

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO.705 of 2016**

1. Mrs. Carrol Fernandes e Pereira  
Daughter of late John Fernandes,  
Aged 38 years, married, service,  
Resident of Yeshwant Nagar,  
Shankar Apts., Flat No.202,  
Vakola, Santa Cruz East,  
Mumbai 400055
2. Mrs. Cecilia Fernandes,  
Daughter of late John Fernandes,  
Aged 40 years, service,  
Resident of Yeshwant Nagar,  
Shankar Apts., Flat No.202,  
Vakola, Santa Cruz East,  
Mumbai 400055
3. Mr. Clive Fernandes,  
Son of late John Fernandes,  
Aged 36 years, service,  
Resident of Yeshwant Nagar,  
Shankar Apts., Flat No.202,  
Vakola, Santa Cruz East,  
Mumbai 400055
4. Mr. Philip Fernandes,  
Son of late John Fernandes,  
Aged 33 years, bachelor, service,  
Resident of Yeshwant Nagar,  
Shankar Apts., Flat No.202,  
Vakola, Santa Cruz East,  
Mumbai 400055

All above Petitioners are represented  
Through their duly constituted  
Power of Attorney,  
Mr. Merwyn Pereira,  
s/o Mr. Eustace Pereira,  
aged 40 years, r/o H.No.175,  
Church Street, Cortalim, Goa. ..

Petitioners

V/s.

Mrs. Veronica Vaz alias  
Veronica Pereira,  
Widow of late Thomas Pereira,  
Aged 65 years, widow, housewife,  
r/o H.No.440, Abade Faria Road,  
Margao, Goa  
Through her Power of Attorney  
Shri James Pereira,  
Son of late Thomas Pereira,  
r/o H.No.440, Abade Faria Road,  
Margao, Goa. ... Respondents

Mr. Cliff Fernandes, Advocate for the petitioners.

Mr. J. Godinho, Advocate for the respondent.

**CORAM :- C. V. BHADANG, J.**

**Reserved on :- 26<sup>th</sup> August, 2016**

**Pronounced on:- 31<sup>th</sup> August, 2016**

**ORDER :**

By this petition, the petitioners, who are the defendants in Regular Civil Suit No.10/2014/C before the learned Civil Judge, Junior Division at Vasco, are challenging the order dated 10/06/2016, by which application Exh.64 filed by the petitioners for amendment of the written statement has been dismissed.

2. The respondent has filed the aforesaid Civil Suit for mandatory and perpetual injunction and consequential reliefs in respect of the land Survey

No.232/14 of village Cortalim (more particularly described in para 4 of the plaint). It appears that the petitioners filed a written statement on 15/04/2014 and issues were settled on 12/08/2014. The evidence of PW1 was partly recorded, when the petitioners filed an application for amendment of written statement, which was allowed on 16/01/2015. Thereafter, the respondents filed an application for amendment of the plaint on 25/03/2015, which was allowed on 02/05/2015. It appears that the respondent led her further evidence and the evidence of PW4 was completed on 04/11/2015, whereupon the respondent closed her side of the evidence. Thereafter, the petitioners sought time twice i.e. on 24/11/2015 and 30/11/2015 for filing an affidavit in evidence. Subsequently, on 09/12/2015, the petitioners filed the application Exh.64 for amendment of the written statement by incorporation of paras 7(b)(i) to 7(b)(xvi). It is contended that in November, 2015, the petitioners came in possession of certain documents from the Comunidade records, which prompted them to file the application for amendment. By virtue of the proposed amendment, the petitioners seek to introduce

a contention that the respondent has not exercised possession over the suit property for last 50 years and has lost her right "by way of prescription". The petitioners are also seeking to introduce pleadings regarding easementary right. The petitioners vie para No.7(b)(ii) are seeking a direction for deleting the name of the respondent from Form No.I and XIV from the column of the occupants on the ground that the said entry is taken erroneously.

3. The application was opposed by the respondent on the ground that it is belated and seeks to introduce a new and inconsistent case.

4. The learned Trial Court found that the trial had already commenced and as such, the petitioners were required to establish that in spite of due diligence they could not bring the said amendment before, which they had failed to show. The Trial Court further found that the petitioners are trying to introduce new and inconsistent pleas. The Trial Court also found that the amendment is in the nature of a counterclaim, which has to be raised before the time

for delivery of defence expires. In that view of the matter, the application has been dismissed.

5. I have heard the learned Counsel for the petitioners and the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the Plaint as well as the Written Statement. I have also gone through the application for amendment and the impugned order passed.

6. At the outset, it is necessary to mention that during the course of hearing at bar, the learned Counsel for the petitioners stated that he will not be pressing for the proposed amendments in paras 7(b)(xv) and 7(b)(xvi). He submitted that the cause for filing the application for amendment arose, when in November, 2015 the petitioners obtained copies of Survey Records from the Comunidade. It is submitted that the proposed amendment does not change the nature of the defence and only attempts at clarifying or explaining the defence already taken. He submits that the proposed amendment is necessary for deciding the real

controversy in dispute and as such, ought to have been allowed.

7. On the contrary, it is submitted by the learned Counsel for the respondents that the amendment is belated and also hit by the proviso to Rule 17 of Order VI of the Code of Civil Procedure, as the amendment is sought after the commencement of the trial. The learned Counsel has pointed out that the amendment is in the nature of raising a counterclaim in which the petitioners are seeking direction to Survey Authorities to delete the name of the respondent from Form No.I and XIV. He submits that the Trial Court has rightly come to the conclusion that the amendment was not permissible.

8. I have carefully considered the rival circumstances and the submissions made.

9. A bare perusal of the proposed amendment would show that the petitioners are trying to incorporate extensive amendment in the Written Statement after the respondent/ plaintiff has closed her evidence. The

learned Trial Court has found, and to my mind rightly so, that the petitioners had cross-examined the witnesses for the respondent and the last of such witness namely PW4, was cross-examined and his evidence was completed on 04/11/2015. Thereafter, in the month of November, 2015 itself, twice time was sought. At any rate, the petitioners have not shown that in spite of due diligence, they could not have sought the amendment earlier, which would be the requirement in view of the fact that the application was filed after commencement of the trial (See **Vidyabai and others Vs. Padmalatha and another**; [2009(2) SCC 409]. In that view of the matter, I do not find that any exception can be taken to the order passed by the Trial Court, rejecting the application for amendment. The petition is without any merit and is, accordingly, dismissed, with no order as to costs.

**C. V. BHADANG, J.**

SMA