

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS. 688 & 689 OF 2017**

Shri Jose Antonio Longuinhas Pasteur
de Jesus do Rosario da Silva Pereira Petitioner

Versus

Mr. Amrutrao Nikant Bandodkar Respondent

Shri Vivek Rodrigues with Shri Vithal Naik, Advocates for the
Petitioner.

Shri Valmiki Menezes with Shri Akshay Shirodkar, Advocates
for the Respondent.

CORAM : C.V. BHADANG, J.

DATE : 16th APRIL 2018

ORAL ORDER:

Both these petitions are between the same parties
and arise out of the same suit and as such, they are being
disposed off by this common order.

2. The brief facts necessary for the disposal of these
petitions may be stated thus:

The respondent is the original plaintiff, while the
petitioner is the defendant, in Regular Civil Suit No. 326/2010
(old Special Civil Suit No. 132/2003), which is presently
pending before the learned Adhoc Additional Senior Civil Judge
at Margao. That suit is filed by the respondent for declaration
and injunction. The subject matter of dispute happens to be
6,600 square metres of land comprised in Survey Nos. 138/1

and 138/5 of Village Colva, along with House No. 302 and the land appurtenant thereto, standing in Survey No. 138/5. In the plaint, apart from the description of the “suit property”, the said house is separately referred to as the “suit house”.

3. The case made out in the plaint is that the respondent is in open, peaceful and continuous possession, as of right of the suit property, since 1960 and the respondent has been carrying on business activity in the house situated in the property bearing Survey No. 138/1. The respondent has sought for declaration that he has become the owner of the suit property, by way of adverse possession/prescription. The respondent has also sought for consequential reliefs, restraining the petitioner or anybody on his behalf, from alienating or creating third party interest in the suit property or interfering with the same, in any manner.

4. The petitioner filed his written statement on 14.01.2004 and apart from resisting the suit, has raised a counter claim. The petitioner has sought a declaration of ownership and for eviction of the respondent, from the suit house and for delivery of its vacant possession and for demolition of any structure/extension in the suit property etc.

The respondent filed his written statement to the counter claim on 10.03.2004.

5. The parties went for trial, in which they led oral and documentary evidence and the trial is stated to have been concluded and the suit is at the stage of hearing arguments. It is at this stage that the respondent filed two applications, one each, for amendment of the plaint (Exhibit-D/172) and for amendment of the written statement to the counter claim (Exhibit-D/173).

6. The application Exhibit-D/172, has been filed for amendment of the plaint, as set out in para 3(a) to 3(g) of the application. In essence, the respondent sought deletion of the words “adverse possession” and its substitution by the word “prescription” in the plaint.

7. The application Exhibit-D/173 is for amendment of the written statement to the counter claim. The proposed amendments are set out in paras 2(a) to 2(e) of the application, apart from addition of new paras 3 and 4 (and numbering of the existing para 3 as para 5). The respondent has also sought for correction of the figure “338” as “302”.

8. The amendment was opposed on behalf of the petitioner *inter alia* on the ground that by the proposed amendment, the petitioner is seeking to withdraw the admission and that the amendment is belated.

9. The learned Trial Court has decided both these applications by separate orders dated 30.05.2017. The learned Trial Court has partly allowed the application Exhibit-D/172 for amendment of the plaint and except for the prayer of deletion of the words “adverse possession” from the pleadings, the rest of the proposed amendment is allowed.

Insofar as the application Exhibit-D/173 is concerned, the same has been allowed, subject to costs of Rs.2,000/-.

The aforesaid two orders are subject matter of challenge in these petitions.

10. I have heard Shri Rodrigues, the learned Counsel for the petitioner and Shri Menezes, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned orders passed.

