

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.2 of 2017**

1. M/s. Suvarn Rajaram Bandekar
Discretionary Trust, a Trust
Registered under the Indian
Trust Act, 1882 and having its
Office at Suvarn Bandekar
Building, Swatantra Path,
Vasco da Gama, Goa.
2. Shri Suvarn Rajaram Bandekar
61 years of age,
R/o. Raj Tara, F. L. Gomes Road,
Vasco da Gama, Goa
3. M/s Vishwas Warehousing and
Trading Private Limited
A Company registered under the
Companies Act, 1956,
Having its office at Suvarn Bandekar
Building, Swatantra Path, Vasco da
Gama, Goa through its Director,
Mr. S. R. Bandekar
4. M/s. Shikargah Investment and Trading
Private Limited
A Company registered under the
Companies Act, 1956, Having its
office at Suvarn Bandekar Building,
Swatantra Path, Vasco da Gama,
Goa through its Director,
Ms. S. R. Bandekar .. Petitioners

Vs.

1. Mr. Armando Cardozo,
Major in age,
r/o Ambexir, Sernabatim, P.O.
Colva Salcete, Goa.
(since deceased) Original Defendant
Through LR's
 - a. Mrs. Maria Leticia Cardozo
(wife of late Mr. Armando Cardozo)
 - b. Mrs. Audrey Cardozo Fernandes
(daughter of Late Mr. Armando Cardozo)
 - c. Mr. James Sebastiao Fernandes
 - d. Mr. Jovek Cardozo

(son of Late Mr. Armando Cardozo)
e. Miss. Shweta Cardozo
(daughter of Late Mr. Armando Cardozo)
f. Miss. Suniffer Cardozo
(daughter of Late Mr. Armando Cardozo)
All legal heirs R/o. H.No.107/A,
Ambexir, Sernabatim, Salcete, Goa .. Respondents.

Mr. E. Dias, Advocate for the petitioners.

Mr. P. Rao, Advocate for the respondent nos.1 (a) and 1(d).

CORAM :- C. V. BHADANG, J.

DATE:- 7th August, 2017

ORAL JUDGMENT :

On 03/02/2017, a notice for final disposal was issued.
Accordingly, the matter is heard finally.

2. By this petition, the petitioners, who are the original plaintiffs, are challenging the order dated 31/08/2016 (below Exh.76), passed by the learned Trial Court, rejecting the prayer to amend the plaint for inclusion of mesne-profits in the plaint.

3. The brief facts are that the petitioners have filed a suit in the year 1992 against the respondents for a direction to the respondents to demolish the illegal structures in the suit property marked as A, AC, AC1 and AC2, as shown in the shaded portion in red in the plan annexed to the plaint and for some other consequential reliefs.

4. The petitioners filed an application for amendment under Order VI, Rule 17 of the Code of Civil Procedure (Code, for short), seeking addition of paras 10A to 10T and para 14A along with the following amendment to the prayer clause :

“C1. The plaintiffs therefore pray that the defendants jointly and severally be directed to pay the compensation/ mesne profits in terms of the report/ table at Annexure B Colly starting from the date of institution of the suit as well as future mesne profits.”

5. The application was opposed on behalf of the respondents.

6. The learned Trial Court, by the impugned order, has found that the amendment vide introduction of Paras 10A to 10T & Para 14A can be granted. However, the prayer with respect to compensation/ mesne-profits is not allowed. It is this order, which is the subject matter of challenge in this petition.

7. I have heard Shri Dias, the learned Counsel for the petitioners and Shri Rao, the learned Counsel for the respondent nos.1(a) and 1(d). Perused record.

8. The learned Counsel for the petitioners submits that

future mesne-profits are exclusively within the discretion of the Trial Court and in a given case, the Court can grant mesne-profits even without a specific claim in that regard. On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of ***Maria Margarida Fernandes and others Vs. Erasmo Jack De Sequeira***; (2012)5 SCC 370 and the decision of this Court in F.A. No.652/2008 (***Uco Bank Vs. Asaram s/o Mohanlal Samdani and Ors.***, decided on 03/05/2016). It is submitted that the learned Trial Court was in error in refusing to grant the prayer for incorporation of mesne-profits, while allowing rest of the amendment.

9. Shri Rao, the learned Counsel for the respondent nos.1(a) and 1(d) submits that under Article 87 of the Limitation Act, compensation/ mesne-profits can be claimed for three years prior to the filing of the claim. It is submitted that the suit is filed as far back as in the year 1992 and the application for amendment is belated. It is submitted that the Trial Court was justified in refusing the incorporation of the prayer for claiming mesne-profits. It is pointed out that under Article 87 of the Limitation Act, which provides for compensation for trespass upon the immovable property, the claim has to be brought within three years from the date of trespass. It is submitted that the claim for mesne-profits would be barred under Article 87 of the Limitation Act and at the highest, the claim can be restricted to

a period of three years prior to the amendment.

10. I have carefully considered the rival circumstances and the submissions made.

11. The perusal of the plaint shows that it is essentially, a suit for removal of encroachment and possession. The suit, as it was originally filed, was pertaining to four structures. By way of amendment, the petitioners are claiming that the respondents have constructed three more structures, thereby encroaching on an area approximately admeasuring 92 square metres. It is, in these circumstances and the subsequent events, that the petitioners had sought amendment by introduction of paras 10A to 10T and para 14A along with the amendment in the prayer clause, so as to incorporate the claim for mesne-profits. The learned Trial Court, in its discretion, has found that the amendment can be allowed at any time. However, at the same time, has refused to grant the prayer for inclusion of the claim for mesne-profits on the ground that it is barred by limitation. In my considered view, once the substantive amendment was granted, the Trial Court could not have refused to allow introduction of a prayer claiming mesne-profits. It is now well settled that the matter about grant of future mesne-profits i.e. from the date of filing of the suit till the delivery of possession are exclusively within the discretion of the Trial Court. Future

mesne-profits are typically divided into two parts namely, from the date of the filing of the suit till the decree is passed and from the date of the decree till actual delivery of the possession. Both these parts are included into future mesne-profits, which are in the discretion of the Trial Court. Grant or otherwise of the future mesne-profits would obviously depend upon the final outcome of the suit. Even if the suit is decreed, the Trial Court, in its discretion, can limit the future mesne-profits and can also decide on the question of the quantum. In an appropriate case, the Court can direct further enquire into future mesne-profits in accordance with the provisions of Order XX Rule 12(2) of the Code. Thus, in my considered view, keeping all these issues open, the amendment can be allowed. The incidental question would also be whether the amendment relates back to the date of the filing of the suit. This aspect can also be left open to be gone into and decided by the Trial Court during the course of the hearing of the suit.

12. With this, the petition is allowed. The impugned order is hereby set aside. The application Exh.76 is allowed as prayed. Necessary amendment to be carried out within three weeks from today. The Trial Court shall decide the suit as expeditiously as possible. Rival contentions of the parties, including the issue whether amendment relates back to the filing of the suit and as to whether the claim of mesne-profits is within the limitation, are

left open. There shall be no order as to costs.

13. Needless to mention that this Court has not expressed any opinion on the merits of the claim as to mesne profits.

C. V. BHADANG, J.

SMA