

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.282 OF 2015**

1 Mr. Jose Carlos D'Silva,
major of age, Indian
National; and his wife,

2 Mrs. Monica D'Silva,
major of age, Indian
National,

Both residing at House
No.1060, Hublican House,
Grande Carona, P.O.
Carona, Bardez-Goa.

.... Petitioners

V/s

1 Mr. Pedro Xavier Elias
D'Cunha alias Pedro
Xavier D'Cunha alias
Peter D'Cunha, major of
age, Ex-I.A.F., residing
at No.10, Appadorai, 2nd
Street, Ayanavaram,
Madras-600023 (expired),
through his legal heirs,

1a) Smt. Sheila Theresa
D'Cunha, widow of late
Pedro Xavier Elias
D'Cunha, of major age,
housewife.

1b) Mr. Arthur Joseph
D'Cunha, son of late
Pedro Xavier Elias
D'Cunha, of major age,
retired.

1c) Smt. Paulena D'Cunha,
daughter of late Pedro
Xavier Elias D'Cunha,
of major age, married.

1d) Mr. Ivan Charles
D'Cunha, son of late
Pedro Xavier Elias
D'Cunha, of major age,
retired.

1e) Mr. Richard Allan
D'Cunha, son of late
Pedro Xavier Elias
D'Cunha, of major age,
retired.

All residents of 3/157,
Subhash Chandra Bose
Street, Gudapakkam,
Thiruvallur District,
Tamil Nadu.

.... Respondents

Shri D. Pangam, Advocate for the Petitioners.
Shri J.J. Mulgaonkar, Advocate for the
Respondents.

CORAM : C.V. BHADANG, J.

DATE : 30th AUGUST, 2016

ORAL JUDGMENT :

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

2. The petitioners, who are the original

defendants, are challenging the order dated 13/10/2014 passed by the learned Civil Judge Junior Division at Mapusa in Regular Civil Suit No.263/2000/E (old Special Civil Suit No.248/1992/A). By the impugned order, the application for amendment of plaint filed by the respondents/plaintiffs has been allowed.

3. The brief facts are that the respondents filed the aforesaid Civil Suit for mandatory injunction seeking demolition of construction of garage of the petitioners and for their eviction from the suit house. It is a matter of record that the petitioners had raised an issue of mundkarship which was referred to the Mamlatdar on 25/03/1994. The issue was finally answered in favour of the petitioners on 7/01/2014. The records and proceedings were transferred to the Civil Court on 17/07/2014. After that on 10/09/2014, the respondents filed an application for amendment of the plaint under Order 6 Rule 17 of the Civil Procedure Code.

4. The case made out in the application for amendment is that while drafting the suit due to inadvertent/bonafide, mistake a prayer for injunction restraining the petitioners/defendants from effecting any further construction has remained to be made in the plaint. It was contended that taking advantage of the absence of the respondents, the petitioners have been raising illegal and unauthorised construction in the suit property, thereby depriving the respondents of their right of enjoyment of the suit property. It was contended that the petitioners have also on several occasions tried to prevent the deceased plaintiffs, so also other plaintiffs, including plaintiff no.1(c) from entering the suit property. In such circumstances, the respondents sought amendment of the plaint by introduction of paras 29(a) to 29(c) and prayer clause (bb).

5. The application was opposed on behalf of the petitioners, inter alia, on the ground that there is no cause of action for seeking the amendment of the plaint. It was contended that no specific instance of an illegal construction being raised or interference in the enjoyment of the suit property has been stated.

6. The learned Trial Court found that from 1994 to 2014, the issue of mundkarship was pending before the Mamlatdar and after the records and proceedings were transferred to the Court on 17/07/2014, the application for amendment came to be made on 10/09/2014. This according to the learned Trial Court was sufficient to explain the delay in filing the application. The Trial Court further found that, delay by itself does not 'entirely curtail the powers of the Court to allow amendment'. In that view of the matter, the application for amendment came to be allowed.

7. I have heard Shri Pangam, the learned Counsel appearing for the petitioners and Shri Mulgaonkar, the learned Counsel appearing for the respondents. With the assistance of the learned Counsel for the parties, I have perused copy of the application for amendment and reply as also the impugned order passed.

