

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 860 OF 2017**

1. Shri Prabhakar P. Malik
Major of age, R/o Kudne,
Sanquelim-Goa.
2. Smt. Pushpawati P. Mailk,
Major of age, R/o Kudne,
Sanquelim-Goa.
(since deceased through her legal heirs)

2(a) Smt/ Dvitiya D. Shet Tanawade (daughter)
major of age, married, housewife and her husband

2(b) Shri Devanand L. Shet Tanawade (son in law)
Major of age, business
both r/o Tanawadewada, Purna,
Bardez-Goa.

2 (c) Shri Prashant P. Mailk (son),
Major of age, married, advocate and his wife

2(d) Smt. Suvarna P. Mailk (daughter in law)
Major of age, housewife,
Both r/o H. No.297, Gaonkarwada,
Kudnem, Sanquelim-Goa.

2(d) Smt. Usha D. Varang (daughter)
Major of age, married, housewife and
her husband

2(f) Shri Devidas D. Varang (son in law)
Major of age, married,
Business, both r/o Madhale Bhat,
Siolim, Bardez-Goa.

2(g) Shri Pramod P. Malik (son),
Major of age, bachelor, business,

R/o H. No.297, Gaonkarwada, Kudnem,
Sanquelim-Goa.

.... Petitioners

V e r s u s

1. Shri Datta P. Mailk,
2. Smt. Pornima D. Mailk,
3. Shri Mangesh L. Malik,
4. Smt. Mangala M. Malik,
All major of age,
All r/o of Gaonkarwada, Kudnem,
Sanquelim-Goa.
5. Unknown heirs of late Shri Ganpat Rao Shamrao
Vishwasrao Dessai,
Originally r/o Lamgao, Bicholim-Goa,
Legal heirs of respondent no.5,
Shri Ganpat Rao Shamrao,
Vishwasrao Dessai (since deceased through his legal heirs)
(a) Shri Shyamrao G. Dessai,
(b) Shri Rajeev G. Dessai,
(c) Shri Mahesh G. Dessai,
(d) Shri Miss Rekha G. Dessai,
All r/o H. No.19, Lamgao,
Bicholim-Goa.
6. Unknown heirs of late Smt. Krishnabai R. Malik,
(since deceased) originally r/o Deulwado, Kudne,
Sanquelim-Goa,
Legal heirs of respondent no.6,
Smt. Krishnabai R. Malik,
(since deceased through her legal heirs)
- (6) (a) Laxmibai G. Mailk,
(since deceased through her legal heirs)
- 6(a) (a) Shri Keshav G. Mailk, Major of age,
- 6(a)(b) Dr. Tripti K. Mailk, Major of age,
Both r/o H. No.301, Savitiri Niwas,
Alto, Porvorn, Bardez-Goa.

(6)(a)(c) Smt. Sudha S. Gauns, Major of age,
 (6)(a)(d) Dr. Shivanand Y. Gauns, Major of age,
 Both r/o Gauns Child Care,
 Mapusa, Bardez-Goa.
 (6)(a)(e) Smt. Lalita M. Kavlekar, Major of age,
 (6)(a)(f) Shri Mohan R. Kavlekar, Major of age,
 Both r/o Porvorim, Bardez-Goa.

(6)(a)(g) Smt. Vinanti S. Mapari, Major of age,
 (6)(a)(h) Shri Subahsh Mapari, Major of age,
 Both r/o Margao, Goa.

(6)(a)(i) Smt. Angjanata S. Gavlinkar, Major of age,
 (6)(a)(j) Shri Suresh S. Gavlinkar, Major of age,
 Both r/o Guirim, Bardez-Goa.

(6)(a)(k) Smt. Amita R. Methera, Major of age,
 (6)(a)(l) Shri Rajesh C. Methera, Major of age,
 Both r/o Bangaluru,

(6)(a)(m) Smt. Leena R. Narvekar, Major of age,
 (6)(a)(n) Shri Raghvendra D. Narvekar, Major of age,
 Both r/o Sankhalim-Goa.

(6)(a)(o) Smt. Neema G. Mailk, @
 Neema D. Sulapurkar,
 (6)(a)(p) Shri Deepesh A. Sulapurkar,
 Both r/o Sankhalim-Goa.

