

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 532 OF 2014

Mr. Jose Vito Cunha,
(since deceased, through his LR's)
1(a) Smt. Juliet Maria D'Cunha,
Daughter of Jose Vito D'Cunha
wife of Shri Anacieto D'Souza,
Aged 41 years, housewife,

1(b) Shri Anacieto D'Souza,
Aged 44 years, State Superintendent,
MPT/HL
Both residing at MPT Colony,
building No.209/1/2 type B Qtrs.
Opp. Deepvihar Higher Secondary School,
Headland Sada,
Mormugao, Goa 403 804

1(c) Shri Agnelo D'Cunha,
Son of Jose Vito D'Cunha
Aged 38 years, married, Clerk,
Fr. Agnel, High School Pilar,

1(d) Smt. Melba Dias,
Wife of Shri Agnelo D'Cunha,
Aged 33 years, Clerk at Mae dos Pobres
High School, Nuvem,
Both residing at H. No.83-B,
Mother's Dream,
Neura, Tiswadi Goa 403 104,

1(e) Fr. Simon Mathew D'Cunha,
Son of Jose Vito D'Cunha
Aged 37 years, Priest at Rachol Seminary,
Nr. Rachol Fort,
Salcete, Goa 403 713.

1(f) Sr. Albertina Rosy D'Cunha
Daughter of Jose Vito D'Cunha,
Aged 40 years, Nun,
residing at C/o Sr. M. Ann Joseph M.C.
Missionaries of Charity
2215, 1st Ave, Quebec P. Quebec
GIL 3 M 9, CANADA.

... Petitioners

Versus

1. Dr. Deepchand Bhandare,
Son of late Shri Bhaskar L. Bhandare,
major, residing near
Dr. Walawalkar House,
Krantinagar Housing Board Colony,
Alto Porvorim, Betim Goa.
2. Fabrica St. Mathews Church of Azossim,
having its office at Azossim, Ilhas Goa,
represented by its Special Constituted Attorney,
3. Shri Pascoal Caiado,
Son of Antonio Joao Caiado,
r/o House No. not known,
Leberadade, PO Neura,
Ilhas Goa.

... Respondents

Mr. F. E. Noronha, Advocate for the petitioners.

Mr. Shivan Desai, Advocate for the respondent no.1.

Coram:- F. M. REIS, J.

Date:- 18th November, 2016

ORAL JUDGMENT

Heard Mr. F. E. Noronha, learned counsel appearing for the petitioners and Mr. Shivan Desai, learned counsel appearing for the respondent no.1.

2. The above petition takes exception to the orders passed by the learned Civil Judge Junior Division, Panaji dated 19.07.2014 whereby the applications for leave to amend the plaint and impleadment of parties filed by the petitioner came to be dismissed.

3. Mr. F. E. Noronha, learned counsel appearing for the petitioner has strenuously argued that the impugned order has no legal sanctity as according to him the pleadings sought to be introduced flow from the original pleadings. It is further pointed out that based on the sale deed executed in favour of the petitioner by the respondent no.2, the petitioner filed a suit for declaration and other consequential reliefs. It is further contended that after the sale deed was executed in the year 1985, the petitioner moved the Revenue

Authorities for mutation to get the subject plot mutated and in such proceedings, the petitioner learnt that the property was mutated in favour of the respondent no.1 herein by a fraudulent exercise as according to him based on the Inventory Proceedings initiated upon the death of the father of the respondent no.1 Bhaskar Bhandare, the whole property was described and thereafter purported to be allotted to the respondent no.1. The learned counsel further pointed out that the proceedings itself are a nullity as according to him 6000 square metres of the property described at item nos.16 and 18 include the property purchased by the petitioner. The learned counsel further pointed out that the suit plot is a part and parcel of such property admeasuring an area of 6000 square metres which belonged to the original owner, the respondent no.2 herein, out of which a plot of 6004 square metres was purchased by the petitioner. It is further submitted that as the suit plot did not belong to the estate leaver, the description of the subject property where the plot is located would itself result in an allotment which is a nullity in law. The learned counsel further submitted that based on a null and void allotment, the respondent no.1 moved the Revenue Authorities for mutation which

was allowed by the concerned Survey Officer. The learned counsel further pointed out that only after filing of the suit, the petitioner learnt that there were Inventory Proceedings also initiated upon the death of the wife of said Bhaskar Bhandare wherein according to him there were grave irregularities in the procedure which would itself entail fraud in the allotment in such proceedings as null and void and as such the mutation entry itself is unsustainable in law. The learned counsel further pointed out that the learned Judge has dismissed the application for leave to amend the plaint essentially on the ground that due diligence has not been established under the provisions to Order VI Rule 17 of the Civil Procedure Code which itself is erroneous as according to the petitioners the Inventory Proceedings came to the knowledge of the petitioner only after the suit was filed. The learned counsel further pointed out that the challenge to the Inventory Proceedings is already part of the plaint and as such the challenge sought to be introduced by the petitioner in connection with the Inventory Proceedings of the wife of the said Bhaskar Bhandare would also be referable to the dispute raised in the suit. The learned counsel further pointed out that grave prejudice would

