

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION No.942 of 2015**

1. Mr. Egidio Braganza,  
Son of late Jose Antonio Rodolph  
Aquaviva Braganza,  
Major of age,  
Married, Service;
2. Mrs. Brigit Irene Braganza,  
wife of Mr. Egidio Rodolph  
Major of age,  
Married, housewife,  
Both residents of Shilpa Apartments,  
Flat no. S-3, 2<sup>nd</sup> Floor,  
Altinho, Mapusa, Bardez, Goa. .... Petitioners

***V e r s u s***

1. Mr. Lino Agnelo Fernandes  
Son of late Mr. Sebastiao Gabriel Fernandes,  
Major of age, business, married
2. Mrs. Josephina Fernandes  
Wife of Mr. Lino Agnelo Fernandes  
Major of age, housewife,  
Both residents of H. No. 494/2,  
St. Francis Waddo, Goa Vbelha,  
Ilhas Goa.
3. Mr. Marcal Antonio Fernandes alias  
Marshal Antonio Fernandes alias  
Marshall S. Fernandes,  
Son of late Mr. Sebastiao Gabriel Fernandes  
Major of age, married, business.
4. Mrs. Ruby Fernandes,  
wife of Mr. Marcal Antonio Fernandes  
Major of age, housewife,  
both residents of Malwara,

Opp. Fr. Agnel College,  
Agassaim, Tiswadi, Goa,

5. Mrs. Micaela Lopes,  
Daughter of late Mr. Sebastiao  
Gabriel Fernandes, Major of age,  
Married, business,
6. Mrs Sylvina Raquel Lopes  
Daughter of late Shri Jose Xavier Lopes  
Major of age, married, business,
7. Mr. Sydney Soares  
son of Mr. Antonio Feo Soares  
Major of age, married, business,  
All there residents of H. No. 13/1,  
Batim, Portel Bhatt,  
Tiswadi, Goa.
8. Mr. Joao Sebastiao Fernandes,  
Son of late Mr. Sebastiao Gabriel Fernandes,  
Major of age, married, business,
9. Mrs. Veronica Joao Fernandes,  
Wife of late Joao Sebastiao Fernandes,  
Major of age, housewife,  
Both residents of H. No. 14,  
Portel Bhatt, Batim,  
Tiswadi, Goa.
10. Mrs. Juliet Fernandes D' Souza,  
Daughter of late Mr. Sebastiao Gabriel Fernandes,  
Major of age, married, housewife,
11. Mr. Anthony D' Souza,  
Son of Mr. Clement D' Souza,  
Major of age, service  
Both residing at H. No. 227/1,  
Silva Waddo, Goa- Velha,  
Ilhas Goa.
12. Mrs. Regina Celina Sara Gracias e  
Braganza alias Sara Braganza  
Daughter of late Mrs. Victoria Gracias e Braganza,  
widow, household.

13. Mr. Lino Antonio Sacra Familia Braganza  
Major of age, service,

14. Miss Romana Guadalupe  
Victoria Braganza,  
Major of age, spinster, household,  
All there residing at H. No. 290,  
Behind Post Office,  
Agassaim, Tiswadi, Goa.

..... Respondents

Shri Galileo Teles, Advocate for the Petitioners.

Shri S. Karpe, Advocate for the Respondents.

**CORAM: C. V. BHADANG, J.**

**DATE: 7<sup>th</sup> April, 2016.**

**ORAL JUDGMENT:**

Rule. Learned counsel for the respondent nos.1 to 4 waive service. There is no appearance on behalf of the rest of the respondents, though served.

2. The record shows that on 24/2/2016, a notice indicating that the matter is likely to be heard finally at the admission stage was issued. As such, the petition is taken up for final disposal at the stage of admission.

3. The petitioner has filed Regular Civil Suit no.60/2012/D against the respondents which is pending before the learned Civil Judge

Junior Division at Panaji. That suit is inter alia for declaration of a sale deed dated 10/8/1998 and a Gift Deed dated 29/1/2010 as null and void. The petitioner is also praying for a relief of compensation for unauthorized user of the suit structure, permanent injunction and for possession.

4. Indisputably, the Petitioner no. 1 has entered into the witness box and his examination in chief is recorded in full and the suit was adjourned for cross examination. At this stage, the petitioner filed an application (Exhibit 93) for amendment of the plaint, to incorporate paras 25(a) to 25 (d). It appears that the application was opposed, inter alia, on the ground that the trial having already commenced, the amendment could not be allowed as the petitioners have failed to show that inspite of due diligence they could not have sought the amendment earlier.