8. It is contended by the learned Counsel for the petitioners that the ground for seeking injunction, was available to the respondents on the date of the filing of the suit, which is evident from the fact that the respondents claim that due to inadvertence the relief of injunction remained to be asked for. He submits that in such circumstances the amendment could not be allowed after 25 years of the filing of the suit. The learned Counsel states that the amendment would be barred by limitation and by the proposed amendment the valuable right accruing to the petitioners, cannot be taken away. It is submitted that the ground about the

pendency of the mundkarial issue before the Mamlatdar as being the cause for not filing the application for amendment earlier is not taken by the respondents in the application. The learned Counsel points out that even otherwise on any such ground or reason the application which is filed at a belated stage could not have been allowed. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Ashutosh Chaturvedi V/s. Prano Devi & Ors., (2008) 15 SCC 610** and **Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) V/s. Ramesh Chander & Ors., (2010) 14 SCC 596.**

9. On the contrary, it is submitted by Shri Mulgaonkar, the learned counsel for the respondents that the proposed amendment does not change the nature of the suit. According to him, the suit is for mandatory injunction for demolition of the garage and for eviction from suit house. He submits that the petitioners,

taking advantage of the absence of the respondents have carried out illegal construction in the suit property. The learned Counsel points out that the foundation for the relief of temporary injunction is already there in the plaint. The learned Counsel further points out that issue of limitation is rightly kept open by the learned Trial Court to be decided at the appropriate stage. He, therefore, submits that the impugned order does not result in any manifest injustice to the petitioners, so as to require interference.

10. I have carefully considered the circumstances and the submissions made. At the outset, it is necessary to mention that admittedly the trial has not commenced in this case. Thus, the proviso to Order 6 Rule 17 of Civil Procedure Code does not come in the way of allowing the amendment. It is true that in the application for amendment the respondents have claimed that the relief of injunction remained

to be incorporated out of 'bonafide inadvertence'. The application for amendment has to be read as a whole, which would indicate that according to the respondents taking advantage of the absence of the plaintiffs, the petitioners 'have been raising illegal and unauthorised construction in the suit property'. It is further claimed that the petitioners have on several occasions tried to prevent the deceased plaintiffs so also the other plaintiffs including plaintiff no.1(c), from entering into the suit property. It is further necessary to mention that the suit as originally filed includes the relief of mandatory injunction and eviction. Thus the proposed amendment cannot be said to be entirely foreign to the subject matter of the suit or the reliefs claimed therein. In my considered view, the proposed amendment would be of the same genre as the relief already claimed in the suit. It is true that the respondents have not pleaded about the pendency of the mundkarial issue as the reason

for not filing the application earlier. However, that cannot preclude the Trial Court from relying on facts which are clearly borne out of the record. Indisputably, the issue of mundkarship was pending before the Mamlatdar from the year 1994 to 2014. The records and proceedings were transferred to the Civil Court in July, 2014 and in September, 2014 the application for amendment came to be made. Considering these circumstances, the Trial Court has found that the delay is properly explained. The Trial Court has further left the objection and the issue of limitation open to be gone into at the appropriate stage. It is evident that the petitioners would get an opportunity to file an additional written statement and contest the suit on all available grounds, including the issue about the amendment being barred by limitation and thus the impugned order cannot be said to have resulted into any manifest injustice to the petitioners, so as to require interference in the supervisory jurisdiction of

this Court under Article 227 of the Constitution of India (see ***Shalini Shyam Shetty & Anr. V/s Rajendra Shankar Patil, (2010) 8 SCC 329***).

11. In the case of ***Van Vibhag Karamchari*** (supra), the suit was sought to be amended by inclusion of a prayer for specific performance after 11 years of the filing of the suit. The Hon'ble Supreme Court after taking note of the limitation as provided under Article 54 of the Limitation Act, found that the inclusion of the plea of specific performance by way of amendment virtually alters the character of the suit, and its pecuniary jurisdiction had gone up and the plaint was required to be transferred to a different Court. In that view of the matter, it was held that the very basis of the suit was changed and such amendment even though allowed could not relate back to the date of filing of the suit.

12. In the case of ***Ashutosh Cahturvedi***

(supra) the amendment was sought at the appellate stage. In para 15 of the judgment, it was found that the pendency of the appeal in the District Court could not have precluded the plaintiffs to file an application for amendment of plaint before the Trial Court, as the Trial Court, despite requisitioning of the records by the appellate Court maintains a supplementary record.

13. In my considered view, the facts in the present case are distinguishable. In any case, as noticed earlier, in the absence of any manifest injustice or prejudice to the petitioners, I decline to interfere with the discretionary order passed by the Trial Court. In the result, the Writ Petition is dismissed with no order as to costs.

C.V. BHADANG, J.

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