

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 804 OF 2015**

Shri Kazi Mohamad Issac, Expired,
son of Kazi Kutubudin, Major in age,
landlord, Resident of Qazi Wada,
Ponda, Goa.

- 1a. Dr. Zaheer I. Kazi and his wife,
major
- 1b. Mrs. Ayesha Z. Kaji, major,
Both resident of 15/14, MHB
Colony, Opp. Leelavati Hospital,
Bandra Reclamation, West Bombay
– 400 050.
- 1c. Saleem I. Kaji, and his wife, major
- 1d. Mrs. Samira S. Kaji, major,
Both resident of Kutub Manzil, Kaji
Vaddo, Ponda.
- 1e. Mrs. Razia A. Hetavkar, major and
her husband
- 1f. Abbas Hetavkar, major (since
deceased)
Both resident of Res. 503-A, Yash,
Resident of Dockyard Road,
Mazagaon, Mumbai – 400 010.
- 1f(i) Mr. Mubin Abbas Hetavkar, son of
late Abbas Hetavkar, and his wife,
- 1f(ii) Mrs. Soabiya Mubin Hetavkar,
Both major in age and residents of
802, A, Belle Vista, CHS, Plot Nos.
46-48, Belapur CBD, Navi Mumbai –
400 614.

- 1f(iii) Dr. Sajid Abbas Hetavkar, son of late Abbas Hetavkar, and his wife,
- 1f(iv) Mrs. Taslim Sajid Hetavkar,
Both major of age and residents of 503-A, Yash Residency, Dockyard Road, Mazagaon, Mumbai – 400 010.
- 1f(v) Mrs. Saba Affendi, daughter of late Abbas Hetavkar, and her husband,
- 1f(vi) Mr. Kavish Affendi,
Both major in age and residents of 103, Silver Cascade Apartments, Mount Mary Road, Bandra West, Mumbai – 400 050.

- 1g. Mrs. Noorjahan N. Kaji, major and her husband
- 1h. Dr. Naseer Y. Kaji, major, Both resident of 2nd Gulistan Shankar, Shet Road, Pune.

- 1i. Mrs. Farida Jalal Kaji, major and her husband
- 1j. Jalal Rukmuddin Kaji, major,
Both resident of 9/NO, Bori Wali, Amrai, Co-operative Society, Near Shanti Ashram, Mumbai – 400 103.

- 1k. Shahida M. Maleem, major and her husband
- 1l. Mustaq Malim, major,
Both resident of 10th floor, Rosary House, Gum Powder Road, Mazagaon, Bombay – 400 010.

2. Badrunissa Kazi, resident of Kazi Wada, Ponda, Goa. (since deceased, represented by legal representatives, Respondent Nos. 1(a) to 1(l).

.... Petitioners

Versus

1. Shri Nagesh Babusso Gaud, son of Babusso Gaud, major in age, Resident of Achem, Betoda, Ponda, Goa.
2. Shri Mangesh Babusso Gaud, son of Babusso Gaud, major in age, Resident of Achem, Betoda, Ponda, Goa.
3. Shri Bombo Babusso Gaud, (expired), son of Babusso Gaud, Major in age, resident of Achem, Betoda, Ponda, Goa.
- 3a. Smt. Kamalavati @ Mogai Bomo Gaud, major in age.
- 3b. Paresh Bomo Gaud, major in age.
- 3c. Gita Bomo Gaud, major in age.
- 3d. Shailesh Bomo Gaud, major in age.
- 3e. Sangita Bomo Gaud, major in age.
All residents of Bethora, Ponda, Goa.
4. Shri Guru Sukdow Gaud, son of Sukdow Gaud, major in age, resident of Achem, Betoda, Ponda, Goa.