(b) Keshav G. Mailk,
 (c) Trupti K. Mailk,
 All r/o H. No.301, Savitiri Niwas, Alto
 Porvorim, Bardez-Goa,
 (d) Vasant Sukdo Malik (since deceased through his legal heirs)
 (1) Shri Vallabha V. Malik (son)
 (2) Smt. Vaibhavi V. Malik (daughter in law)
 (3) Shri Pradeep V. Malik (son),
 (4) Smt. Shaileja P. Malik (daughter in law)
 (5) Shri Sunil V. Malik (son),
 (6) Shri Mahesh V. Malik (son),
 (7) Shri Rajendra R. Bhagat Amonkar (son in law)

(8) Smt. Riya @ Smita Rajendra Bhagat Amonkar (daughter)

(e) Sumati V. Mailk,
All r/o Marra, Pilerne, Bardez-Goa.

(f) Shrimati S. Malik,
(Since deceased through her legal heirs)

6(f)(a) Smt. Geetanjali A. Malik (daughter in law)
6(f)(b) Shri Narayan S. Malik (son),
6(f)(c) Shri Dinesh S. Mailk (son)
6(f)(d) Kum. Meenaxi S. Malik (daughter)
6(f)(e) Kum. Ashwini S. Malik (daughter)
6(f)(f) Kum. Urmila S. Malik (daughter)
All r/o Marra, Pilerne, Bardez-Goa.

(g) Sandeep S. Malik,
Both r/o Marra, Pilerne, Bardez-Goa.

(h) Anand R. Mailk,

(i) Smt. Meera A. Malik,
Both r/o Marra, Pilerne, Bardez-Goa,
All are Major.

.... Respondents

Registered addresses.

Shri S. D. Lotlikar, Senior Advocate with Adv. Ms. A. Naik for the Petitioners.

Shri J.E. Coelho Pereira, Senior Advocate with Adv. V. Branganza for the
Respondents.

CORAM: C. V. BHADANG, J.
Reserved on: 28/3/ 2018.
Pronounced on: 5/4/2018

ORDER:

This is a third round of litigation between the parties before this court, on the issue of amendment of written statement, in a suit of the year 1991.

2. The petitioners are original plaintiffs. The petitioners have filed special civil suit no 34/1991/A against the respondents for declaration injunction and some consequential reliefs, which is pending before the Senior Civil Judge at Bicholim. The petitioners are claiming a declaration that they are the exclusive owners of the suit property which is described in para nos. 1 and 2 of the plaint as under:

“1. That there is a property known as “Poimpoicodil Molly” also “Poimpolicodil Mol” or “Poyakadil Moli” surveyed under nos. 48 sub-divisions 1, 2, 3, 4, 5 and 6 and survey nos. 47 sub-divisions 1, 2, 3, 4, 5, 7, 8 and 9 of village Kudnem, which is originally surveyed under Old Cadestral Survey no. as 118. This property is hereinafter called as suit property.

2. That the suit property is described in the Conservatory of Registration of the properties of Sub-District of Bicholim, under no. 10, 166 at page 106 overleaf of Book B-26 New and registered in Taluka Revenue Office (Matriz) under the name as aforesaid under nos. 58 and 59. It is inscribed in the name of original owner Shri Vinayak Nilconte Sinai Borkar

under nos.15, 195 at page 173 of Book G-20.”

3. The boundaries of the property are set out in para 3 of the plaint.
4. The original defendants nos. 1 to 4 (respondents nos.1 to 4) filed their written statement on 19.6.1992. While resisting the suit, these defendants raised a counter claim, seeking declaration of ownership. The defendants vide paras 3 and 4 of their written statement have admitted the contents of paras 1 and 2 of the plaint, meaning thereby that the description of the property is not disputed by these defendants.
5. The trial court decreed the suit on 3.4.2000. The contesting defendants challenged the same in R.C.A no.125/2000. The appeal came to be partly allowed on 9.6.2006 and the matter was remanded to the trial court. After remand the respondents no.1 to 4 filed an application for amendment of the written statement on 7.1.2008. Essentially the defendants sought deletion of existing paras 3 and 4 and substitution of the same, by new paras 3 and 4 .The learned trial court dismissed the application by order dated. 14.11.2008 on the ground that by the proposed amendment the defendants were trying to withdraw admission which was not permissible. That was challenged by the respondents no.1 to 4 before this court in Writ petition no.777/2008. This Court disposed off the petition by order dated. 12.2.2009. This court

