

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 473 OF 2016

**MRS. DALIRA E.C. FERNANDES AND
ANR.,**

... Petitioners

Versus

**MRS. SITA ANTAO E MASCARENHAS AND
7 ORS.,**

... Respondents

Adv. Ryan Da Piedade Menezes for the Petitioners.

Adv. B. Rodrigues for the Respondent nos. 1, 2.

Adv. P. A. Kamat, Addl. Government Advocate for Respondent
nos.

3,5, 6.

Coram:- C. V. BHADANG, J.

Date:- 17th June, 2016.

ORAL ORDER:

By this petition, the petitioners, who are the defendants nos. 9 and 10 are challenging the order dated 10/3/2016 (below Exhibit 81) passed by the learned District Judge, South Goa, Margao in Civil Suit no.50/2011, by which application for amendment of the plaint, filed by the respondent nos. 1 and 2 has been allowed.

2. The learned Trial Court has found that although

the trial had commenced in the 2012, the respondent nos.1 and 2 had shown that inspite due diligence they could not bring the amendment earlier. It has also been found that the amendment is necessary in order to avoid multiplicity of proceedings.

3. The learned counsel for the petitioners submits that respondent nos. 1 and 2 had initially filed a suit claiming to be co owners and by virtue of the amendment, they are claiming exclusive ownership and thus the proposed amendment changes the nature of the suit. It is next contended that admittedly the trial had commenced in the year 2012 and thus the respondents were required to establish the aspect of due diligence, which is a requirement of the proviso to Order 6 Rule 17 of C.P.C. It is submitted that merely making in the application statement to that effect would not be sufficient. Reliance in this regard is placed on the decision of this Court in the case of **SMT. JAYASHREE SUBHASH KALBANDE AND ANR. VS. SHRI BHAURAO NAGORAO DERKAR & ORS.**, reported in 2014(3) ALL MR 605 and in particular para 9 thereof. The

learned counsel submits that the trial Court has erred in holding that the respondent nos. 1 and 2 had shown that inspite of due diligence the amendment could not be brought earlier. He submits that the impugned order exhibits jurisdictional error which needs interference.

4. On the contrary the respondent nos. 1 and 2 have supported the impugned order. It is submitted that the deceased Mozart Antao, who was the uncle of the respondent no.1 was not traceable, as he was put in an old age home. Mr. M. Antao died on 7/3/1969. It is submitted that the learned District Judge after considering the application filed by the respondents has rightly held that the respondents inspite of due diligence could not bring the amendment earlier. He submits that no interference is called for.

5. I have considered the rival circumstances and the submissions made. In the application for amendment filed by the respondent nos. 1 and 3 it is claimed by the respondent that they were continuously searching for the document of their uncle i.e Mr. Mozart Antao as she had information that

he was lodged in an old aged home in Goa, but did not know the whereabouts and that in the month of May 2015, she met one Mr. Sidhono from Chandor who was a family friend of Josefato, the plaintiff's father and who during casual conversation informed the petitioner that M. Antao was put in an old age home at Bardez. It is thereafter that she made inquiries and found that as per the death certificate Mr. M. Antao, he died on 7/3/1969 and as such, Mr. M. Antao was alive when the sale deed dated 10/2/1969 was executed.

6. I have carefully gone through the order passed by the learned District Judge. The learned District Judge after considering the application and the requirement of due diligence and the judgment in the case of **SMT. JAYASHREE SUBHASH KALBANDE (supra)**, has allowed the amendment. The learned District Judge has further found that, if the amendment is not allowed, the same would require the respondents to file a fresh suit, which would result, in multiplicity of proceedings. In my considered view the respondent nos.1 and 2 had given sufficient particulars as to why the amendment could not be brought earlier.

7. In the judgment in the case of **SMT. JAYASHREE SUBHASH KALBANDE** this Court has recapitulated the law as it stands on the aspect of requirement under proviso to Order 6 Rule 17 C.P.C.. If the learned District Judge has exercised the discretion on the basis of the facts and circumstances of the case and has found that in order to avoid multiplicity of proceedings the amendment was necessary, I do not find that the impugned order exhibits any jurisdictional error so as to require interference.

7. It is needless to mention that the petitioners shall be entitled to raise all the contentions as may be available to them in law and facts, including the question of limitation and the question whether amendment would relate back to the filing of the suit, which are expressly kept open. With this the writ petition is dismissed with no order as to costs.

C. V. BHADANG, J.

ap/-