5. Gurudas S. Gaude, son of Emuna Sukdo Gaude, major in age, (since deceased)
 - 5a. Kalidas S. Gaude, son of Emuna Suykdo Gaude, major in age.
 - 5b. Damu S. Gaude, son of Emuna Suykdo Gaude, major in age.
 - 5c. Anand S. Gaude, son of Emuna Suykdo Gaude, major in age.
 6. Mrs. Goku Guru Gaude, major in age, wife of defendant no. 4.
 7. Mrs. Premavati Manguesh Gaude, major in age, wife of defendant no. 2.
 8. Mrs. Rukumini Nagesh Gaude, major in age, wife of defendant no. 1.
Defendant Nos. 6 to 8 are resident of Achem, Betora, Ponda.
- Respondents

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar, Advocate for the Petitioners.

Mr. Agnelo F. Diniz and Mr. Ryan Menezes, Advocates for the Respondents.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 16th MARCH, 2016

PRONOUNCED ON:- 22nd MARCH, 2016

JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Ryan Menezes, learned Counsel waives service on behalf of the

respondents. Heard finally, by consent of the parties.

2. By this petition, the original plaintiffs/appellants are challenging the order dated 01.06.2015 passed by the learned District Judge-2, Panaji in Regular Civil Appeal No. 36/2010. By the impugned order, the application (Exhibit-24) for production of additional document i.e. the certificate dated 13.07.2012 issued by Mr. Umesh Phaldesai, Civil Engineer and Surveyor and the application (Exhibit-25) for amendment of the plaint, at the appellate stage, have been dismissed.

3. The brief facts are that the plaintiffs claim to be the owners of the property better known as 'Jawalychi Rai' or 'Tolvottem' situated at Bethora, Ponda, Goa, which is registered under no. 5838. According to the petitioners, the said property is registered under matríz nos. 1077 and 1078 and it is having old cadastral survey no. 70 and under the new survey record, it is surveyed under no. 88/0. According to the petitioners, the property originally belonged to Pandurang Parab, who sold the same under a sale deed dated 09.02.1907 to Xec Salaskar and

others and Xec Salaskar sold the property to Abdul Beg under sale deed dated 31.10.1947 and it was later purchased by Kaji Mamod Issak, the predecessor in title of the petitioners, under sale deed dated 21.01.1951. The case made out in the plaint was that the suit property consisted of new survey no. 88/0, apart from an area of 7,600 square metres from the land survey no. 81/0, which is towards the South of the land under survey no. 88/0. In short, according to the petitioners, an area admeasuring 7,600 square metres, which forms part of the land survey no. 88/0 is wrongly shown to be included, in survey no. 81/0. According to the plaintiffs, it was contended that sometime in July, 1992, the respondents/defendants erected wooden poles and sub divided the property into smaller parts and also brought construction material on the site. It is then, that the petitioners came to know about the incorrect survey records, when the petitioners obtained the copy of Form I and XIV. In such circumstances, the petitioners filed Special Civil Suit No. 79/1992/A against the respondents before the learned Civil Judge Senior Division, Ponda for correction of the survey records, declaration and injunction.

4. The respondents resisted the suit and also raised a counter claim, claiming permanent injunction, against the petitioners, from trespassing or otherwise interfering with the portion admeasuring 7,600 square metres forming part of the new survey no. 81/0.

5. The learned trial Court raised as many as 15 issues including two additional issues. The parties led evidence. The learned trial Court by judgment and order dated 30.04.2005 dismissed the suit as well as the counterclaim. The learned trial Court came to the conclusion that the petitioners had failed to establish that the suit property as described in the plaint corresponded with the old cadastral survey no. 70 or that area admeasuring 7,600 square metres from survey no. 88/0 was erroneously shown as part of survey no. 81/0.

6. Feeling aggrieved, the petitioners have challenged the same in Regular Civil Appeal No. 36/2010, which is pending before the learned District Judge, Panaji.

7. The petitioners filed two applications being Exhibit-24 for production of additional document i.e. the certificate dated 13.07.2012 issued by Mr. Umesh Phaldesai, Civil Engineer and Surveyor and Exhibit 25 for amendment of the plaint.

8. The applications were opposed by respondent nos. 1, 2, 3(a) to 3(e), 7 and 8, on the ground that the petitioners have failed to show any due diligence and that the petitioners are trying to introduce a new case which is irrelevant. The learned District Judge has dismissed both these applications. That is how the petitioners are before this Court.