confirmed part of the order refusing to delete the existing paras, however the rest of the amendment was allowed to be carried out. This court in para 5 of the order found that by the proposed amendment the respondents no.1 to 4 are trying to withdraw the admission and thus found that the same was rightly refused. The respondents no.1 to 4 carried out amendment, to the extent, according to them, was allowed by this Court, in Writ petition no. 777/2008. Normally this should have put to rest the issue of amendment. The petitioners however filed an application to strike out /remove the amendment which according to them was not carried out in terms of the orders of this court. The learned trial court partly allowed the application by order dated. 18.1.2010. Feeling aggrieved the petitioners challenged the same before this court in Writ petition no. 663/2010 which was decided on 21.9.2011. This court found that the trial court was not justified in allowing amendment as proposed in paras 5(a) and (b) of the application, which was already disallowed. However it was found that the amendment as proposed in paras 5 (c) to 5 (s) can be allowed. This court at the same time granted liberty to the respondents to file an application to incorporate paras 5 (a) and (b) (as the proposed amendment was of an extensive nature) by restricting it only to the extent it clarifies/explains their original stand in the written statement.

6. In pursuance of the liberty granted the respondents no.1 to 4 filed an application for amendment on 9.12.2013 seeking to incorporate paras 9 (A)

and (B) as under :

“9-A . The Defendants state that the property “Poimpolicodil Mol” presently surveyed under Survey No.47/1, 2, 3, 4, 5, 6, 7, 8 and 9 of Cudnem is described in conservatorio of Registration of properties of sub-district of Bicholim under No.9759 of Book B-25 on page 101(New) and inscribed in the name of Vasu Mangesh Malik and Kashinath Krishna Malik in view of inscription No.7697 dated 15/1/1923. The suit property was inscribed in favour of State Revenue Department under No.2459 dated 05/06/1907 which was cancelled in view of the Order dated 26/9/1908 and inscribed in favour of Lucio Fedrico Octowiano Amorem Ferao having been purchased by him in public auction under no.4622 dated 26/09/1908. The property “Poimpolicodil Mol” was purchased by Vassu Mangesh Molico and Crishna Vencetexa Molico under the Deed of Sale dated 22/04/1922 drawn before Notary Public in Judicial Jurisdiction Bardez, Dr. Lucio A. Fedrico Octaviano de Amorim Ferao. This property was partly surveyed under old cadastral survey no.118 and 119 of Village Cudnem.

The entire suit property “Poimpolicodil Moi” is bounded as per the old documents on the East by a rock, on the West by the property “Borodo Moi” of Pundolica Quensoa Moilico. On the North by a rock and on the South by stone wall. Presently the property of the defendants is surveyed under survey no.47 sub-division 1 to 9 and the property of the Plaintiffs is surveyed under Survey no.48 sub-division 1 to 6 of Village Cudem.

9-B. The Defendants state that Shri Manguexa Vencetexa Molico in the capacity of administrator father of his minor son Vassu Manguexa Molico and Crisna Vencetexa Molico in the capacity father administrator of his minor son Caxinata Crisna Molico purchased the property “Pimpolecodil Moi” and other described under No.9759, 9761, 9764, 9766, 9767 and 1095 in the inventory proceeding No.40/2007/A in the Court of Civil Judge Senior Division at Ponda, the Hon'ble Court by final order dated 15th October 2007 confirmed the allotment of those properties in favour of interested parties Dattu Malik alias Datta Pandurang Malik, the Defendant No.1 and Manguexa Malik, Defendant no.3.”

7. The application was opposed on behalf of the petitioners, inter alia on the ground that it seeks to add, self same paras, as before which were disallowed. The learned trial court by an order dated 13.6.2016 allowed the amendment which brings the petitioners to this court.

8. I have heard Shri Lotlikar the learned Senior Counsel for the petitioners and Shri Pereira, the learned Senior Counsel for the respondents.

9. It is submitted by Shri Lotlikar, the learned Senior Counsel for the petitioners that the amendment sought and allowed is similar, if not identical, to paras 5(a) and 5(b) of the application dated 7/1/2008 which has been disallowed by this Court twice i.e. while deciding Writ Petition no.777/2008 and also while deciding Writ petition no.663/2010. It is submitted that all that this Court had said, while deciding Writ petition no.663/2010, is that the respondents can file an application for amendment of the written statement to incorporate the proposed amendment as set out in paras 5 (a) and 5 (b) by “restricting it only to the extent it clarifies/explains their original stand in the written statement”. It is submitted that this Court in categorical terms had held that the respondents are not entitled to incorporate the said paras 5 (a) and 5 (b) in the written statement. It is submitted that paras 9 (A) and 9 (B) are

similar if not identical to paras 5 (a) and 5 (b) and the learned trial court was in error in allowing the proposed amendment. It is submitted that mere deletion of the opening statement in paras 3 and 4 of the written statement, would not be sufficient to hold that the respondents are not trying to withdraw the admission. The learned Senior Counsel was at pains to point out that the liberty was to explain the original stand taken in the written statement.