11. It is submitted by Shri Rodrigues, the learned Counsel for the petitioner that the amendment is belated and is a post trial amendment, where the proviso to Order VI, Rule 17 of the Code of Civil Procedure (Code, for short), would apply. It is submitted that the Trial Court without advertent to the issue of compliance with the said proviso, has allowed the amendment by cryptic orders. It is submitted that the impugned orders do not consider the effect of the amendment effected before.

On behalf of the petitioner, reliance is placed on the decision of this Court in the case of **Mitra of Archdiocese of Goa and Daman Vs. Mr. K. Vijayadharan, (2000) 1 Mh.L.J. 615**. It is submitted that the proposed amendment could not have been allowed on the spacious plea of “inadvertent mistake”, particularly, when the trial in the suit has concluded and the suit is at the stage of hearing arguments. It is submitted that by the proposed amendment, the respondent is trying to introduce a new case, which is not permissible.

12. Reliance is also placed on the decision of the Supreme Court in the case of **Ajendraprasadji N. Pandey & Another Vs. Swami Keshavprakeshdasji N. & Others,**

(2006) 12 SCC 1 and Vidyabai & Others Vs. Padmalatha & Another, 2009(1) ALL MR 471 and the decision of this Court in the case of Smt. Jayashree Subhash Kalbande & Another Vs. Shri Bhaurao Nagorao Derkar & Others, 2014(3) ALL MR 605 and Gangubai Baban Kadam & Another Vs. Dr. Vidya Vijay Joshi, 2015(5) ALL MR 238.

13. On the contrary, it is submitted by Shri Menezes, the learned Counsel for the respondent, that the plea of mundkarship and prescription is already taken in the pleadings and hence, the Trial Court has rightly held that the part of the amendment is clarificatory in nature. It is submitted that there are two separate structures, in the two survey numbers. The suit house i.e. House No. 302, which is situated in land Survey No. 138/5, is a mundkarial house. It is submitted that the plea of prescription is with regard to the area excluding the mundkarial area and there is no new plea sought to be introduced. It is submitted that the proposed amendment to the written statement to the counter claim, is in consonance with the amendment of the plaint. He submits that there is no blanket prohibition, in the proviso to Order VI, Rule 17 of the Code, to permit the amendment, after the commencement of the trial.

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

15. The law as to the amendment of the pleadings, under Order VI, Rule 17 of CPC, is well settled to be restated. After the insertion of the proviso to Order VI, Rule 17 of CPC, in addition to the requirement, that the amendment is necessary for deciding the real controversy in dispute, the Court has also to be satisfied that inspite of due diligence, the party could not have “raised”, the matter, before the commencement of trial. Thus, it can be said that where, the application for amendment is filed, after the commencement of trial, there are two jurisdictional facts, which would clothe the Court with power to grant such amendment. The first is that the amendment is necessary for deciding the real controversy in dispute, while the second is that the party seeking such amendment, inspite of due diligence, could not have raised the matter before the commencement of trial. As noticed earlier, the part of the amendment to the plaint, seeking to delete the words “adverse possession” and its substitution by word “prescription”, has not been allowed by the Trial Court. That rejection has not been challenged by the respondent-plaintiff. Thus, essentially, the

challenge has to be examined in the context of the amendment, both, to the plaint and to the written statement, being allowed. In this regard, it may be mentioned that prior to the present amendment, there was yet another amendment sought by the respondent in the year 2010. It would be worthwhile to reproduce para 1 of the plaint, as it stood at the time when the suit came to be filed as under:

“In Colva, Salcete, Goa, along 4th Ward Road, in its 3rd ward, there is a property admeasuring 6,600 sq.mts. comprised in Survey Nos. 138/1 and 138/5 of village Colva. This property shall hereinafter be referred to as the “suit property.”

16. By virtue of an amendment, granted on 27.01.2010, a portion was added to para 1 and para 1 of the plaint, as amended by the amendment of the year 2010 reads thus:

“Save and except for the house structure, which bears H. No. 302, which exists in the suit property and the land appurtenant thereto, i.e. in the land bearing Survey No. 138/5 of village Colva, Salcete Goa, of which house the plaintiff is the Mundkar. This house structure along with land appurtenant thereto is hereinafter referred to as “the suit house”.”