9. I have heard Mr. Sudin Usgaonkar, learned Senior Counsel for the petitioners and Mr. Agnelo F. Diniz, learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have perused record.

10. It is submitted by the learned Senior Counsel for the petitioners with reference to Exhibit PW-1/2 that, property shown in the name of Pandurang Parab was corresponding to old survey

no. 70 and was admeasuring 1,02,540 square metres. It is submitted that at the time of allotting new survey numbers, an area admeasuring 7,600 square metres forming part of the new survey no. 88/0 (corresponding to old cadastral survey no. 70) was wrongly included in the land survey no. 81/0. It is submitted that the learned trial Court has dismissed the suit *inter alia* on the ground of failure of the petitioners to establish that the land survey no. 88/0 corresponded to the old cadastral survey no. 70. It is submitted that apart from one larger portion of the land, it comprises of smaller areas bearing various survey numbers. It is submitted that the area admeasuring 7,600 square metres, which is the subject matter of dispute, is in the nature of a triangular portion to the south-eastern corner of the suit property. The learned Senior Counsel submitted that the land surveyed under no. 81/0 is to the southern side of the land surveyed under no. 88/0. The learned Senior Counsel would submit that the Surveyor Mr. Umesh Phaldesai after super imposing the survey plan, has certified the super imposed area of cadastral survey no. 70 consisting of various survey numbers as set out in the said certificate. It is submitted that this has necessitated the

amendment of the plaint as also production of the document, in the form of the certificate. The learned Senior Counsel has referred to the plaint paragraph 1 which reads thus:

"The said property is registered in the matriz under nos. 1077 and 1078. The said property is having old cadastral survey no. 70 and in the recent survey it is surveyed under survey no. 88/0 and of Betora village in Ponda Taluka."

(Emphasis supplied)

11. It is submitted that there is an apparent mistake as out of inadvertence the other survey numbers were not mentioned after the portion "survey no. 70 and", in the plaint. The learned Senior Counsel submitted that the learned District Judge has not specifically considered the application for amendment in as much as the learned District Judge has rejected the said application only on the ground of refusal to produce additional evidence. In other words, no independent reasons have been given for rejection of the application for production of additional evidence.

12. The learned Senior Counsel has placed reliance on the following decisions of the Hon'ble Apex Court:-

(i) M/s Ganesh Trading Company Vs. Moji Ram, AIR 1978 SC 484;

(ii) Pandit Ishwardas Vs. State of Madhya Pradesh and Others, (1979) 4 SCC 163 and

(iii) Haryana Waqf Board Vs. Shanti Sarup and Others, (2008) 8 SCC 671.

13. On the contrary, it is submitted by the learned Counsel for the respondents that the prayer for amendment of the plaint and production of additional document is belated and lacks due diligence on the part of the petitioners. The learned Counsel pointed out that the suit was filed as far back as in the year 1992 and it was dismissed in the year 2005 *inter alia* on the ground of failure of the petitioners to establish that the property corresponded to the old cadastral survey no. 70. It is submitted that the petitioners ought to have been put to notice, atleast in the year 2005 of any alleged errors or omissions in the plaint. It is submitted that even after the appeal was filed in the year 2010,

the applications were not moved promptly. The learned Counsel has pointed out that the proviso to Order 6 Rule 17 of the Civil Procedure Code mandates that in such cases, the party is expected to demonstrate, due diligence. The learned Counsel has pointed out that there were six applications for amendment of the plaint filed by the petitioners, out of which, two applications, one each, filed in the years 1997 and 2000, pertained to the amendment relating to the description of the property. The learned Counsel has taken me through the copies of the applications for amendment, in order to show that the amendment pertained to the description of the property.

