposite of
Dr. Cardoso Residence, Santa Cruz,
Tiswadi, Goa.
3. Mrs. Iveta Cleophas Felicidade
Soares, wife of Felix Fernandes,
housewife,
4. Mr. Felix Fernandes,
s/o Mr. Peter Fernandes, Service,
both Indian Nationals,

5. Mr. Candido Manuel Soares,
s/o late justino Soares,
business,
6. Mrs. Nancy Dias e Soares,
wife of Candido M. Soares,
Teacher, both major of age,
Indian Nationals,
Defendants Nos.3 to 6
r/o House No.1015, Primeiro
Bairo, Santa Cruz, Tiswadi,
Goa.
(Respondent nos.3 to 6 are
deleted as per order
dated 18/02/2016) .. Respondents

Mr. D. Zaveri, Advocate for the petitioners.

Mr. F. E. Noronha and Ms. Sweta Sawant, Advocates for
the respondent no.1.

Mr. V. R. Parsekar, Advocate for the respondent no.2.

WITH
WRIT PETITION NO.631 of 2016

Mrs. Maria Conceicao Yonne
Mascarenhas e Gonsalves,
wife of Bismark Eugenio Pachelli
Rego Gonsalves, aged 50 years,
married, housewife, Indian
National, resident of St.
Agostinho Wado, Opposite of
Dr. Cardoso Residence, Santa Cruz,
Tiswadi, Goa.
Through Power of Attorney Holder,
Selwyn A. Botelho .. Petitioner

Versus

1. Mr. Francisco Agnelo Soares,
s/o late Justino Soares,
business
2. Mrs. Hycintha Pamela Soares,
wife of Francisco Soares,
Housewife,
3. Mrs. Angela Soares e Souza,

d/o late Justino Soares,
housewife,

4. Mr. Macario Souza,
s/o Lawrence Souza, business,
all major of age, Indian Nationals,
r/o H.No.1015, Primeiro Bairro,
Santa Cruz, Tiswadi, Goa.
5. Fabrica de Igreja de St. Cruz
Through its Attorney,
Having office at St. Cruz
Church, Santa Cruz, Tiswadi,
Goa.
6. Mrs. Iveta Cleophas Felicidade
Soares, wife of Felix Fernandes,
housewife,
7. Mr. Felix Fernandes,
s/o Mr. Peter Fernandes, Service,
both Indian Nationals,
8. Mr. Candido Manuel Soares,
s/o late Justino Soares,
business,
9. Mrs. Nancy Dias e Soares,
wife of Candido M. Soares,
Teacher, both major of age,
Indian Nationals,

Respondent Nos.6 to 9
r/o House No.1015, Primeiro
Bairro, Santa Cruz, Tiswadi,
Goa.

.. Respondents

Mr. V. R. Parsekar, Advocate for the petitioner.

Mr. F. E. Noronha and Ms. Sweta Sawant, Advocates for
the respondent no.5.

Mr. D. Zaveri, Advocate for the respondent nos. 1, 2, 3
and 4.

CORAM :- C. V. BHADANG, J.

Reserved on :- 9th JUNE, 2016.

Pronounced on :- 4th JULY, 2016

ORAL JUDGMENT :

Rule. Rule, made returnable forthwith. The learned Counsel for the respondents waive service. Heard finally by consent of the parties.

2. Both these petitions arise out of the order dated 26/11/2015 passed by the learned Senior Civil Judge at Panaji in SCS No.14/11/B.

3. The petitioners in W.P.No.20/2016 are the original plaintiffs while Writ Petition No.631/2016 is filed by the original defendant no.2 in the said suit. For the sake of convenience, the parties are referred to, in their original capacities, as plaintiffs and defendants.

4. The plaintiffs filed the aforesaid suit for declaration, that the plaintiffs and original defendant nos.3 to 6 are the owners and are in possession and enjoyment of the suit property, more particularly described in para 2 of the plaint. The plaintiffs are seeking a direction to the Survey Authorities to delete

the names of the defendant nos.1 and 2 from the occupant's column in respect of the suit property (Survey No.28/1) by substituting the names of the plaintiffs and the defendant nos.3 to 6 in the occupant's column. The plaintiffs are seeking a further declaration that the Sale Deed dated 10/05/2006 executed by defendant no.1 in favour of defendant no.2 before the Sub-Registrar of Ilhas, is null and void and for restraining the defendant nos.1 and 2 or anybody on their behalf from interfering in the suit property, carrying out any construction thereon or creating a third party interest therein. The plaintiffs are also seeking a mandatory injunction directing demolition of the compound wall, constructed around plot I of the suit property.