17. By the said amendment, the following para 2(a) was also added:

“That the suit house is occupied, possessed and enjoyed by the plaintiff and prior to that by his predecessors in title i.e. his late father, as a fixed habitation. However somewhere in the year 1980-1985 on account of the fact that the family of the plaintiff was growing and for the sake of comfort of the members of the plaintiff's family, the plaintiff constructed a new house bearing H. No./236/1 in 3rd Ward, Colva, Salcete Goa. The plaintiff however continues to occupy, possess and enjoy the suit house as his fixed habitation, till date.”

18. Lastly, in para 5 of the plaint, it was said that the respondent is in process of filing an independent application for declaration of the mundkarial rights, in respect of the suit house. The said application is said to be filed and is pending.

19. It appears that the petitioner filed an additional written statement in consequence of the amendment allowed to the plaint. That additional written statement was filed, as far back as on 06.08.2010, in which, the petitioner *inter alia* denied that the house bearing No. 302, existing in the suit property, is a mundkarial house of the plaintiff.

20. With reference to para 2(a) of the plaint, the following reply was filed vide para 3(a) of the additional written

statement.

“3.a) With reference to para 2(a) the contents thereof are denied. It is denied that the suit house was built by the father of the defendants and the suit house was never occupied by the plaintiff by fixed habitation. It is true that the plaintiff is residing at the different address, however, it is not for the reasons of their growing family, even till date, the plaintiff does not reside in the suit house.”

It can thus be seen that the respondent had “raised”, the matter about the House No. 302 along with the land appurtenant thereto, standing in land Survey No. 138/5, being a mundkarial house, way back in the year 2010. It is undisputed that the petitioner did not challenge the said amendment, which was allowed on 27.01.2010. The amendment which is now allowed, has to be seen in the context of the amendment, which was allowed in the year 2010, in as much as, the learned Trial Court has held that the proposed amendment is only clarificatory in nature. At the cost of repetition, it needs to be emphasized that, rest of the amendment deleting the words “adverse possession” and its substitution by word “prescription”, has been disallowed by the Trial Court. If we carefully consider the proposed amendment in the context of

the amendment allowed in the year 2010 (which the petitioner chose not to challenge), it does appear that the proposed amendment is of clarificatory nature, bringing the rest part of the plaint in consonance with para 1 and para 2(a). The question essentially is whether, the plaintiff in such circumstances, can be said to have made an attempt to “raise the matter for the first time, after the commencement of the trial”, within the meaning of the proviso to Order VI, Rule 17 of CPC. The answer in my humble opinion has to be in the negative.

21. The principles apart (which may apply universally) the question whether, the amendment is one, which can be allowed in the context of the proviso to Order VI, Rule 17 of CPC would depend upon facts and circumstances of each case. Here is a case where the gist of the amendment namely, the House No. 302 and the land appurtenant thereto situated in land Survey No. 138/5 being “mundkarial house”, was already “raised” way back in the year 2010 and that order has attained finality. The respondent had carried out the necessary amendment to the plaint, to which, the petitioner had filed additional reply, setting out the defence. Thus, in my considered view, the respondent could be said to have already “raised” the

matter, before the commencement of the trial and the proposed amendment, is only to bring the rest of the part of the plaint in consonance with the rest of the contents of the plaint.

22. Coming to the amendment of the written statement to the counterclaim. As per Order VI, Rule 1 of CPC “pleading” shall mean plaint or written statement. In a suit where there is a counterclaim lodged by the defendant, the “pleadings” would comprise of the plaint, the written statement, the counter claim and the written statement (of the original plaintiff) in reply to such counterclaim. The “pleadings” of a party in a suit where there is a counterclaim raised, would include the plaint, as well as the written statement to the counterclaim. Although, the suit and the counterclaim may principally be two distinct actions (in as much as, the counterclaim can continue, even if, the suit is dismissed in default and vice versa), when being decided on merits, they are decided together. By the proposed amendment to the written statement to the counterclaim, the respondent is only trying to bring the pleadings in the said written statement in consonance with the contents of the plaint.