10. On the contrary, Shri Coelho Pereira, the learned Senior Counsel for the respondents no.1 to 4 has supported the impugned order. It is submitted that there was specific liberty granted by this Court while deciding Writ petition no.663/2010 and thus the proposed amendment has rightly been allowed by the trial court. It is submitted that the amendment as proposed in paras 9 (A) and 9 (B), cannot be said to be identical to paras 5 (a) and 5 (b) of the earlier application for amendment. It is submitted that, normally, an amendment to the written statement, has to be liberally granted and when such amendment is allowed, in pursuance of a liberty granted by this Court, no exception can be taken to the impugned order allowing the amendment.

11. I have carefully considered the rival circumstances and the submissions made. As noticed earlier, in the written statement originally filed, as far back as on 19/6/1992 the respondents had admitted the contents of paras 1 and 2 of

the plaint as set out above.

12. Initially the suit came to be decreed and in appeal, the matter was remanded to the trial court for deciding the suit afresh. It is after the remand that the respondents filed an application seeking extensive amendment to the written statement, including the amendment as proposed in paras 5 (a) and 5 (b). Presently, we are concerned with paras 5 (a) and 5 (b) of the said application which read thus:

“5- The defendants propose the following amendment:

a) The statement in para 3 of the written statement be deleted and new statements be inserted in para 3 as follows:

“The contents of para 2 of the plaint are denied for want of knowledge. The plaintiff be put to strict proof of the same...” The property “Poimpolicoddil Mol’ which is the suit property described in Conservatorie of Registration of properties of sub-district of Bicholim under no.9759 of Book-B-25 on page 10 (new) and inscribed in the name of Vassu Mangesh Malik and Kashinath Krishna Malik in view of Inscription No.7697 dated 15/1/1923. The suit property was inscribed in favour of State Revenue Department under no.2459 dated 5/3/1907 which was

cancelled in view of the Order dated 26/9/1908 and inscribed in favour of Lucio Fedrico Octowiano Amorem Ferao having been purchased by him in public auction under no.4622 dated 26/9/1908. The suit property "Poimpolicodil Mol" was purchased by Vassu Mangesh Molico and Crishna Venceteka Molico under the Deed of Sale dated 22/4/1922 drawn before the Notary Public in Judicial Jurisdiction Bardez Dr. Lucio A. Fedrico Octaviano de Amorim Ferao. The suit property was surveyed under old cadastral survey no.118 and 119."

b) The statement in para 4 of the written statement be deleted and new statement be inserted as follows:

'The contents of para 3 of the plaint are not admitted.
The plaintiff be put to strict proof of the same. The suit property "Poimpolicodil Mol" is bounded as per the old documents on the East by a rock, on the West by the property "Borodo Mol' of Pundolica Quensoa Mollico'. On the North by a rock and on the South by stone wall. Presently the suit property is surveyed under survey no.47 sub-division 1 to 9 and survey no.48 sub-division 1 to 6 of village Kudne and is bounded on the East by property

surveyed under survey no.109, on the West by the property surveyed under survey no.51 and village Viridi, on the North by the property surveyed under survey no.49 and on the South by public road.”

(Emphasis supplied)

13. It can thus clearly be seen that the respondents sought to deny the contents of para 2 and intended to incorporate new paras 3 and 4 by deleting the existing ones. This Court while deciding Writ petition no.777/2008 had clearly held that by the proposed amendment the respondents were trying to withdraw the admission given by the respondents in the original written statement filed by them and therefore that part of the amendment was rightly disallowed. This Court, however, permitted the rest of the amendment. This Court confirmed part of the order of the trial court, refusing deletion of the paras from the original written statement. After this, the petitioners filed application pointing out to the Court that the amendment carried out by the respondent was not in accordance with the order passed in Writ petition no.777/2008 and sought striking of certain paras. The learned trial court disposed off the said application vide orders dated 18/1/2010 and 25/6/2010. Feeling aggrieved, the petitioners approached this Court in Writ petition no.663/2010, which was decided on 21/9/2011. It would be apposite to

reproduce paras 6 and 7 of the order dated 21/9/2011 as under:

