

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 686 OF 2015**

1. Mr. Antonio Braganza, S/o Mr. Gregorio Braganza, Aged 74 years, retired, Resident of H. No. E-340 A, Tivai Vaddo, Calangute, Goa.
Through the Power of Attorney,
Petitioner No. 2, Mrs. Aldila Braganza.
2. Mrs. Aldila Braganza, w/o Mr. Joseph Braganza, aged 42 years, housewife, resident of 53, Langdale, Stanhope Street, London, NW1 3 RA. Petitioners

Versus

1. Mr. Antoneto John D'Souza @ Johny D'Souza, aged 54 years, businessman.
2. Mrs. Bernardeth D'Souza @ Johny D'Souza, w/o Mr. Antonetto John D'Souza, in business,
Both resident of E-3/34, Tivai Vaddo, Calangute, Goa. Respondents

Mr. Nigel Da Costa Frias, Advocate for the Petitioners.

Mr. J. Coelho Pereira, Senior Advocate with Mr. Somnath B. Karpe, Advocate for the Respondents.

CORAM:- S.B. SHUKRE, J.

DATE:- 19th JANUARY, 2016.

ORAL JUDGMENT:

Heard. Rule. Rule made returnable forthwith.

2. This Writ Petition takes an exception to the order dated 22.07.2015 passed by the learned Adhoc Senior Civil Judge at Mapusa thereby rejecting the application of the petitioners/plaintiffs for carrying out amendment to the plaint in terms of Order 6 Rule 17 of C.P.C.

3. According to the learned Counsel for the petitioners, the order is arbitrary and perverse as it does not apply the test of due diligence properly to the facts of the present case. He submits that the learned Civil Judge has completely ignored the fact that after the disposal of the suit, there were several other writ petitions between the same parties, one of which also resulted in restoration of the suit with direction of expeditious disposal of the suit to the trial Court which showed that the petitioners were pursuing their case with reasonable care, caution and effort.

4. Learned Counsel for the petitioners further submits that it is well settled law that liberal approach has to be adopted

while allowing amendment to the pleadings of the party and that such an approach is necessary to do justice between parties and prevent multiplicity of proceedings. In support of his argument he has placed reliance on the following cases:

(i) **Pankaja and Another Vs. Yellappa (D)**

by LR's and Others, (2004) 6 SCC 415;

(ii) **Abdul Rehman and Another Vs. Mohd.**

Ruldu and Others, (2012) 11 SCC 341 and

(iii) **Shri Rajaram Naik Vs. The State of**

Goa and Others, 2016(1) ALL MR 5.

5. Learned Senior Counsel for the respondents submits that no interference with the impugned order can be made as it neither shows any arbitrariness or perversity nor it can be seen to be having been passed in complete ignorance of law or in violation of law. He further submits that all the amendments proposed to be introduced by the petitioners were well within the knowledge of the petitioners and the petitioners did not show any promptitude or reasonable diligence in filing the amendment application before the commencement of the trial. In support of his argument, the learned Senior Counsel has relied upon the following cases:-

(i) **Dharamsingh Sardarsingh Chabada Vs.**

Pritamsingh Sardarsingh Chabada,

2008(2) Bom.C.R. 906;

(ii) **Jai Singh and Others Vs. Municipal**

Corporation of Delhi and Another, (2010) 9

SCC 385 and

(iii) **Conception Fernandes and Another Vs.**

Tasneem Shaikh (Mrs.) and Others, 2014

(6) Bom.C.R.179.

6. Insofar as the principles of law governing amendment of pleadings are concerned, there cannot be any dispute about them. Generally, as held in the case of **Pankaja** (supra), Court's jurisdiction to allow an amendment of pleadings is wide enough to permit amendments even in cases where there is substantial delay in filing the applications for amendment of pleadings. However, the discretion that was so wide got its limitations when by an amendment in 2002, a new provision of Order 8 Rule 17 of C.P.C. came into being by substitution of old provision. By this new provision, as held in above referred cases, barring cases of **Pankaja and Jai Singh** (supra), the power of the Court to grant an amendment application has been

to some extent curtailed, in the sense that now Order 6 Rule 17 of C.P.C. contains a proviso which lays down that no application for amendment should be allowed after the trial has commenced unless the Court is satisfied that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. While the first part of Order 6 Rule 17 of C.P.C. allows a party to make amendment to the pleadings without requiring it to demonstrate any care and diligence, the second part, which is to be found in the nature of the proviso, places certain restrictions on the party seeking amendment to the pleadings. The proviso expects the party to explain it's conduct. It lays down that the party must show due diligence or reasonable effort on it's part before it can seek indulgence of the Court in allowing the application for amendment of pleadings. Concept of due diligence has to be understood through the eyes of a prudent man. It means reasonable effort or industry that a prudent man would exhibit in his quest for justice in similar situation.