23. In the case of **Mitra of Archdiocese of Goa and Daman** (supra), the petitioner had filed a civil suit for

declaration that the respondent had no right of whatsoever nature to the suit house and that he is a trespasser and was seeking eviction from the suit house. The case made out was that one Miss Fernanda Amaral, was allowed to reside in the house during her lifetime. She expired on 14.05.1988 and during her lifetime, Miss Fernanda Amaral had made a declaration to the effect that the suit house was exclusively belonging to the petitioner and she was occupying the suit house with the permission of the petitioner. After the death of Miss Fernanda Amaral, when the petitioner's representative went to the suit house, he found that the respondent was occupying the suit house, who refused to vacate the same. The respondent disputed the declaration, allegedly made by Miss Fernanda Amaral. He claimed that he was residing along with Miss Fernanda Amaral in the suit house since 1975, with the consent and knowledge of the petitioner. The learned Trial Court decreed the suit. In appeal, the respondent sought amendment to the written statement, seeking to introduce a plea that the respondent was a mundkar of the suit house and therefore, the Civil Court lacks jurisdiction to entertain and try the suit. It was in these circumstances held that the amendment, which was sought on the spacious ground of "inadvertent mistake", could not have been allowed.

In the present case, the amendment introducing a plea of mundkarship, insofar as the House No. 302, is concerned, has already been introduced in the year 2010, presumably before the commencement of the trial.

24. In the case of **Vidyabai** (supra), the issue in the context of Order VI, Rule 17 of CPC was whether, the trial had commenced. It was held that when issues are settled and an affidavit in lieu of examination in chief is filed, the trial can be said to have been commenced. In the said case, the application was filed by the defendant for amendment of the written statement, with addition of parties, after the trial had commenced. The learned District Judge, dismissed the application, holding that an entire new case has been set up. The learned District Judge found that the contention, that the defendant had no knowledge of the facts and that the defendants could not gather the material and information necessary for drafting proper written statement, was rejected. The High Court, reversed the order, allowing the amendment, on the ground that there is no "retracting of the statement made in the written statement, already filed" and allowed the amendment. The Hon'ble Supreme Court found that the High Court had not considered the jurisdictional issue of the

requirement of the proviso to Order VI, Rule 17 of CPC, being satisfied and had also exceeded the jurisdiction as the judgment did not satisfy the test of judicial review. In my humble opinion, the case clearly turned on its own facts.

25. In the case of **Gangubai Baban Kadam** (supra) there was an application for amendment and addition of defendants filed, after conclusion of the oral evidence, without any justification as well as without any due diligence. This Court found that addition of a party, is not a formality and when the question is as to whether, a party is a necessary or a proper party, it ought to be shown as to how, it prevents the Court from arriving at a proper conclusion, in the absence of the party sought to be added. This Court found that the rejection of the application by the Trial Court was justified. It can thus clearly be seen that the case turned on its own facts.

26. In the case of **Smt. Jayashree Subhash Kalbande** (supra), it was held that ignorance by party or his counsel, in spite of knowledge, cannot be a matter of “due diligence”. This Court held that the question whether, due diligence has been established or not, is essentially a question of fact, which is required to be determined in the facts and circumstances of

each case. In the said case, it was found that “due diligence” was not established.

In the present case in hand, the plea of mundkarship was already “raised” in the plaint, of which, the petitioner was aware of and the parties have led evidence, fully knowing each other's case.

