

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 169 OF 2017**

1. Mr. Calvin Rodrigues,  
Son of late Shri Vincent Rodrigues,  
Major in age, Married, Retired  
and his wife,

2. Mrs. Fatima Rodrigues,  
Wife of Mr. Calvin Rodrigues,  
Major in age, Married, Service,  
Both Indian Nationals and  
R/o H. No.613,  
Behind Nani and Rani Restaurant,  
P. O. Calangute, Baga,  
Bardez-Goa.

.... Petitioners

V e r s u s

1. Mrs. Maria Amberta Fernandes,  
Wife of Mr. Alexandre Hermenegildo Fernandes,  
Major in age, Married,  
R/o H. No.558, Near Royal Goan Beach Hotel,  
Arpora-Bga, Bardez-Goa.

2. Mr. Rajesh Simepuruskar,  
R/o Umtavaddo, Calangute,  
Bardez-Goa.

.... Respondents

Shri Deepak Gaonkar, Advocate for the Petitioners.

Shri Rohit Bras De Sa , Advocate for the Respondents.

**CORAM: M. S. SONAK, J.**

**DATE: 18<sup>th</sup> April, 2017.**

**ORAL JUDGMENT:**

Heard Mr. Deepak Gaonkar, the learned counsel for the  
petitioners and Mr. Rohit Bras De Sa, the learned counsel for the

respondents.

2. Rule. With the consent of and at the request of the learned counsel for the parties heard forthwith.

3. Mr. Gaonkar, the learned counsel for the petitioners has very ably assailed the orders dated 30/9/2016 made by the learned trial Judge granting leave to the respondents to amend the plaint as well as the written statement to the counter claim. Mr. Gaonkar submits that the trial in the suit had already commenced and there was no material on record to establish due diligence on the part of the respondents. In such circumstances, Mr. Gaonkar submits that the proviso to Order 6 Rule 17 of the C.P.C was clearly attracted and the amendment applications ought not to have been allowed. Mr. Goankar further submits that the plaint as initially instituted had made reference to the property surveyed under no.225 (part) (old cadastral) and the house therein presently surveyed under no.263/8 as admeasuring 125 sq.mtres. The proposed amendment seeks to enhance this area from 125 to 152 sq.mtrs. In the bargain, the respondents, have also thrown a direct challenge to the survey records and the description of the area in the survey records. Mr. Gaonkar also points out that in the plaint as originally instituted, there is reference in para 4 to property survey under no.263/4 which was

stated as admeasuring 1775 sq.mtrs. The proposed amendment, however seeks to reduce this area at 1566 sq.mtrs. Mr. Gaonkar submits that said exercise amounts to resiling or withdrawing from the admissions made in the plaint. He relies upon the decision of the Hon'ble Supreme Court in **Heeralal Vs. Kalyan Mal 1998 (1) SCC 278** to submit that no party may be permitted by means of an amendment to withdraw or resile from admissions made in the pleadings. Mr. Gaonkar submits that the learned trial Judge has only taken cognizance of the submission relating to withdrawal of admissions, but has failed to adjudicate upon the same.

4. Mr. Gaonkar also submits that in the written statement initially filed to the counter claim raised by the petitioners, the respondents had merely denied the counter claim. However, in terms of the amendment which is now permitted by the impugned orders, the respondents have proceeded to set up a completely new case. Mr. Gaonkar submits that this is impermissible and the amendment in such circumstances ought not to have been allowed.

5. Mr. De Sa, the learned counsel for the respondents submits that suitable explanation was furnished as to why such amendment could not be applied prior to the commencement of the trial. Mr. De Sa points out that the evidence of PW.1 is going on and it is at this stage that certain documents

(old survey records) were obtained by the respondent and on the basis of the same, amendment came to be applied for. Mr. De Sa submits that the amendment does not change the basic case pleaded by the respondents and the amendment is necessary for adjudication of the issues which arise in the matter. Mr. De Sa submits that this is clearly not a case of any withdrawal of the admissions. Mr. De Sa submits that the amendment basically elaborates upon the pleadings including, in particular, the pleadings in the written statement to the counter claim. For all these reasons Mr. De Sa submits that the petition may be dismissed.

