

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 189 OF 2017

MR. MENINO SANTANA FERNANDES., ... Petitioner
Versus
KENTHONY FERNANDES @ ANTHONY @
SHANU AND 15 ORS., ... Respondents

Shri Nigel Da Costa Frias, Advocate for the petitioner.
Shri C. A. Coutinho, Advocate for the respondent nos.1 to 4.
Shri V. Braganza, Advocate for the respondent nos.5 to 8 except
respondent no.5(a) who has stated to have expired.
Shri Vishwadh Sardessai, Addl. Govt. Advocate for the
respondent nos.10 to 16.

Coram:- M. S. SONAK, J.

Date:- 19th April, 2017

P.C.

Heard Mr. N. Costa Frias, learned Counsel for the petitioner,
Mr.C. A. Coutinho, learned Counsel for the respondent nos.1 to
4, Shri V. Braganza, learned Counsel for the respondent nos.5 to
8 except respondent no.5(a) who has stated to have expired and
Shri V. Sardessai, learned Addl. Govt. Advocate for the
respondent nos.10 to 16.

2. The challenge in this petition is to an order dated 25.1.2017
by which the learned Trial Judge has declined the
petitioner/original plaintiff leave to amend the plaint.

3. Mr. N. Costa Frias, learned Counsel for the petitioner
submits that merely because leave to amend was applied after
commencement of the trial that by itself does not mean that such

leave has to be rejected. In this case, the petitioner had pointed out that the petitioner had throughout requested his earlier Advocate to place on record the facts which are now to be introduced by way of amendment. Mr. N. Costa Frias, further submits that amendment is necessary for determination of all the issues in a comprehensive manner. He submits that such an amendment is in the interest of justice and will also curtail further litigation. He submits that if amendment is allowed, the nature of the suit and the reliefs claimed, therein will not in any manner changed. Amendment is basically in order to elaborate or clarify what is already there in the main plaint. Mr. N. Costa Frias, learned Counsel relying upon decision of this Court in the case of *Mona Kapadia and others Vs. M/s Gammon India Limited*, 2015(1)Goa L.R. 357 and decision of Hon'ble Supreme Court in the case of *Pankaja and another Vs. Yellappa(Dead) By LRS. and others*, 2004(6) SCC 415, in support of his submissions.

4. The learned Counsel for the respondents points out that trial in the suit has already commenced. The plaintiff's evidence has already concluded. The defence evidence is currently on. They point out that in the past the plaintiff had amended the plaint at least on two occasions. They point out that amendment does not seek to bring on record any subsequent event. There is absolutely no explanation as regards diligence on the part of the petitioner. Amendment, if permitted, would contradict the

existing reliefs in the plaint. For all these reasons they submit that present petition may be dismissed.

5. Upon due consideration of the rival submissions and on perusal of the material on record, I am satisfied that there is no case made out to interfere with the exercise of discretion of the learned Trial Judge. Admittedly, trial in this suit has fairly advanced. The petitioner has concluded his evidence. The defendants' evidence is in progress. In terms of proviso to Order VI Rule 17 of CPC, no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

6. On perusal of the application seeking amendment, there is no explanation as regards any due diligence on the part of the petitioner. Self serving statement that the petitioner had informed his advocate earlier and he chose not to incorporate such material in the plaint is hardly sufficient to dilute rigour of Order VI Rule 17 of CPC. Apart from this there is no explanation in the application seeking leave to amend, even though, leave to amendment was applied for at highly belated stage after commencement of the trial. It is also required to note that on 2 earlier occasions the petitioner has already amended the plaint.

7. If the schedule to the amendment is perused, then, it is clear that the petitioner now seeks to introduce a relief that the defendant nos.5 to 8 transfer the suit property in favour of the

defendant no.9 i.e. Panchayat by way of a gift deed. If the plaint as originally instituted is perused then, it appears that it was the case of the petitioner that since they are also co-owners of the plot and suit property is an open space meant for the benefit of the plot, no transfer can take place without the consent of the petitioner. This means that the petitioner by means of amendment seeks to introduce a different plea, if not entirely, a contradictory plea in the suit. Proposed amendment is really not necessary for adjudication of the issue which is raised in the suit.

8. The discretion in the present case has been fairly exercised by the learned Trial Judge. This is not a case of either any judicial error or unreasonable exercise of discretion. In the case of Mona Kapadi(supra) this Court was concerned with an amendment to the written statement. Besides, by means of amendment what was sought to be challenged was an order in the course of proceedings. In Pankaja and another(supra) the Hon'ble Apex Court has held that discretion of the Court depends upon the facts and circumstances of the case and has to be exercised on judicious evaluation thereof.

9. In this case, on perusal of the impugned order, it cannot be said that the learned trial Judge has not judiciously evaluated facts and circumstances of the case. For the aforesaid reasons, the petition is dismissed. There shall be no order as to costs.

10. It is clarified that observations in this order are only for the limited purpose of deciding whether leave to amendment ought

to have been granted or not. All contentions of all the parties on merits of the matter and law as applicable are kept open.

M. S. SONAK, J.

vn