6. As such, considering the impugned Orders passed by the learned Trial Judge, I find that the learned Judge was not justified in allowing that Paras 5(a) and (b) of the proposed amendment to be part of the pleadings of the written statement which appear to have been disallowed by this Court. But, however, the remaining paras 5(c) to 5(s) sought to be incorporated can be allowed to be incorporated in the written statement. But, however, considering the facts and circumstances of the case and on perusal of the said proposed amendment of paragraphs 5(a) and 5(b) being of an extensive nature, I find it appropriate that the Respondent be permitted to be given an opportunity to file and application to amend the written statement only to incorporate proposed pleadings mentioned at paras 5(a) and 5(b) by restricting them only to the extent they clarify/explain their original stand in the written statement. In case such an application is filed, the Petitioners would be entitled to be heard and the learned Judge shall consider such application for amendment in accordance with law. At this stage, the Respondents are not entitled to incorporate said paragraphs 5(a) and (b) in the written statement.

7. In view of the above, the impugned orders dated 18/01/2010 and 25/06/2010 are modified to the extent that the amendment as sought to be incorporated in paras 5(a) and 5(b) in the amendment application are quashed and set aside. The remaining part of the order is upheld

and the Respondents are permitted to incorporate para 5(c) to 5(s) in their written statement subject to the liberty to the Respondents to file an application for amendment in the light of the observations made hereinabove.”

(Emphasis supplied)

14. In pursuance of the liberty granted by this Court, as aforesaid, the respondents filed an application for amendment on 9/12/2013 seeking to add new paras 9 (A) and 9 (B) after the existing para 9 of the written statement, which has now been allowed. The question is whether such an amendment could have been allowed.

15. In order to decide the issue as involved, it would be necessary to examine whether the application for amendment of the written statement filed on 9/12/2013 can be said to be within the scope and ambit of the liberty granted by this Court in the order dated 21/9/2011 in Writ petition no.663/2010. A bare perusal of para 6 of the order would make it clear that liberty was granted to file an application to amend the written statement only to incorporate the proposed pleadings mentioned in paras 5 (a) and 5 (b) “by restricting them only to the extent they clarify/explain their original stand in the written statement.” It can thus clearly be seen that the liberty was to clarify/explain the stand taken by the respondents in the written statement as

originally filed and not otherwise. A comparison of paras 5 (a) and 5 (b) of the first application and paras 9(A) and 9 (B) of the second application would make it clear that the paras are identical except for the following portion which is missing:

“The contents of para 2 of the plaint are denied for want of knowledge. The plaintiff be put to strict proof of the same.”

“The contents of para 3 of the plaint are not admitted.

The plaintiffs be put to strict proof of the same.”

The rest of the contents are identical.

16. It can thus clearly be seen that mere deletion of the aforesaid portions would not be sufficient to hold that the respondents are not trying to withdraw the admission. At the cost of repetition it needs to be stressed that the incorporation of paras 5 (a) and 5 (b) was initially disallowed by the trial court and that part of the order was confirmed by this Court in Writ petition no.777/2008. Even in Writ petition no.663/2010 this Court has held that the learned trial court was not justified in allowing the amendment as proposed in paras 5 (a) and 5 (b) and had granted liberty to clarify/explain the stand of the respondents as set out in the written statement originally filed.

17. In the original written statement the contents of paras 2 and 3 were admitted. It may not be out of place to mention here that there was no issue

framed on the identification of the property when the suit was decided in the earlier round of litigation, obviously on account of the fact that the contents of paras 2 and 3 were not disputed by the respondents. In my considered view the respondents are trying to incorporate the self same paras by making some cosmetic changes, by formally deleting the portion as set out above and retaining the substantive part, which has twice been disallowed by this Court. The learned trial court thus in my considered view was not justified in allowing the said amendment. It is trite, that a thing which is directly prohibited, cannot be allowed to be achieved indirectly. In that view of the matter, in my considered view the impugned order demonstrates a material irregularity in the exercise of the discretion. In the result, the petition is allowed. The impugned order is hereby set aside. The application for amendment stands dismissed. In the circumstances there shall be no order as to costs.

C. V. BHADANG, J.

Ap/

