

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 209 OF 2018**

1. Mrs. Maria Santana Lobo (deleted)
2. Mrs. Dorothy Fernandes, 41 years of age, wife of Joel Fernandes, r/o H. No. 5/181, Umtavaddo, Calangute, Bardez, Goa.
3. Mr. Joel Fernandes, 48 years of age, r/o H. No. 5/181, Umtavaddo, Calangute, Bardez, Goa. Petitioners

Versus

1. Cofre de Capela de S. Joao Baptista De Umtavaddo Calangute alias Capela De Sao Joao Batista Do, Bairro Umtavaddo, Calangute, Bardez, Goa, represented by its attorney, Mr. Juvenile Lobo, resident of H. No. 1378, Umtavaddo, Calangute, Bardez, Goa.
2. Mr. Jude Lobo, major of age, resident of H. No. not known, Souza Lobo, Umtavaddo, Calangute, Bardez, Goa.
3. Mrs. Levarn Lobo, major of age, resident of H. No. not known, Souza Lobo, Umtavaddo, Calangute, Bardez, Goa. Respondents

Shri Ashwin D. Bhobe, Advocate for the Petitioners.

Shri Sudesh Usgaonkar with Ms. Rosette Pereira, Advocates for the Respondent No. 1.

CORAM : C.V. BHADANG, J.

Reserved on : 29th November, 2018

Pronounced on : 10th December, 2018

JUDGMENT:

On 13.02.2018, a notice for final disposal was issued in this petition. I have heard the learned Counsel for the parties and the petition is being disposed of finally.

2. By this petition, the petitioners, who are the original defendant nos. 1, 2 and 3 are challenging the order dated 09.01.2008, passed by the learned Civil Judge Junior Division at Mapusa in Regular Civil Suit No. 63/2010/D. By the impugned order, the application filed by the petitioners and the respondent nos. 2 and 3 (original defendant nos. 4 and 5) for amendment of their written statement/counterclaim has been dismissed.

3. The brief facts necessary for the disposal of the petition may be stated thus:

That land admeasuring 500 square metres, bearing survey no. 199/11 of village Calangute having Saint John Chapel therein, is the subject matter of dispute. The administration of the said Chapel is entrusted by the Archdiocese of Goa to the first respondent/plaintiff. The petitioners and the respondent nos. 2 and 3 claim to be the owners in possession of the adjoining land bearing survey no. 199/10. The first respondent filed the aforesaid suit on the allegations that the petitioners are running a business, under the name and style as "Infantaria" in property bearing Survey No. 199/10 and are serving drinks, snacks and food and that the petitioners and

the respondent nos. 2 and 3 are trespassing in the suit property and the suit Adro (which is an open space opposite the Chapel) and are obstructing the access thereto.

4. The first respondent filed the suit *inter alia* for restraining the petitioners or anybody on their behalf, from trespassing in the suit property, the suit 'Adro', the gallery portion of the Chapel, as well as from parking their vehicles and/or serving drinks, snacks and food in the gallery portion of the Chapel. The first respondent has also sought order directing the petitioners to remove the refrigerator and STD telephone booth in suit Adro and to restore the land to its original condition and has also sought direction, restraining the petitioners from carrying out any construction in the suit property and suit Adro.

5. The petitioners and the respondent nos. 2 and 3 filed their written statement and while resisting the suit have raised a counterclaim. According to the petitioners, 200 square metres of land, belonging to them being part of survey no. 199/10, has been wrongly included in the northern part of survey no. 199/11. In the counterclaim, the petitioners, are seeking declaration that they be declared as owners of the said

portion by adverse possession. It is contended that the defendants are in occupation of the property bearing survey no. 199/2010 alongwith 200 square metres of land, located towards the northern part of the property bearing survey no. 199/11 since last more than fifty years.

6. The learned Trial Court, on the basis of the rival pleadings has frames issues and the suit was set down for evidence, in which, the first respondent has filed the affidavit in lieu of chief examination of their first witness. The witness is yet to enter into the witness box. It is at this stage, that the petitioners and the respondent nos. 2 and 3, filed an application for amendment of the written statement/counterclaim. It is contended that it is all along their case in the counterclaim that they are absolute owners of 950 square metres of land (comprising of 750 square metres of survey no. 199/10) and 200 square metres, which is erroneously shown as part of survey no. 199/11. The petitioners therefore, sought amendment of the written statement/counterclaim as set out in para 15 of the application.

