

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.228 OF 2015.

1. Mr. Francisco Mario Pereira
Alias Franky Pereira, s/o late
Mariano Pereira, Major in age,
Businessman, H. No. 110/M/15,
Kirbhat Nuvem, Salcete, Goa.
 2. Jose Salvador Fernandes, Major in
age, Businessman, r/o. H. No.110,
Demani, Cuncolim, Salcete, Goa.
 3. Mr. Kenneth Sunil Fernandes, s/o.
late Pedro Fernandes, major in
age, Businessman, r/o. H. No.114,
Demani, Cuncolim, Goa.
 4. Mr. Bruno Rodritgues, Major in
age, Businessman, r/o. H. No.259,
Francisco Costa Waddo, Utorda,
Salcete, Goa.
- Petitioners.

Versus

1. Comunidade of Balli, Through its
Attorney, Having its office at
Mottar, Bali, Quepem, Goa.
2. The Administrator of
Comunidade of Salcete,
Having his office at
Comunidade Building, Margao
Goa.
3. Yeshwant Vishwanath Keni
Robolo Since Deceased through
his heirs:
 - a) Swapnil Yeshwant Keni Robolo,
 - b) Sudhakar Yeshwant Keni
Robolo,
Both are of major age,
businessman, c/o Swapnil

Investment, Near Navelim
Panchayat, Navelim, Salcete
Goa.

4. Hari Gurguro Phaldesai Since deceased through his LRS:
 - a Smt. Taramati Hari Foldesai, W/o Hari Gurguro Phaldesai
 - b Miss. Lata Hari Fol Dessai
 - c Miss Alka Hari Fol Dessai
 - d Smt. Rohini Rohidas Fol Desai w/o late Rohidas Hari Fol Dessai
 - e Miss Sarika Rohidas Fol Desai, d/o late Rohidas Hari Fol Desai,
 - f Shri Deeraj Rohidas Fol Desaik, d/o late Rohidas Hari Fol Desai,
 - g Miss Santoshi Rohidas Fol Desai, d/o late Rohidas Hari Fol Desai,
 - h Smt. Prema Madhukar Gaunco Desai, w/o Shri Madhukar Govind Gaunco Desai
 - i Shri Subhash Hari Fol Dessai And his wife
 - j Smt. Subhadra Subhash Fol Dessai w/o Subhash Hari Fol Dessai
 - k Shri Dilip Hari Fol Dessai
 - l Shri Sanjay Hari Fol Dessai, all of major age, and All r/o. Balli, Quepem, Goa.
5. Guno Yesso Phaldesai, Since deceased Through his sole heir Mr. Promod Guno Phaldesai Of major age, businessman, r/o Karemoll, Balli, Quepem, Goa.

6. Mr. Digamber Shiva Phaldesai,
Major in age, r/o Karemol, Bali,
Quepem, Goa.
 7. Somu Sinai Audi, Of major age,
retired, Residing near
Chowgule Car Depot, Davorlim,
Salcete Goa.
 8. Pundalik Vithoba Phaldesai, Of
Major age, retired, r/o. Balli
Math, near Four Roads, Balli,
Quepem Goa.
 9. Balasu Vithoba Phaldesai,
Since deceased through his
heirs:
 - a) Mandar Balasu Phaldesai
 - b) Deepak Balasy Phaldesai
Both of major age,
businessman,
r/o Balli (Four Roads),
Balli, Quepem Goa.
 10. Bhagwant Balikar,
Major in age, last known
address: Adnem, Balli, Quepem
Goa.
 11. Dr. Vishvajet Vishwanath Fal
Dessai
 12. Shri Ramakant Vithal Fal
Dessai
 13. Sham Vithal Fal Dessai,
All major in age, married,
r/o Balli, Quepem, Goa.
- Respondents.

Shri S. Volovikar, Advocate for the petitioners.

Shri S. Redkar, Advocate for the respondent no.1.

Shri R. G. Ramani, Advocate for the respondent no.2.

CORAM : F.M. REIS, J.

DATE : 30th November, 2016.

ORAL JUDGMENT

Heard Shri S. Volovikar, learned counsel appearing for the petitioners, Shri S. Redkar, learned counsel appearing for the respondent no.1 and Shri R. G. Ramani, learned counsel appearing for the respondent no.2.

2. Rule.

3. Heard forthwith with the consent of the learned Counsel appearing for the respective parties.

4. The learned Counsel appearing for the respective respondents waive notice.

5. The challenge in the above petition is to the refusal by the learned Civil Judge, Junior Division at Quepem to grant

leave to amend the plaint.