occasion to the petitioner as the mutation carried out in favour of the respondent no.1 is fraudulent and based on the documents which cannot in any way create any title in favour of the respondent no.1 nor defeat the title of the petitioner. The learned counsel further submitted that there is a jurisdictional error committed by the learned Judge while passing the impugned order by refusing leave to amend the plaint and as such the impugned order deserves to be quashed and set aside. The learned counsel further pointed out that along with the sale deed executed in favour of the petitioner, there is a declaration given by the deceased father of the respondent no.1 which conclusively establishes that the plot which is a part of 6000 square metres belonged to the predecessor in title of the petitioner, the father of the respondent no.1 had declared has no right therein.

4. On the other hand, Mr. S. Desai, learned counsel appearing for the respondent no.1 has taken me through the application for amendment to point out that there are vague allegations therein which by no stretch of imagination can suggest that there was any due diligence on the part of the petitioner which

prevented him from introducing the proposed amendment at the time of the filing of the suit. The learned counsel further pointed out that the learned Single Judge of this Court in the judgment dated 04.10.2016 passed in ***W.P. No.934 of 2015*** has taken a view that if due diligence is not established after the commencement of trial, the question of granting leave to amend would not arise. The learned counsel further pointed out that all the allegations in the proposed amendment are irrelevant and not necessary to decide the matter in controversy and further pointed out that the contention that any fraud was committed by the respondent no.1 is totally misplaced. The learned counsel further submitted that there is no jurisdictional error committed by the learned Judge while refusing leave to amend the plaint to the petitioner and as such the petition deserves to be rejected.

5. I have considered the submissions of the learned counsel and with the assistance of the learned counsel appearing for the petitioner, I have also gone through the records relied upon by the petitioner. It is undisputed that the suit filed by the petitioner is for

declaration based on a claim of title by the petitioner through the respondent no.2. Merely because there is an allotment in favour of the respondent no.1 by itself cannot defeat the title of the petitioner herein if so established. The Inventory Proceedings which ultimately culminated in the homologation of the partition may confer title to the person in whose favour the property is allotted in terms of Article 2158 of the Portuguese Civil Code but this will depend on whether the property so described belonged to the estate leaver. In such circumstances, the challenge sought to be drawn by the petitioner to the Inventory Proceedings is not at all necessary for deciding the matter in controversy and as such the contention whether there was due diligence or not need not be gone into in such circumstances. The petitioner, if he is so entitled would have to independently establish his claim of title in the suit. In such circumstances, the challenge sought to be drawn to the Inventory Proceedings initiated upon the death of the wife of the said Bhaskar Bhandare, is not at all necessary to decide the matter in controversy. Even assuming the Inventory Proceedings stand vitiated as sought to be contended by the petitioner by no stretch of imagination would defeat any right, title or interest in

the subject property of the petitioner herein if so exists. As already pointed out herein above, the petitioner on the basis of the documents produced on record would have to establish his title to the property and get a relief if he is so entitled.

6. The remaining averments sought to be incorporated in the plaint with regard to the alleged fraud committed by the respondent no.1 in mutation proceedings cannot create or defeat the title of the petitioner as claimed. The title has to be established on the basis of the documents on record. Even assuming the claim of the petitioner that the entries by mutation have been fraudulently introduced, by itself cannot create any title to the respondent no.1 to the subject property as it is not disputed that the property was otherwise surveyed in the name of the deceased father of the respondent no.1 Bhaskar Bhandare. It is not the case of the petitioner that the said Bhaskar Bhandare or the respondent no.1 are claiming any right through the respondent no.2 who has conveyed the property in favour of the petitioner herein. In such circumstances, as the proposed amendments are not at all necessary to decide the matter in

controversy, I find that the discretion exercised by the learned Judge in refusing leave to amend the plaint does not call for any interference. The suit filed by the petitioner is claiming title to the property and seeking a prayer that the allotments in the Inventory Proceedings in favour of the respondent no.1 are null and void. Such a claim which flows from the claim of title in the pleadings in the plaint is based on the title over the subject property which the Court would have to be adjudicated on its own merits in accordance with law. As such no interference in the impugned order refusing leave to amend the plaint in the light of the above observations. The petition stands accordingly rejected.

F. M. REIS, J.

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