7. The first respondent filed reply and opposed the application. It is contended that the application is filed with a

view to grab the property of the Church/Chapel. It is contended that the petitioners filed the written statement and counterclaim on 04.03.2011 and the application for amendment at this stage is belated and would not be permissible, as the trial has commenced. It is contended that the pleadings now sought to be incorporated were well within the knowledge of the defendants and no reason has been shown as to why the said pleadings were not made in the written statement, as originally filed. The application is filed in a casual manner and the petitioners are trying to change their defence, from adverse possession to a plea of title by prescription. It is also contended that the proposed amendment is barred by limitation.

8. The learned Trial Court by the impugned order has dismissed the application. Hence, this petition.

9. I have heard Shri Bhobe, the learned Counsel for the petitioners and Shri Usgaonkar, the learned Counsel for the first respondent. Perused record.

10. Shri Bhobe, the learned Counsel for the petitioners has pointed out the order sheet dated 06.03.2018, in order to submit that the suit was adjourned on the said date for filing

affidavit in evidence. It is thus contended that the first respondent is yet to file the affidavit of it's witness and the trial has not commenced. It is submitted that the proviso to Order VI, Rule 17 of CPC would not come in the way of granting the amendment. The learned Counsel has taken me through the proposed amendment, in order to submit that the amendment is necessary for deciding the real controversy in dispute and that the amendment does not change the nature of the defence. It is submitted that all along it has been the case of the petitioners that 200 square metres of land has been wrongly included in survey no. 199/11 and thus, the proposed amendment does not change the nature of the defence.

On behalf of the petitioners, reliance is placed on the decision of this Court in Writ Petition No. 743/2012 in the case of **Teodolinda Dias Mandoly C. Viegas Vs. Laurie Hermegeild Pereira** decided on 15.03.2013 and the decision of the Delhi High Court in the case of **Raj Rani & Another Vs. Sumitra Parashar & Another, (2014) 2 High Court Cases (Del) 98**. It is submitted that all such amendments, as are necessary for deciding the real controversy in dispute need to be allowed.

11. Shri Usgaonkar, the learned Counsel appearing for the first respondent has supported the impugned order. Reliance is placed on the decision of the Supreme Court in the case of **Vidyabai & Others Vs. Padmalatha & Another, (2009) 2 SCC 409**, in order to submit that the trial would commence when the affidavit in evidence is filed. The learned Counsel has referred to the earlier order sheet dated 11.11.2016, in order to submit that the first respondent had filed the affidavit in evidence at Exhibit 37 and thus, the trial had already commenced when the application for amendment (Exhibit 38) was filed on 25.01.2017. It is submitted that the proposed amendment thus suffers from the vice of non compliance with the proviso to Order VI, Rule 17 of CPC, as the petitioners have not demonstrated due diligence in bringing the amendment. It is submitted that the amendment otherwise changes the nature of the defence from adverse possession to prescription, which is not permissible. It is submitted that the decisions relied are distinguishable, as the aspect of commencement of trial, when the affidavit in evidence is filed, has not been taken into consideration therein.

12. I have carefully considered the circumstances and the submissions made.

13. It is now well settled that the Court can allow all such amendments, at any stage of the suit, which are necessary for deciding the real controversy between the parties. Such a finding that the proposed amendment is necessary for the purpose of determining the real questions in controversy between the parties is the first jurisdictional fact before allowing any such amendment. After the introduction of the proviso to Order VI, Rule 17 of CPC, there is a second jurisdictional fact introduced, which applies where the application for amendment is brought after the commencement of the trial. The expression “commencement of trial” has not been defined in CPC and has been subject matter of several decisions of the Supreme Court and the High Courts. In the case of **Vidyabai** (supra), amendment of the written statement was sought, when the affidavit in evidence was filed.

14. In the present case, there was a debate during the course of the arguments at bar as to whether, indeed the affidavit is filed or not, as the order sheet dated 11.11.2016 shows that the affidavit of PW-1 Anthony Bosco was filed at Exhibit 37. On the contrary, it was contended on behalf of the petitioners that the order sheet dated 06.03.2018 shows that

the suit was adjourned for filing the affidavit in evidence and the application for amendment was filed in the interregnum on 25.01.2017. Shri Bhobe, the learned Counsel for the petitioners has also contended that the mere physical production of affidavit would not be sufficient. It is submitted that unless and until the concerned witness enters into the witness box and formally tenders the affidavit, it cannot be said that the affidavit in evidence is filed. I do not propose to go into this question, as I would proceed on the basis that the trial had commenced, in this case.

