

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 296 OF 2018**

1. Mrs. Ingrid Rebello Cotta,
Married, Resident of
R-1, Ocean Mist, Plot No.17/18,
Dona Paula, Goa and 8 others.

..... Petitioners

V e r s u s

1. Mr. Pedro Fernandes,
Major of age, married, service,
Residing at Tilamol,
Quepem-Goa and others.

..... Respondents

Shri V. Rodrigues, Advocate for the Petitioners.

Shri A. D. Bhobe with Ms. Annelise Fernandes, Advocates for the
Respondents.

CORAM: C. V. BHADANG, J.

DATE: 20th December, 2018.

ORDER:

By this petition, the petitioners, (defendants nos.4, 6, 7, 8, 9, 10, 11 & 12) are challenging the order dated 20/11/2017 passed by the learned trial court in Regular Civil Suit no.15/2010/B (Old Special Civil Suit no.3/2000/A), by which an application (Exhibit 120) for amendment of the written statement filed by the respondent nos.1 and 2 (original defendant nos.18 and 19) has been allowed. Significantly the respondent nos. 3 to 5,

who are the original plaintiffs have not challenged the said order and have even chosen to remain absent, inspite of service.

2. I have heard Shri Rodrigues, the learned counsel for the petitioners and Shri Bhobe, the learned counsel for the respondent nos.1 and 2 (a) to 2 (m). With the assistance of the learned counsel for the parties, I have perused record.

3. The respondent nos. 3 to 5 have filed the aforesaid civil suit for injunction, correction of survey records and other reliefs. That suit is resisted by the petitioners as well as the original defendant nos. 18 and 19 (since deceased). It appears that the evidence of the defendant no.18, Pedro Fernandes (DW1) was recorded by the trial court and he was cross examined. After this, the defendant nos.18 and 19 filed an application for amendment of their written statement claiming that recently the defendant no.18 got prepared a plan from surveyor Mr. Suresh Bandekar, for identification of the property owned by the defendant nos.18 and 19 somewhere in September 2017. It was revealed that 135 numbers of shares admeasuring 2,70,000 sq.mtrs which is comprised in survey nos 152/1, 1-A, 2, 2-B 4 and 4-B, 157/1 to 29, 160/2 (part), 61/1 to 48, 41-A and 44-A, 162/1 to 50, 163/1 to 9, 164/1 to 40; 38-B-C, 165/1 and 166/1; the defendant nos. 18 and 19 are the

absolute owners of these survey numbers, which are corresponding to land registration nos. 2345, 3595, 7404, 7405 and 20298. It is contended that since the plan was not drawn earlier, identifying the property, the same remained to be included earlier. It was contended that the amendment is necessary for deciding the real controversy in dispute.

4. The application was opposed on behalf of the petitioners on the ground that it is belated and by the proposed amendment, an admission is sought to be withdrawn.

5. The learned trial court by the impugned order dated 20/11/2017 has allowed the application. The learned trial court has found that the amendment is necessary for deciding the real controversy in dispute and the defendants immediately upon getting the report of the surveyor have sought the said amendment.

6. Shri Rodrigues, the learned counsel for the petitioners has raised two contentions. Firstly, it is contended that there is no consideration about the requirement of the proviso to Order VI Rule 17 of C.P.C. (as introduced in the year 2002), being complied with inasmuch as the trial court, has not considered the aspect, whether the defendant nos.18 and 19 inspite of due

diligence could not have brought the amendment prior to the commencement of the trial. Secondly, it is contended that by the proposed amendment, the defendant nos.18 and 19 are trying to wriggle out of an admission, in the cross examination of defendant no.18, Pedro Fernandes (DW.1).

7. Shri Bhobe, the learned counsel for the respondents on the contrary has submitted that the suit is instituted in February 2000 and was re-registered in the year 2010 and as such, the proviso to Order VI Rule 17 of C.P.C will not apply as it was introduced in the year 2002. It is submitted that even otherwise the trial court has considered that the amendment is based on the report of the surveyor which was obtained somewhere in September 2017. It is submitted that co-defendants do not have a locus to challenge the amendment by the other co-defendants. The learned counsel pointed out that the plaintiffs initially were not even made parties to the petition and the plaintiffs (respondent nos.3 to 5) have not chosen to challenge the said amendment. It is submitted that neither the defendant nos.18 and 19 nor the petitioners have raised any counter claim and thus the dispute essentially is between the plaintiffs and the two sets of the defendants and thus the petitioners have no locus to challenge the amendment. It is submitted that there is no attempt to wriggle out of any admission as alleged.

8. I have considered the circumstances and the submissions made and I do not find that any case for interference is made out. It is not necessary to lay down a general proposition, that in no case a co-defendant can challenge the amendment of written statement by other co defendants. However, in the present circumstances, I do find that the learned counsel for the respondents is right that the petitioners cannot justifiably challenge the amendment to the written statement by the co defendant nos.18 and 19, as essentially the dispute is between the plaintiffs on one hand and two sets of defendants on the other. In so far as the aspect of due diligence is concerned, again the learned counsel for the respondents is right that the suit having been instituted in the year 2002, the proviso to Order VI Rule 17 of C.P.C would not be applicable (see the decision in the case of **Sumita Pradipkumar Dixit Vs. Pushpadevi G. Makharria and others, 2011 (5) AIR Bom. R 444**). That apart, the trial court has noticed that the amendment is based on the subsequent development of obtaining the report of the surveyor somewhere in September 2017.

9. I have also gone through the cross examination of DW.1. At this stage it is not possible to accept that there is any attempt to get out of any admission. However, this aspect is left open to be considered by the trial court at an appropriate stage while deciding the suit. It is well settled that in a

given case, admissions can be clarified or explained away and thus there is no absolute rule that admission can never be withdrawn. However, again this is a question which would depend on facts and circumstances of each case. In that view of the matter, no case for interference is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/