The learned Counsel has placed reliance on the decision of this Court in the case of **Maria Pereira and Others Vs. Dolorosa Christina Rodrigues and Others, 2015(3) Bom.C.R. 675**, in order to submit that production of the additional document in the form of a certificate issued by the Civil Engineer could not be permitted. The learned Counsel would submit that the petitioners have already examined Mr. Shyamlal R. Vishvakarma (PW-4), whose evidence has been disbelieved by the trial Court. The learned Counsel has also placed reliance on the decision of the

Hon'ble Apex Court in the case of **Chander Kanta Bansal, (2008) 5 SCC 117**, in order to submit that an application for amendment made after 18 years was held to be rightly rejected. The Hon'ble Supreme Court has referred to its earlier decision in the case of **Union of India Vs. Pramod Gupta, (2005) 12 SCC 1**, wherein the Courts have been cautioned that delay and laches on the part of the parties would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings.

14. I have considered the rival circumstances and the submissions made. The suit is filed by the petitioners for correction of the survey records claiming that an area admeasuring 7,600 square metres forming part of the survey no. 88/0 has been wrongly included in survey no. 81/0. The petitioners came with a case that the property corresponds to matríz nos. 1077 and 1078 and old cadastral survey no. 70. In plaint paragraph 3, it was contended that the records of Betoda village were promulgated some days back and the plaintiffs had obtained the copy of Form I and XIV in the last week of June, 1992 from the Talathi of Nirankal

Betora and after verification the petitioners found that the survey records are not correct. The petitioners submitted that they had engaged services of Architect Girish Kelekar and asked his comment and report, who after verification found that an area of 7,600 square metres is less in the new survey plan and that the said area is included in survey no. 81/0. It can thus be seen that the petitioners had engaged the services of an Architect, even before filing of the suit.

15. A perusal of the judgment of the trial Court would reveal that on behalf of the petitioners an expert witness, namely, Shyamlal R. Vishvakarma (PW-4) was examined. The learned trial Court has disbelieved the evidence of Shyamlal R. Vishvakarma (PW-4). It is not necessary to examine the correctness of the finding of the trial Court at this stage, in as much as the appeal challenging the same is pending before the learned District Judge. The fact remains that the petitioners had engaged the services of an expert twice, before the application for production of additional evidence was made. One of the said expert witness has already been examined before the trial Court. The question is whether the

petitioners could be permitted to bring the evidence of yet another expert, namely, Mr. Umesh Phaldesai. Mr. Umesh Phaldesai had issued a certificate on 13.07.2012. A perusal of the certificate issued by Mr. Umesh Phaldesai would show that the said witness had attempted to calculate the area falling in the old cadastral survey forming part of the smaller survey numbers after going through Form I and XIV of property bearing survey nos. 87/3, 88/0 and 87/14. The certificate further shows that Mr. Umesh Phaldesai had done the exercise on perusal of the plan at Exhibit PW-4/1 i.e. issued by Shyamlal R. Vishvakarma (PW-4). Mr. Umesh Phaldesai has recorded the following conclusion:

"On calculating the same, I hereby certify that the super imposed area of cadastral survey no. 70 consists of survey no. 87/3 (part) admeasuring 60133 square metres, survey no. 87/4 (part) admeasuring 1551 square metres, 91/2 (part) admeasures 1398 square metres, 91/1 (part) admeasures 892 square metres, 89 (part) admeasures 97 square metres, 78 (part) admeasures 373 square metres and 79 (part) admeasures 196 square metres. The said certificate has been issued to be produced before the Court."

16. The learned District Judge has observed that for such exercise of calculation/computation, the evidence of a witness is not necessary and it is a matter of argument. The petitioners claim that at the time of preparation of written arguments in appeal, it transpired that some words and figures between the words "and", "of" are missing in paragraph 1 of the plaint.