15. The proviso to Order VI, Rule 17 of CPC says that no such amendments shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the parties could not have “raised the matter”, before the commencement of the trial. A bare perusal of the written statement filed by the petitioners would show that the claim that the property known as “Sultanachy Batty” consisting of a palmgrove, bearing survey no. 199/10 and survey no. 199/11 part (admeasuring 200 square metres) and that the remaining part of survey no. 199/11 (admeasuring 300 square metres) known as “Adro”, in which there exists a Chapel known as “Saint John Chapel” has already been raised

in the written statement. Thus, the basic case about 200 square metres of land, from the northern part, out of survey no. 199/11, being part of the land of the petitioners, has already been “raised” by the petitioners in their written statement. In this context, it is necessary to look into the nature of the amendment sought. In para 3, the only amendment sought is to replace the word “inadvertently” by the word “erroneously”. Thereafter, the petitioners are praying to add paras 3A to 3H, after the existing para 3 of the written statement. With the assistance of the learned Counsel for the parties, I have gone through each of these paragraphs. It can be seen that paras 3A and 3B correspond to the contentions raised in paras 8 and 9 of the written statement. Para 3H is similar to para 3A. Paras 3C to 3E are again in the nature of raising a similar case about 200 square metres of land of survey no. 199/10 being erroneously shown as part of survey no. 199/11. Thus, the material amendment sought can be classified into two parts. First with reference to the petitioners substituting the case of ownership and title and alternatively, ownership by prescription as contemplated in Article 505 of the Portuguese Civil Code, in the place of the existing plea of ownership by adverse possession. The second part constitutes the production of the report of the Surveyor, Sitakant Kamat as well as the plan in the report of

the expert, Prazeres Gonsalves and the record about the verification report and the land registration certificate pertaining to inscription no. 40441, 25263 and inscription no. 3840 (corresponding to description no. 6352 and inscription nos. 2981, 6352 and description 6354 (corresponding with the property of defendants). The petitioners have made out a case in para 8 of the application that on account of non availability of the documents at the time of preparing the written statement, certain vague statements were made in the written statement, which are now needed to be brought in line with the defence of the petitioners. Insofar as the documents are concerned, the petitioners claim that they are obtained subsequent to the filing of the written statement. It is significant to note that the learned Trial Court in para 22 of the impugned order has also found that these facts are necessary to decide the controversy between the parties and thus, the learned Trial Court has answered the point no. 1 partly in the affirmative holding that the amendment is necessary to decide the real controversy between the parties.

16. Insofar as the substitution of the case, based on the title and alternatively on prescription is concerned, the Trial Court has found that it would change the nature and the

fundamental character of the defence. It is not possible to accept the reasoning as articulated. It is significant to note that the Trial Court has come to the conclusion that the petitioners are not trying to withdraw any admission. The learned Trial Court has relied on the decision of the Supreme Court in the case of **Ragu Thilak D. John Vs. S. Rayappan & Others, (2001) 2 SCC 472**, in which it has been held that the “dominant purpose of allowing an amendment is to minimize litigation”. The learned Trial Court has also noted that the Supreme Court has held that in a given case, even admission can be withdrawn or explained. Evidently, the question would depend upon facts and circumstances of each case. In my considered view, the Trial Court has rightly held that the amendment is “necessary for deciding the real controversy” in dispute and particularly, having regard to the fact that the documents, on the basis of which, the said plea sought to be substantiated are already on record. Even, insofar as the substitution of the plea of title is concerned, I find that the basic case about the alleged erroneous inclusion of an area of 200 square metres from out of survey no. 199/10, in land survey no. 199/11 has already been raised by the petitioners, prior to the commencement of the trial. The petitioners have also shown that the documents have been obtained subsequently

and the Trial Court has also found that by part of the amendment the petitioners are only trying to see that the averments made in the written statement are happily worded. It can be seen that there is no absolute bar on the power of the Court to allow the amendment, after the commencement of the trial. It is hedged with a condition of the Court finding that the plaintiffs could not have raised the matter earlier, inspite of due diligence. Considering this, I find that the application deserves to be granted , subject to costs of Rs.5,000/-.

17. In the result, the following order is passed:

O R D E R

- (a) The petition is allowed.
- (b) The impugned order is hereby set aside.
- (c) The application (Exhibit 38) is allowed, subject to costs of Rs.5,000/-, to be paid within three weeks from today.
- (d) The necessary amendment shall be carried out, within three weeks from today.
- (e) Needless to mention that the respondent no. 1 shall be entitled to carry out consequential amendment to the written statement to the counterclaim, whereupon the Trial Court shall appropriately modify the issues and then, proceed to hold the Trial.

C. V. BHADANG, J.

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