6. The rival contentions now fall for determination:-

7. There is some explanation furnished as to why the amendment could not be applied for before the commencement of the trial. The explanation is that the respondents obtained possession of the cadastral survey plan on 3/6/2016 and soon thereafter applied for leave to amend. It is the case of the respondents that upon the superimposition of the cadastral survey plan with the present survey plans, they realized that some elaboration/explanation/clarification is necessary with regard to the areas set out in the original plaint. The learned trial judge has accepted such explanation and it really cannot be said that there is any unreasonableness either in the explanation furnished or in the approach of the learned trial

judge in accepting such explanation. In this case we are concerned with the old cadastral survey records and no sooner the respondents obtained the copies of the same, leave to amend was applied for. In these circumstances, it cannot be said that the impugned orders are in breach of the proviso to Order 6 Rule 17 of C.P.C..

8. This is also not a case of withdrawal of admissions or resiling from admissions. No doubt in the plaint as initially instituted there was reference to some areas. The respondents state that after they obtained the old cadastral survey record or upon superimposition of the same with the new survey records they have realized that the areas stated by them in the plaint were not quite accurate and therefore they applied for leave to amend. In one instance, there is a marginal increase in the area from 125 to 152 sq.mtres and in respect of other survey number there is consequential marginal decrease of the area by 1775 to 1563 sq.mts. The areas originally stated cannot as such be regraded as some sort of admissions, nor it can be said that the proposed amendments seek to withdraw admissions or permit the respondents to withdraw from the so called admissions made by them.

9. **Heeralal Vs. Kalyan Mal** (supra) no doubt reiterates the legal position that amendments which permit parties to resile from admissions

must not be permitted. The parties can always explain admissions or explain the circumstances in which so called admissions came to be made. However, generally, the parties should not be permitted to withdraw the admissions from the record or to resile from admissions. This was mainly in the context of certain and unambiguous admissions made in the written statement which were sought to be resiled by the defendants. The fact situation in **Heeralal (supra)** does not offer any parallel to the fact situation in the present case. As noted earlier, this is hardly a case of admission or withdrawal from admission. This is more a case where the respondents had sought to clarify matters or place the matters before the Court, which they perceive to be in the proper perspective, in the light of the old cadastral documents which have now come in their possession.

10. In the written statement to the counter claim as well the respondents had denied the counter claim raised by the petitioners. It is possible that the written statement was not elaborate. The amendment elaborates upon such denials. This is not a case where the respondents have come up with some entirely new case or a situation where the foundation of the defence has been altered. This is not a case where the proposed amendment displaces in its entirety the defences originally raised by the petitioners. There is accordingly no reason to fault the impugned orders made

by the learned trial judge in granting leave to amend, except to the extent that the learned trial judge completely overlooked that this was a case where the petitioners were required to be compensated by way of costs.

11. This is also not a case where some frontal challenge has been thrown to the survey records. Some statement that the areas reflected in the survey records are not correct does not amount to frontal challenge to the survey records itself. Besides in a civil suit the parties are entitled to lead evidence and demonstrate that the areas reflected in the survey records are incorrect or that they may not be relied upon. Ultimately, these are all matters to be decided on the basis of evidence in the suit. Accordingly, there is no case made out to interfere with the impugned orders except to the extent that the learned trial judge has not required the respondents to pay costs to the petitioners. The issues have been already been framed. The evidence of PW.1 is partly recorded. It is at this stage that leave to amend was applied for. All this is bound at least to some extent prejudice the petitioners. However, the prejudice is not of such nature as cannot be compensated by way of costs. The impugned orders are accordingly modified and the respondents are directed to pay to the petitioners costs of Rs.10,000/- each in respect of the amendments to the pleadings and to the written statement to the counter claim.

12. The impugned orders to the extent, they grant leave to amendment are not interfered with. However, the impugned orders to the extent, they impose no costs upon the respondents are modified and it is directed that the respondents shall pay consolidated costs of Rs.20,000/- to the petitioners within a period of eight weeks from today or on or before the next date fixed before the learned trial judge for hearing in the suit. It is made clear that in case such costs are not paid or deposited before the learned trial judge on or before the next date, the respondents shall not have the benefit of the orders impugned in this petition.

13. Further, the petitioners are held entitled to file their additional written statement if not already filed within the period of eight weeks from today.

14. Rule is accordingly made party absolute in this petition.

15. All concerned to act on basis of authenticated copy of this order.

**M. S. SONAK , J.**

**Ap/**