It is inconceivable that the plaintiffs did not notice any such discrepancies right from the year 1992 and even on the dismissal of the suit when one of the grounds of dismissal was identity of the property as corresponding to old cadastral survey no. 70. Even after the appeal was filed, the application was moved belatedly. It would be further significant to note that the petitioners had examined Shyamlal R. Vishvakarma (PW-4), who was an expert witness alongwith the plan (Exhibit PW-4/1), who was already disbelieved by the trial Court. In such circumstances, I do not find that any exception can be taken to the finding recorded by the learned District Judge that the production of additional document could not be allowed. It is true that the learned District Judge has not given separate reasons for dismissal of the application for amendment, except observing that, when the

petitioners could not be permitted to produce additional document, the amendment application also deserves to be dismissed. However, for this reason alone, the impugned order may not become vulnerable. Both the applications were inter connected and based on certificate issued by Mr. Umesh Phaldesai. There cannot be any manner of doubt that in an appropriate case, the Court can allow amendment at any stage including at the appellate stage. However, this would depend on the facts and circumstances of each case.

17. The learned Senior Counsel for the petitioners has placed reliance on the decision of this Court in the case of **Sumita Pradipkumar Dixit Vs. Smt. Pushpadevi G. Makharia and Others** decided on 29.03.2011 in order to submit that proviso to Order 6, Rule 17 of C.P.C. would not be applicable to this case, as the suit was instituted prior to coming into force the Amendment Act, 2002. It is true that the rigour of proviso to Order 6, Rule 17 of C.P.C would not apply to this case as the suit was instituted prior to coming into force the Amendment Act, 2002. However, it is necessary to mention at this stage that the appellate Court has

not relied upon the said provisions, while passing the impugned order. That apart, the fact that the said proviso would not be attracted in this case, cannot altogether exclude considerations as to due diligence. Even before the introduction of the said proviso, the Courts were employing the test and there was an insistence that the party seeking amendment approaches the Court with due diligence. The proviso has given statutory recognition to the said principles. Thus, even though the strict rigour of the said proviso may not be attracted in this case, the requirement of due diligence cannot be excluded all together.

18. As noticed earlier, the petitioners twice sought amendment of the plaint (out of total six occasions for amendment), as to the description of the property. Thus, it cannot be accepted that inspite of due diligence, the petitioners were precluded from raising the matter earlier.

19. Order 41, Rule 27 of the Civil Procedure Code which provides for production of additional evidence at the appellate Court envisages three different situations namely, (1) where the

Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or (2) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or (3) the appellate Court requires any document to be produced or any witness to be examined, to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such amendment. The present case obviously does not fall under the first or the third clause. Insofar as the second clause is concerned, again it has to be demonstrated that inspite of due diligence, the party was unable to produce the evidence earlier. That apart, the prayer is for production of a certificate issued by the Architect, when the petitioners had already examined one Architect and had engaged services of yet another, before the filing of the suit.

20. It was submitted by the learned Senior Counsel for the petitioners that the recent trend of judicial opinion in a dispute of

the present nature, is to appoint a Commissioner for local investigation and in that view of the matter, the Court may permit production of the certificate issued by Mr. Umesh Phaldesai, he being an expert. I would tend to disagree. Reliance in this regard placed on the decision of the Hon'ble Apex Court, in the case of **Haryana Waqf Board** (supra) is misplaced, as in my humble opinion the said case is clearly distinguishable on facts. In that case, the dispute was regarding demarcation of the suit land and removal of encroachment and the appellants had filed an application before the trial Court as well as the appellate Court for appointment of the local Commissioner for demarcation. It was also found on facts, that there was no specific denial of the averments, that the appellant's land had been encroached. It was in these circumstances held that the appeal could not have been dismissed and a local Commissioner ought to have been appointed.

Reliance is also placed on paragraph 5, on the decision of the Hon'ble Apex Court, in the case of **Pandit Ishwardas** (supra), which reads thus:

"There is no impediment or bar against an appellate Court permitting amendment of pleadings so as to enable a party to raise a new

plea. All that is necessary is that the appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court."

(Emphasis supplied)

21. It can thus be seen that the delay in making the application seeking amendment will have to be taken into consideration, and if such application is made at the appellate stage, the reason, as to why it was not sought in the trial Court. The reasons are not forthcoming in this case.

22. In the result, I do not find that a case for interference in the exercise of extra ordinary jurisdiction of this Court is made out. Consequently, the petition is hereby dismissed. Rule is discharged with no order as to costs.

C. V. BHADANG, J.

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