

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 224 OF 2017

Assentina Fernandes
D/o. Late Caetano Fernandes
63 years of age, household
R/o H. No. 253, Sovaskai-vaddo,
Batim, P. O. Goa Velho – Goa.

..... Petitioner

V e r s u s

Mr. Joaquim Antonio Vaz
s/o late Mateus Vaz,
Aged 73 years, landowner
R/o. H. No. 254,
Sovaskai-vaddo,
Batim, P. O. Goa Velho – Goa.

..... Respondent

Mr. Sagar Dhargalkar, Advocate for the Petitioner.

Mr. M. A. Fernandes, Advocate for the Respondent.

Coram :- **F. M. REIS, J**

Date : **2nd March, 2017**

ORAL JUDGMENT

Heard Mr. Dhargalkar, learned Counsel appearing for the Petitioner
and Mr. Fernandes, learned Counsel appearing for the Respondent.

2. Rule. Heard forthwith with the consent of the learned Counsel.
Learned Counsel appearing for the Respondent, waives service.

3. The above Petition takes exception of an Order dated 16.02.2017,

whereby an application for amendment filed by the Petitioner to incorporate additional grounds to challenge two Orders dated 20.04.2012 and 05.04.2014, came to be rejected.

4. Mr. Dhargalkar, learned Counsel appearing for the Petitioner, has pointed out that the application for amendment of the grounds in the Appeal Memo filed by the Petitioner before the Lower Appellate Court were essentially to challenge the said Orders passed during the course of the proceedings before the learned Trial Judge. Learned Counsel further pointed out that the learned Judge has erroneously dismissed the said application essentially on the ground that such application was not maintainable in terms of Order 41 Rule 33 of the Civil Procedure Code and that the allegations in the proposed amendment are without any substance. Learned Counsel has further pointed out that the Petitioner is entitled to challenge such Orders in terms of Section 105 of the Civil Procedure Code as, admittedly, the Petitioner had not filed any Appeal challenging such Orders before the Appellate forum. Learned Counsel has thereafter taken me through the proposed amendment to point out that the learned Judge has failed to exercise its jurisdiction in granting leave to amend the grounds of the Appeal Memo and, as such, the impugned order deserves to be quashed and set aside.

5. On the other hand, Shri Fernandes, learned Counsel appearing for the Respondent, has supported the impugned Orders. Learned Counsel has further pointed out that the dispute between the parties is not between the Bhatkar and the Mundkar but between two Mundkars and, as such, the contention raised in

the proposed amendment is without any substance. Learned Counsel further pointed out that the allegations by the Petitioner to the effect that the Respondent has not made out his case to get the relief granted by the learned Trial Judge is without any substance as, according to him, there are enough pleadings as well as material on record to establish that the learned Trial Judge has rightly decreed the suit filed by the Respondent. Learned Counsel further submits that the grounds sought to be raised by the Petitioner in the proposed amendment are without any basis as, according to him, such grounds cannot be examined in a dispute raised in the proceedings between the two Mundkars. Learned Counsel as such pointed out that there is no jurisdictional error committed by the learned Judge which would call for any interference of this Court in the present Petition.

6. I have carefully considered the submissions of the learned Counsel. With the assistance of the learned Counsel, I have also gone through the proposed amendment as well as the impugned order and the relevant documents on record. On perusal of the impugned Order passed by the learned Judge, the application for amendment has been essentially rejected on the ground that such application is not maintainable under Order 41 Rule 33. But, however, the learned Judge has lost sight of the fact that the Orders which were impugned by the proposed amendment are in fact Orders which can be challenged under Section 105 of the Civil Procedure Code as, admittedly, such challenge was not raised by the Petitioner when the proceedings were pending before the learned Trial Judge before the Appellate Forum. Apart from that, it cannot be forgotten that the provisions of Order 6 Rule 17 of the Civil Procedure Code for amendment of the pleadings are

also available to an Appellate Court whilst deciding an Appeal under Section 96 of the Civil Procedure Code. Taking note of the fact that the present amendment is referable to the contentions raised before the learned Trial Judge, I find that the learned Judge was not justified to pass the impugned Order and refuse leave to the Petitioner to challenge the said two Orders.

7. In such circumstances, I find that the learned Judge has acted with material irregularity whilst passing the impugned Order which has caused grave injustice to the Petitioner which calls for interference of this Court under Article 227 of the Constitution of India. Needless to say, the contentions raised with regards to the merits of the grounds raised by the Petitioner are matters which should be examined at the time of the hearing the Appeal. Leaving all such contentions open, I find that the impugned Order passed by the learned Judge dated 16.02.2017, cannot be sustained and deserves to be quashed and set aside. Needless to say, such leave is to be granted subject to payment of costs of Rs.3,000/- as condition precedent.

8. In view of the above, I pass the following :

ORDER

- (i) The impugned Order dated 16.02.2017 is quashed and set aside.
- (ii) The application filed by the Petitioner for leave to amend the Appeal Memo is allowed subject to payment of costs of Rs.3,000/- as condition precedent to the Respondent herein.

- (iii) Rule is made absolute in the above terms.
- (iv) Petition stands accordingly disposed of.

F .M. REIS, J.

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