6. It is contended by the learned Counsel appearing for the petitioners that much before most of the defendants file their written statements, the petitioners filed an application for leave to amend to fashion the claim put forward by the petitioners in the suit in terms of the consent decree which came to be passed way back on 31.12.1966. The learned Counsel further points out that when the suit was filed, the petitioners did not have knowledge of such consent decree wherein the ancestors of the petitioners as well as the respondents were parties to such decree. It is further submitted that the error which had cropped up in the plaint in describing the property as well as the reliefs claimed in the suit were being rectified on the basis of the consent decree which according to the petitioners is binding on the petitioners and the respondents. The learned Counsel has thereafter taken me through the impugned order to point out that the learned Judge has misdirected itself in refusing the leave to amend specifically on the ground that the relief sought is barred by limitation. It is further pointed out that the learned Judge has erroneously taken a view that the suit itself is for executing the

decree, which according to him, is an erroneous approach. The learned Counsel further points out that correcting a typographical error in the number of the Land Records and raising the claim put by the petitioners would not by itself change the nature of the suit and cause of the action. The learned Counsel, as such, submits that the impugned order be quashed and set aside.

7. Shri R. G. Ramani, learned Counsel appearing for the respondent no.2 essentially raised the contentions that the respondents have already filed their written statements and the amendment application was filed only thereafter. The learned Counsel further submitted that the petitioners are in fact correcting the loopholes in their plaint based on the stand taken by the respondents which exercise is not permissible in law. The learned Counsel further points out that the suit property itself would change and the cause of action would be different and, as such, the learned Judge was justified to pass the impugned order.

8. Shri S. Redkar, learned Counsel appearing for the respondent no.1 submitted that the relief sought to be

incorporated would change the nature of the suit and, as such, according to him, the relief is essentially to execute the decree passed in the year 1966. The learned Counsel further points out that as the cause of action would change, the learned Judge was justified to pass the impugned order and to refuse the relief to the petitioners to amend the plaint.

9. I have duly examined the records with the assistance of the learned Counsel and have also considered rival contentions.

10. It is not disputed that the application for amendment was filed much before the trial had commenced. It is also not disputed that the issues were not framed and most of the defendants had not even filed the written statement.

11. On perusal of the impugned order passed by the learned Judge which essentially took a view that the relief sought by the petitioners would amount to executing the decree passed in the year 1966. The learned Judge also considered that the relief itself is time barred and consequently refused to grant leave to the petitioners to amend the plaint by the

impugned order.

12. On perusal of the proposed amendment, it appears that the petitioners are fashioning their claim based on the consent decree passed in the year 1966. Though the learned Judge has noted that the parties to the consent decree have expired nevertheless, the learned Judge has failed to note that it is the contention of the petitioners that the petitioners and the respondents are the descendants of the parties to such consent decree. Whether the consent decree is binding on the respondents or not or whether the petitioners are entitled to raise a plea based on such consent decree is a matter to be examined by the learned Judge based on the stand taken by the respondents and after evidence is recorded. At this stage merely because the petitioners are raising their claim based on the consent decree passed in the year 1966 by itself cannot mean that cause of action has change or that the pleadings sought to be incorporated are inconsistent with the original pleadings.

13. Taking note of the fact that the application for amendment was filed before commencement of the trial, I find

that the learned Judge was not justified to pass the impugned order by refusing leave to the petitioners to amend the plaint. Needless to say that the respondents would be entitled to file an additional written statement and take all available defences in connection with the proposed amendment. Basically it cannot be disputed prima facie that the proposed amendments would in any way change the cause of action nor the subject matter of the property.

14. In view of the above, I find that the learned Judge was not justified to pass the impugned order by refusing leave to the petitioner to amend the plaint. No doubt the respondents are entitled for costs which are quantified at ₹5000/- (Rupees five thousand only) each to the parties represented by Advocate R. G. Ramani and Advocate S. Redkar respectively.

15. In view of the above, I pass the following:-

ORDER

- (i) The impugned order dated 27.8.2014 is quashed and set aside.
- (ii) The petitioners are granted leave to amend the plaint subject to payment of costs of ₹5000/- each to

the two sets of the respondents represented by the learned Counsels referred to herein above.

- (iii) Needless to say that the respondents are entitled to file an additional written statement and take all defences available in accordance with law. Rule is made absolute in the above terms.

F.M. REIS, J.

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