5. The learned trial Court by the impugned order has found that the trial had commenced. The learned trial Court was further found that the petitioners having failed to demonstrate to that inspite of due diligence, they could not have raised the matter before the amendment cannot be allowed. Thus basically on the ground of the requirements of proviso to Order 6 Rule 17 of C.P.C the application (Exhibit 93) came to be dismissed.

6. The learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Sajjan Kumar vs. Ram Kishan** reported in **(2005) 13 SCC 89** in order to submit that an amendment of the present nature can be allowed in order to avoid any complication at the stage of execution. It is submitted that the proposed amendment was only clarifactory in nature and could not have caused any prejudice to the respondents as the petitioner was still, under cross examination.

7. The learned Counsel for the Respondent nos. 1 to 4 has supported the impugned Order. It is submitted that the trial would commence on the Plaintiff entering into the witness box. It is submitted that once the proviso to Order 6 Rule 17 of the C.P.C. is attracted, unless and until it is shown that inspite of due diligence, the Petitioner could not have sought for the amendment, earlier the Court would lack jurisdiction to grant the same.

8. I have considered the rival circumstances and the submissions made. The perusal of the plaint, would show that the Petitioners essentially seek declaration about the Sale Deed dated 10.08.1998 and Gift Deed dated 29.01.2010 as being null and void. There are some consequential reliefs about possession, injunction and

compensation prayed for. Indisputably, the Petitioner no. 1 has entered into the witness box and his examination in chief is said to be complete. The cross examination is yet to start.

9. By virtue of the amendment, the Petitioner wants to add paragraph 25(a) to 25(d) in the plaint.

10. On perusal of the application for amendment, it would show that in paras 25(a), the Plaintiff wants to incorporate a total area of the survey holding no. 22/2 of Village Batim of Tiswadi Taluka and to set out the remaining after the sale of the two different portions of the said survey holding, by the late father of the Petitioner no. 1. By virtue of Para 25(b), the Petitioners want to produce a sketch of the portions after the same of the survey holdings. In Par 25(c), the Plaintiff wants to set out the boundaries of the portion sold to Shri Sebastiao Gabrial Fernandes while by Para 25(d), the Petitioners want to bring on record that the mango tree does not fall in the area sold either to Shri Sebastiao Gabriel Fernandes or to the sons of late Narayan Govenkar. A perusal of the plaint would go to show that survey no. 22/2 was a contiguous to the subject matter of dispute.

11. Thus, to my mind, the learned Counsel for the Petitioners is justified in contending by way of the proposed amendment, it is only

certain particulars/description of the property be gathered so as to facilitate proper identification and in that view of the matter, the proposed amendment would only be clarificatory in nature.

12. In the case of ***Sajjan Kumar vs. Ram Kishan*** (supra), the application by the Petitioners for amendment, seeking correction of description of the suit premises was rejected. In that case, the prayer for amendment was proposed on behalf of the defendant on the ground that although the defendant had taken a plea in the written statement that the suit premises were not correctly described, yet, the Petitioners had proceeded with the trial and did not seek an amendment at an early stage. The Hon'ble Apex Court held that in the peculiar circumstances, the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal thereof, would create needless complications at the stage of execution in the event of the Plaintiff succeeds in the suit. It was in these circumstances, that the amendment was allowed.

13. Normally, the amendment can be allowed at any stage of the proceedings and there are instances where such amendments are allowed even at the stage of Second Appeal. In so far as the proviso to Order 6 Rule XVII of the Civil Procedure Code is concerned, it would

come in the play only where the Court comes to the conclusion that the party has not approached the Court with due diligence. This Court in the case of ***Shri Rajaram Naik vs. The State of Goa & Ors.*** reported in ***2016(1) ALL MR 5***, has, inter alia, held that the proviso in fact aims at balancing conflicting considerations of expeditious disposal of the suit on one and the genuine need of the party to effect amendment. The nature of the amendment may also be relevant for instance where the amendment is only by way of an amplification and/or clarification of the matter in respect of which the foundation is already ready in the plaint may receive more liberal consideration.

14. This Court in the case of ***Rajbahaddur Jiyaram Yadav vs. Prakash @ Pappu Jiyaram Yadav & Ors.*** reported in ***2016(I) ALL MR 550*** had allowed an amendment amidst of the final argument to include the property which was excluded. The amendment was allowed subject to condition of payment of a costs with a view to reduce hardship of other side.

15. Coming back to the present case, I find that the proposed amendment is essential to facilitate the more proper description and identification of the property and thus could be allowed subject to costs.

16. In the result, the Petition is allowed. The impugned Order dated 05.09.2015 is hereby set aside. The application for amendment is allowed subject to payment of costs of Rs.3,000/- to be paid to the Respondents.

17. Rule is made absolute in the aforesaid terms with no Orders as to costs.

C. V. BHADANG, J.

Ap/-arp/\*