5. On 04/04/2015, the plaintiffs filed an application (Exh.D-80) for amendment of the plaint as set out in Annexure A to the application, thereby seeking addition of paras 3-A to 3-C, 8-A to 8-D, 10-A to 10-C, 17-A, 18-A to 18-E and addition of prayer clauses b(i) to b(iv). Admittedly, this application is filed at pre-trial stage.

6. The defendant nos.1 and 2 opposed the said

application by filing separate replies. It was contended that the plaintiffs are trying to introduce new facts and prayers, which are barred by limitation and the same will cause prejudice to these defendants.

7. The learned Trial Court, by the impugned order, has partly allowed the application, permitting incorporation of paras 3-A to 3-C, 10-A to 10-C, 18-D and 18-E and prayer clauses b(iii) to b(iv). Indisputably, the amendment allowed, pertains to defendant no.2, while the amendment disallowed pertains to defendant no.1. In such circumstances, the plaintiffs have filed W.P.No.20/2016 challenging the part of the order disallowing the amendment to the extent pertaining to defendant no.1 while the defendant no.2 has challenged the impugned order granting the amendment.

8. I have heard the learned Counsel for the parties and have gone through the averments made in the plaint as also the Written Statement and the impugned order.

9. In the suit, as originally filed, the plaintiffs have only sought a declaration that they

along with the defendant nos.3 to 6 are the owners in possession and enjoyment of the suit property and that the Sale Deed dated 10/05/2006 executed by the defendant no.1 along with defendant no.2 purporting to sell 459 square metres of area from out of land Survey No.28/1 to the defendant no.2 is null and void, with some other reliefs. The plaint allegations would show that the land Survey No.28/1 admeasuring 9741 square metres, which is referred to as bigger property, known as "PALMAR DA VIGARIO" is described as the entire property out of which the aforesaid area was allegedly sold to defendant no.2. The plaintiffs came with a case that they are in exclusive possession and enjoyment of the said "entire property" (under Survey Nos.28/1 and 28/2) since the time of its purchase by the Deed of Sale dated 15/12/1886. It was contended that Pedro Manuel Diniz was the grandfather of Mrs. Aurora and the great grandfather of the plaintiffs and the defendant nos.3 to 6. It was contended that after the demise of Mrs. Aurora on 26/02/2009, the plaintiffs have become the exclusive owners in possession and enjoyment of the said property. It can, thus, be seen that the suit as originally filed, did not seek the relief of possession.

10. The defendant no.1 denied that the plaintiffs have become owner and were in possession of the suit property by virtue of the Sale Deed dated 15/12/1886. Without prejudice to this, it was contended that the Sale Deed is illegal, null and void. It was also contended that the Sale Deed pertains only to some structure and not the land underneath. It was contended that the defendant no.1 is the owner and the Sale Deed executed in favour of the defendant no.2 is legal and valid.

11. The defendant no.2 also set up a case more on less on similar lines. It was contended that the defendant no.1 validly sold plot No.I to the defendant no.2 and it was done openly and not clandestinely as alleged.

12. Let us now consider the proposed amendment (Annexure A to the application). Vide paras 3A, 3B and 3C, the plaintiffs want to add the particulars as to the Deed of Sale dated 15/12/1886 and the flow of title as claimed by them. This part has been allowed by the learned Trial Court.

13. In para 8A to 8D, the plaintiffs want to introduce a case that the defendant no.1, some time in the year 1972, had encroached on the suit property and had constructed a building covering an area of 990.70 square metres on the same. It was contended that the defendant no.1 has thereafter encroached on the suit property "to the extent of" 3292.64 square metres. It is also contended that the construction of the building was without licence or any proprietary rights. The plaintiffs want to introduce pleading for claiming mesne-profits from the defendant no.1 at the rate of Rs.60,000/- per month from 01/01/1972 till the actual handing over of the vacant and peaceful possession of the part of the said property, which is encroached.

This amendment has been disallowed on the ground that it is barred by limitation. Introduction of para 17A, which again refers to the alleged encroachment by defendant no.1 and occupying the building without mandatory occupation certificate, has been disallowed. The amendment in paras 18A to 18C, inter alia for mandatory injunction against the defendant no.1 to demolish the illegal building, has also been rejected. The prayer clauses (bi) and (bii) seeking possession of the encroached portion from

defendant no.1 and the mesne-profits has been refused for a similar reason.

