

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 61 OF 2016

1. Mr. Francis Luciano Pereira,
Major in age,
2. Mrs. Fatima Pereira,
Major of age,
Both r/o. House no. 4-133,
Porba Wado, Calangute,
Bardez, Goa. Petitioners

V e r s u s

1. Messrs Kay Jay Constructions Co. Pvt. Ltd.
Represented by
Mr. Harish Korwani,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
2. Mr Anthony Egidio Fernandes,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
3. Mr. Vitorino Fernandes,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
4. Mr. Rover Fernandes Alvares,
Major of age, unmarried,
5. Miss Lavita Fernandes Alvares,
Major of age, unmarried,
6. Mr. Joelson Carlos Lamartine de
Melo Fernandes Alvares,
Major of age, married,
7. Mrs. Merle Felecity Fernandes Alvares,
Major of age, married,
All r/o. Reora, Behind
Corporation Bank,
Bardez, Goa.

8. Mr. Issac Anthony Fernandes (deceased)
through his legal heir,
Mr. Michael Fernandes,
Major of age,
r/o. H. No. 1721,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
 9. Mr. Alex Fernandes,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
 10. Mr. Celestino Thomas Fernandes,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
 11. Mr. Inacio Brigido Fernandes,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
 12. Mr. Xavier Lobo,
Major of age,
r/o. Porba Waddo,
Calangute, Bardez, Goa.
 13. Mrs. Maria Sebastiana Pinto,
Major of age, housewife,
 14. Mr. Bernard Pinto,
Major of age,
Both r/o. Porba Waddo,
Calangute, Bardez, Goa.
- Respondents

Mr. J. Godinho, Advocate for the Petitioners.

Mr. S. D. Lotlikar, Senior Advocate with Mr. P. Lotlikar, Advocate for the Respondents.

Coram :- C. V. BHADANG, J

Judgment reserved on : 31.03. 2016

Judgment Pronounced on : 05.05.2016

JUDGMENT

Rule, made returnable forthwith. The learned Counsel for the contesting Respondent nos. 1 and 3 waive service. Heard finally by consent.

2. By this Petition, the Petitioners who are original Plaintiffs are challenging the Order dated 12.10.2015, passed by the learned Civil Judge, Junior Division at Mapusa in Regular Civil Suit no. 161 of 2009 by which application exhibit D-113 filed by the Petitioners for amendment of the Plaint, has been rejected.

3. The brief facts are that the Petitioners have filed the aforesaid suit for declaration and injunction in respect of a right of way. The case made out in the plaint is that the Plaintiffs have their mundkarial house in property bearing survey no. 362/10 known as "Prabhu waddo" at Calangute, Bardez, Goa. It is contended that the Petitioner no. 1 had constructed a house therein about 38 years back. It was contended that the Defendants had purchased a portion of the property bearing survey no. 362/10 from the owners and had obstructed the access/way of the Plaintiffs. In such circumstances, the aforesaid suit came to be filed for declaration and injunction.

4. It appears that during the recording of evidence of Dw.1, the witness produced form no. I and XIV claiming that the entire survey no. 369/10 is belonging to Jose Fernandes and his family. It was contended that the Defendants had

purchased part of the property under survey no. 362/10 which is now bearing survey no. 362/10-C in respect of which a separate Form I and XIV was issued. That was produced and marked as exhibit 108. The separate Survey Plan of survey no. 362/10-C was produced and marked exhibit 112. Dw.1 also admitted that in the suit the Petitioners are claiming an access through the property bearing survey no.362/10-C.

5. In such circumstances, the Petitioners filed an application for amendment exhibit D-113.

6. The only ground on which the amendment was sought was that the Petitioners have subsequently learnt that survey no. 362/10 has been partitioned before the Deputy Collector and the portion from which the suit way is claimed is now numbered as 362/10-C. The Petitioners, therefore, have sought for amendment in the plaint and to the prayer clause.

7. The learned Trial Court by the impugned order, has found that the Petitioners falsely claimed that they were unaware of the Partition proceedings. It was found that the Partition proceedings were commenced in the year 2007 i.e. two years before the filing of the suit. Dw. 1, had produced a certified copy of application dated 15.04.2008 by which the Petitioner no. 1 had sought his intervention in the Partition proceedings. It was thus found that the Petitioners were aware of the Partition proceedings and the claim that they had subsequently learnt about the properties having been partitioned, is false. The Trial Court,

therefore, rejected the application with exemplary costs of Rs.2,000/-.

8. I have heard the learned Counsel for the Petitioners and the learned Counsel for the first Respondent which is the contesting party.

9. On hearing the learned Counsel for the parties and perusal of the record and the impugned Order, I do not find that the impugned Order can be sustained. The learned Trial Court found that the Partition proceedings were filed prior to the institution of the suit and the Petitioner no. 1 also filed an application for intervention thereto and, therefore, the reason for not carrying out the amendment earlier is false. I do not find that the said finding can be sustained. It is true that the Partition proceedings may have been filed prior to the filing of the suit in which the Petitioner no. 1 had sought intervention. However, there is nothing on record whether such intervention was allowed. Be that as it may, the evidence of DW.1 clearly shows that the Trial Court had allowed the production of Form I and XIV and a Survey Plan in respect of survey no. 362/10-C. Dw. 1 has also admitted that the Petitioners are claiming the suit access through property bearing survey no. 362/10-C. Not only that, Dw.1 has also stated in the evidence that the partition was carried out after filing of the suit. If that be so, I find that the reason cannot be said to be false as held by the learned Trial Court. In either case, the Court can always allow amendment which is necessary for deciding the real controversy in dispute and to ensure that the Decree, if passed, is effective and executable. It is not necessary to go into the aspect whether the Petitioners would be able to substantiate their case or not. Suffice it to mention, that subsequent to the filing of

this suit, property surveyed under no. 362/10 was partitioned and a particular portion through which the access is claimed is now marked as survey no. 362/10-C. If the Trial Court has allowed the production of the form I and XIV and the Survey Plan during the cross examination of Respondent no. 1, there is no reason as to why an amendment in the nature as sought could have been refused. I find that the amendment would be necessary to decide the real controversy in the suit and does not cause any prejudice to the Respondent no. 1.

10. In that view of the matter, the Petition is allowed. The impugned Order is hereby set aside. Application exhibit 113 is allowed as prayed. Amendment shall be carried out within a period of four weeks from the receipt of this Order.

11. It is made clear that this Court has not expressed any opinion on the merits of the rival contentions in the suit.

12. Rule is made absolute in the aforesaid terms with no Order as to costs.

C. V. BHADANG, J.

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