7. A perusal of the impugned order shows that the only ground on which the application for amendment has been rejected is that the petitioners have failed to answer the rule of

due diligence, which was applicable with the trial of the suit having been commenced on 07.02.2011. As there is no dispute about the filing of amendment application after the trial had began, the test of due diligence will have its application here and then the petitioners would be answerable for it. To ascertain whether or not the petitioners have satisfactorily showed due diligence, we have to briefly consider the amendments sought by the petitioners.

8. With the assistance of the learned Counsel for the parties, I have gone through the amendment application. It is seen that there are new paragraphs which are sought to be added and some of the paragraphs are sought to be deleted. From the averments made in the paragraphs, what is found is that the petitioners did have knowledge of various developments stated in the paragraphs and even if the petitioners had acquired knowledge in respect of some of the facts, after filing of the suit, it is seen, it was still before commencement of trial and so amendment application could have been moved before it. But, that was not to be. So, the petitioners owed an explanation as to why they did not do so before the trial of the suit began. The petitioners contend that one of them is very old

and has been all along busy in prosecuting other petitions including the petition before this Court. This could hardly be the reason for satisfying the test of due diligence embedded in Order 6 Rule 17 of C.P.C. The learned Civil Judge has therefore, rightly found that this test is not satisfactorily answered and I see no perversity or arbitrariness in the impugned order.

9. In the case of **Jai Singh** (supra), Hon'ble Apex Court has held that supervisory jurisdiction of this Court under Article 227 of the Constitution of India can be exercised only where the order is passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. I do not see in the impugned order that it has been passed in grave dereliction of duty or complete ignorance of well settled principles of law or is arbitrary.

10. Learned Counsel for the petitioners has also raised the issue of causing of prejudice to the case of the plaintiffs. It is now well settled law that the factor of prejudice has to be examined not only from the perspective of the case of the plaintiffs but, also from the view point of the defendants. While considering the aspect of prejudice to the party resulting from

refusal of its application for amendment of pleadings, the Court has also to consider its ripple effect on the case or defence of rival party. In other words, the Court is required to carry out the exercise of balancing of conflicting considerations particularly when the trial has commenced as has been observed by the learned Single Judge of this Court in the case of **Rajaram Naik** (supra) and I am in complete agreement with the learned Single Judge. If, the petitioners are allowed to carry out the proposed amendments at this stage by exempting them from the test of due diligence, it is likely to lead to delay in the trial for the fault of petitioners and no fault of respondents, which would defeat the very purpose of the amended provision of Order 6 Rule 17 of C.P.C. The obvious purpose is to minimise delay in trial of suits. It would also make the law uncertain which is always known, hailed and respected for its fundamental element of certainty. That cannot be the purpose of supervisory nature of jurisdiction under Article 227 of Constitution of India.

11. Before parting with the case, I must say, the trial Court has wrongly observed, as rightly submitted by the learned Counsel for the petitioners, that the amendment application was

not filed by the petitioners on 02.05.2015 when the cross examination of PW-1 was continued. This is definitely an error apparent on the record of the case. But, having an overall view of the matter, I would say that one wrong observation made by the trial court has not, in this case, resulted in causing of loss to the petitioners or accrual of any benefit to the respondents in the light of what has been observed earlier.

12. In the circumstances, I do not find any merit in the Writ Petition. It deserves to be dismissed. The Writ Petition stands dismissed. No costs. Rule is discharged.

It is made clear that the trial Court shall not be influenced by the observations made in this order by this Court regarding filing of amendment application at late stage and shall proceed to dispose of the suit on its own merits.

S. B. SHUKRE, J.

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