14. The contention on behalf of the plaintiffs is that the suit for possession based on title, which is governed by Article 65 of the Limitation Act cannot be said to be barred by limitation in the absence of a plea of adverse possession being set up by the defendant. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Mohammadbhai Kasambhai Sheikh and others Vs. Abdulla Kasambhai Sheikh**, (2004)13 SC 385 and a decision of this Court in the case of **Mario Cotta Pereira Vs. State of Goa and others**; 2010(6) Mh.L.J. It appears that before the learned Trial Court reliance was also placed on the decision in **Narayan Vs. Trimbakrao**; AIR 1988 Bombay 94 on behalf of the plaintiffs. The learned Trial Court has held that and to my mind rightly so, that the case of **Narayan** (supra), would be distinguishable as in that case, the execution of Sale Deed by one Trimbakrao in favour of the plaintiffs in respect of half portion of the suit house was admitted. However, a defence was set up that the said transaction was a English Mortgage and the possession of the half share and ownership continued with the defendants. That apart, in that

case, the suit was initially filed before the Civil Judge, Senior Division on 27/08/1964 and the Sale Deed was executed on 27/08/1952 and thus, the decision in the case of **Narayan** (supra), cannot come to the aid of the plaintiffs. The case of **Mohammadbhai** (supra) arose out of a dispute between the heirs of one Mohammadbhai. The Hon'ble Apex Court has held that under the Mohammadian Law, heirs succeed as tenants-in-common and, therefore, unless the defendant raises the defence of adverse possession to claim for share in the ancestral property, he cannot also raise an issue relating to limitation.

In the case of **Mario Cotta Pereira** (supra), the property which was admittedly owned by the plaintiff was requisitioned by the Government. The Trial Court had upheld the preliminary issue of limitation and jurisdiction dismissing the suit which was subject matter of challenge before this Court. It was, in such circumstances, held that once the property belonging to the plaintiff as owner was requisitioned, in the absence of Government setting up an adverse title, Article 65 would not apply. It applies only in case the defendant sets up a plea of adverse possession.

15. In the present case, it is true that the defendant no.1 has not specifically set up a plea of adverse possession while denying the title of the plaintiffs. He has claimed independent ownership. However, the fact remains that on their own saying it is the plaintiffs' case that the construction on the suit property was allegedly made by the defendant no.1 as far back as in the year 1972 and that construction is also of a building admeasuring 990 square metres which can be prima facie said to be a hostile act done openly and continuously without obstruction for a period of more than 12 years. The learned Trial Court has therefore, found that the amendment which is sought after 43 years of the alleged encroachment and construction cannot be allowed being barred by limitation.

In the illustrated decision of Hon'ble Supreme Court in the case of **L. J. Leach & Co. Ltd Vs. Jardine Skinner and Co.**, AIR 1957 SC 357, it has been held that the Court would as a rule decline to allow amendment if a fresh suit on the amended claim would be barred by limitation on the date of application. Although it has been held that this aspect does not affect the power of the Court to order amendment, the same has to be taken into account in exercise of the discretion as to

whether the amendment should be allowed.

16. The learned Trial Court has placed reliance on the decision of the Supreme Court in the case of **Shiv Gopal Sau Vs Sita Ram Saraugi and others;** (2007)14 SCC 120 in which it was held that an amendment at a belated stage was held to be rightly not permitted.

17. This takes me to the part of the amendment, which is allowed. As noticed earlier, apart from paras 3A to 3C, amendment by introduction of paras 10A to 10C, 18D and 18E and prayer clauses (b)(iii) and b(iv) are allowed on the ground that that is only clarificatory in nature and "necessary averments in respect of the Sale Deed executed in favour of the defendant no.2 as well as the construction done pursuant to that are already existing in the plaint." In para 10A, it is claimed that the defendant no.1 does not have any right, title or interest to execute Sale Deed dated 10/05/2006 in favour of the defendant no.2, which is bad in law and about the alleged illegal construction carried out by the defendant no.2 in the said area. In para 10C, mesne-profits at the rate of 45,000/- have been claimed from the defendant no.2. In

para 18D and 18E again, there are averments about the plaintiffs being entitled for a decree of possession against defendant no.1 and for mesne-profits which are replicated in prayer clauses b(iii) and b(iv). Considering the fact that the challenge is to the Sale Deed dated 10/05/2006 in a suit, which is filed in the year 2011, the proposed amendments being sought in the year 2015, no question of the said, being barred by limitation, can arise. Hence, to my mind, the learned Trial Court rightly allowed the part of the said amendment.

18. The petitions are, thus, without any merit and are dismissed, with no order as to costs. It is made clear that the Trial Court shall not be influenced by any of the observations herein at the trial.

C. V. BHADANG, J.

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