27. A useful reference may be made, at this stage, to the decision of this Court in the case of **M/s K.T. Kubal Company Vs. Mujibur Rehman Haji Israr Alam Siddiqui, 2015(2) ALL MR 700**. In that case, a similar contention about the matter having been “raised”, earlier, was pressed into service, on behalf of the petitioner. This is what is held by this Court in para 17 of the judgment:-

“17. Lastly, Mr. Godbole attempts to hang onto the word “raised” used in the proviso as regards the matter to be brought into the pleadings by way of amendment. He submits that use of the word “raised” in the language of the proviso is significant. According to him, use of the word indicates that the matter of amendment must be new matter, not referred to earlier at any point of time. Since the proposed amendment in this case contained the matter which was already “raised” earlier on record at various stages of the proceedings it fell outside the proviso. The

argument needs to be only stated to be rejected. The raising of the matter relates to the pleadings i.e. plaint and written statement as per Order VI, Rule 1 CPC and not the general record of the case which would include several interlocutory proceedings.

(Emphasis supplied)

It can thus be seen that this Court has held that the “raising” of the matter relates to the pleadings, i.e. to the plaint and the written statement. Here again, unlike the case of **M/s K.T. Kubal Company** (supra) (where the matter was raised in the general record of the case including several interlocutory proceedings), the matter has been raised in the pleadings i.e. in the plaint in the year 2010.

28. Lastly, in the case of **Ajendraprasadji N. Pandey** (supra), it was found that in addition to the absence of bonafides of the proposed amendment sought to be introduced, a totally new and inconsistent case, was tried to set up. It is in these circumstances that the contention on behalf of the appellants that they have raised the matter covered by the amendment, before the commencement of trial, was not accepted.

29. Shri Rodrigues, the learned Counsel for the petitioner has strenuously urged that the amendment, if allowed, would greatly prejudice the petitioner, who is a senior citizen and is contesting the suit and the counterclaim from the year 2003. It is submitted that the amendment to the written statement to the counterclaim would greatly prejudice the petitioner in the prosecution of the counterclaim.

30. In my considered view, although, it cannot be disputed that the suit is pending from 2003 and is now fixed for final arguments, the contention as to the prejudice to the petitioner, cannot be accepted. As noticed earlier, the basic amendment, claiming that the House No. 302 (along with the land appurtenant thereto) in land Survey No. 138/5, was introduced way back in the year 2003, to which the petitioner has filed a reply, by way of an additional written statement. The parties went through trial, being aware of each others' case and the parties have led their evidence, which now stands concluded.

31. Shri Menezes, the learned Counsel for the respondent submitted that the respondent is not desirous of reopening the evidence or leading any further evidence, in the

matter, on the basis of the amendment allowed by the Trial Court. In other words, it is submitted that the amendment is only to bring the plaint as well as the written statement in consonance with the amendment effected in the year 2010. It can thus be seen that the respondent will not lead any further evidence and the Trial Court can decide the matter after hearing the arguments. In the wake of such a statement, I do not find that any prejudice would be caused to the petitioner, by virtue of the amendment being allowed. Thus, I do not find that any case for interference is made out in the impugned order.

32. It is now well settled that the jurisdiction exercised by this Court, under Article 227 of the Constitution of India, is neither appellate nor revisional jurisdiction, but, is of supervisory nature. Apart from the jurisdictional error, the Court is also expected to see whether, the impugned order results into any manifest injustice, or exceptional hardship, in order to justify interference, which is lacking in this case. As noticed earlier, the respondent is not seeking to reopen the trial and thus, no manifest injustice can be said to have been caused to the petitioner, resulting from the impugned order (see **Syed Yakoob Vs. K.S. Radhakrishnan & Others, AIR 1964 SC 477** and **Surya Dev Rai Vs. Ram Chander Rai, (2003) 6**

SCC 675).

In the result, the petitions are dismissed, with no order as to costs.

33. At the request of the learned Counsel for the petitioner, the interim relief, already operating, shall continue for a period of six weeks.

C. V. BHADANG, J.

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