

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.826 OF 2016**

Shri Kushnoba Babani Parab
77 years of age,
S/o. late Babani Parab
married, retired,
Indian National,
R/o. House no.134,
Alorna, Pernem-Goa.

....Petitioner

V/s

1. Shri Pundalik Yeshwant Nhavi
alias Halankar & his wife.
 2. Smt. Ambika Pundalik Nhavi
alias Halankar,
Both residents of Alorna,
Pernem-Goa. Major of age.
 3. Shri Ashok Appa Parab,
r/o. Alorna, Pernem-Goa.
Major of age.
 4. Shri Bapu Appa Parab,
r/o. Alorna, Pernem-Goa.
Major of age.
 5. Shri Avi Appa Parab,
All major of age and
Indian Nationals,
R/o. Alorna, Pernem-Goa. `
-Respondents

Shri Sarvesh Kalangutkar, Advocate for the
Petitioner.

Shri A.D. Bhole, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 27th SEPTEMBER, 2016

ORAL JUDGMENT :

Rule. The learned Counsel for the respondents waives service. Heard finally by consent of the parties.

2. The petitioner/original plaintiff is challenging the order dated 8/08/2016 below application Exhibit 68 passed by the learned Civil Judge Junior Division, Pernem in Regular Civil Suit No.30/2006. By the impugned order, application for amendment of plaint filed by the petitioner has been dismissed.

3. The brief facts are that the petitioner has filed the aforesaid suit against the respondents for a declaration that the petitioner is in exclusive possession and enjoyment of the suit property excluding the house existing therein as shown in the plan and for a further declaration that one Apa Bapu Parab or the defendants 3,4 & 5 have no right, title or interest whatsoever in the suit property and that they have never been

in possession or enjoyment of the same. The petitioner is also seeking declaration that the entry in Form no.I & XIV pertaining to the suit property showing the name of Apa Babu Parab in Occupant's column is erroneous and that the judgment and order dated 14/10/2005 passed by the learned Joint Mamltdar, Pernem is not binding on the petitioner.

4. Indisputably, the trial has not commenced in the suit. Earlier, the petitioner filed an application Exhibit 57 for amendment of the plaint which was rejected by the Trial Court on 16/07/2015. The petitioner filed an application for review of the order which was also rejected. The petitioner challenged these orders before this Court in Writ Petition No.163/2016 which was allowed to be withdrawn on 27/06/2016. The petitioner had contended in the said petition that he proposes to amend the plaint by including the prayer clause for incorporating appropriate prayers and then file an application

for production of additional documents. This Court while permitting withdrawal has observed that in the event such an application is filed the Trial Court shall decide the same on its own merits and in accordance with law. All the rival contentions of the parties were left open. Thereafter, the petitioner filed application Exhibit 68 for amendment of plaint. Indisputably, the said application is a replica of the earlier application which was rejected except the last three paras of the proposed amendment which are as under:

- At para 12, 2nd last line, delete word "adverse".
- At prayer "AA" before prayer "a".

For a Judgment and Decree, declaring that the Plaintiff is the co-owner of the property under Survey No.184/19 of Village Alorna.

- Add para 28 A

The Plaintiff is entitled for a Judgment and Decree, declaring that the Plaintiff is the co-owner of the property under Survey No.184/19 of Village

Alorna.

5. The learned Trial Court has dismissed the said application holding that the present application is similar to the one filed earlier, which was rejected. It has also been held that the petitioner cannot withdraw the case of adverse possession as set up in the plaint. In para 14 of the impugned order, the learned Trial Court has found that the case as originally set up in the plaint was to declare the petitioner as the sole and absolute owner in exclusive possession and enjoyment of the suit property by adverse possession, which is now sought to be changed, as the petitioner is now claiming to be the co-owner. In that view of the matter, the application has been dismissed.

6. I have heard the learned Counsel for the parties and perused record.

7. It is submitted by the learned Counsel for

the petitioner that the suit is at a stage where the trial has not commenced. It is submitted that amendment has to be liberally allowed particularly when the trial has not commenced. It is submitted that the petitioner had inadvertently mentioned in para 12 of the plaint that the petitioner is in possession by way of adverse possession. It is submitted that now the petitioner has come in possession of certain documents which show that the petitioner is the co-owner. It is submitted that this Court had granted liberty to the petitioner to file an application for amendment which has not been properly considered. He, therefore, submits that the impugned order be set aside.

8. On the contrary, it is submitted by the learned Counsel for the respondent that the present application for amendment, is identical, except the addition of paras as reproduced above. It is submitted that the petitioner having withdrawn the earlier petition could not

have filed another application on a similar ground. The learned Counsel also submits that the petitioner having based his claim on adverse possession cannot now claim to be the co-owner on the basis of certain alleged title document and this would amount to withdrawal of a categorical admission, which is not permissible. It is submitted that the impugned order does not show exercise of discretion with any material irregularity, so as to require interference.

9. I have carefully considered the rival circumstances and the submissions made. At the outset, it is necessary to mention that the application filed by the petitioner has not been dismissed on the ground that the trial has commenced. Thus, the said issue does not arise in this petition. Even at the stage where the trial has not commenced, it is necessary for the petitioner to satisfy the Court that, a case for allowing the amendment is made out. I find that the present application filed by the petitioner

is practically on similar lines as the one filed earlier, which was rejected and the petition against the same has been withdrawn. That apart, the petitioner specifically came with a case in para 12 of the plaint as under:

"12. The Plaintiff states that all the above acts have been carried out by the Plaintiff openly, peacefully, continually and have been never objected by any person whomsoever and therefore exclusive right, interest and title to the suit property has crystalised in favour of the Plaintiff by virtue of adverse possession."

Now, the petitioner is trying to extricate himself from the said case, on the specious ground that this was so pleaded inadvertently. It is trite that a plea of adverse possession cannot go along with a plea of co-ownership. In that view of the matter, as rightly submitted on behalf of the respondents, if the proposed amendment is allowed the same would amount to permitting the petitioner to retract from a categorical admission. It is now well settled that in a given case an admission made in the

pleadings can be explained or clarified but cannot be withdrawn or retracted (See **Ram Niranjan Kajaria V/s. Sheo Prakash Kajaria and others, 2015 10 SCC 203**). In that view of the matter, in addition to the reasons articulated by the Trial Court, I find that the amendment cannot be granted. The petition is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

NH