

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 762 OF 2017**

1. Mr. Susruta Agnelo Paulo Gomes Martins (deceased through LRs):
 - 1(a) Miss Esmina Martins, 18 years of age, student,
 - 1(b) Miss Elizabeth Martins, 17 years of age, Both residing at House No. 91, "Kranti Jyoti", Paithona, Salvador-do-Mundo, Bardez-Goa.
 2. Mrs. Beena Martins, daughter of late Zacharia Joseph, 45 years of age, Homeopathic Practitioner. Both residing at House No. 91, "Kranti Jyoti", Paithona, Salvador-do-Mundo, Bardez-Goa.
- Petitioners

Versus

Mrs. Meenacshi Philomena Martins, daughter of late Dr. Jose Francisco Xavier Antonio Martins, 47 years of age, married, psychiatrist, residing at House No. 1017, Shriwada, Paithona, P.O. Alto Porvorim, Bardez, Goa - 403 521.

.... Respondent

Shri Ajit Kantak, Advocate for the Petitioners.

Shri Somnath Karpe, Advocate for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 30th January, 2018.

ORAL JUDGMENT:

Rule made returnable forthwith. Advocate Shri Karpe, waives service for the respondent. Heard finally, by consent of parties.

2. The petitioners are the original defendants in Regular Civil Suit No. 166/2007/E, on the file of the learned Civil Judge Junior Division at Mapusa, which is a suit filed by the respondent for permanent injunction, "reduction of the Will" and declaration of Deed of Succession, as null and void. In the said suit, after the respondent-plaintiff entered into the witness box, an application (Exhibit-84/D), for amendment of the written statement came to be filed by the petitioners, seeking introduction of the following amendments:

A) After para no. 10 of the additional written statement, para 10(a) be added to be read as follows:

"It is categorically stated that as the case set out by the plaintiffs is that the suit properties are common properties, and as the plaintiffs have sought a relief to be declared as the owner of 3/8th share in each of the said properties, the present suit is not maintainable in view of the fact that the rights have not been determined in inventory proceedings or in any public deed of partition. It is further stated that the following inventory proceedings are pending:-

a) Inventory Proceedings No. 464/2010/A in the Court of the Civil Judge Senior Division 'A' Court at Mapusa initiated by Meenackshi Philomena Martins Shukla i.e. the plaintiff herein.

b) Inventory Proceedings No.280/2011/A in the Court of the Civil Judge Senior Division A-Court at Mapusa.

c) Orphanological Inventory Proceedings bearing No. 416/2010/B in the Court of the Civil Judge Senior

Division 'B' Court at Mapusa initiated by Mrs. Beena Martins.

It is also stated that until and unless the above inventory proceedings are conclusively decided by the Hon'ble Courts of competent jurisdiction, this Hon'ble Court would have no jurisdiction to try and determine the present suit, more specifically the issue of declaration of 3/8th share as well as reduction in the Will".

B) After para no. 10(a) add para no. 10(b) to be read as follows:

"It is specifically stated that it was the duty of the plaintiffs to make a clear disclosure to this Hon'ble Court that the value of the gifted properties to her, exceeds her share, which she would be entitled to in the inheritance, and return the excess in Specie. The plaintiff has very cunningly and calculatedly not made any reference about the value of the gifted properties which becomes a subject matter of collation in terms of law and if one takes into consideration the value of the said properties as on the death of the father of the plaintiff the value of the gifted property would exceed the share of the plaintiff in the estate".

C) After para no. 14 add para no. 14(a) to be read as follows:

"The defendants state and submit that the subject matter of the gift to the plaintiff in the life time of the parents which is subject to collation constitute

more than half of the disposable share and therefore the question of reduction in the Will does not and cannot arise at all”.

D) After para no. 14(a) add para no. 14(b) to be read as follows:

“The defendants state and submit that the plaintiffs has miserably failed to produce on record any document to substantiate that her claim that the suit properties constituted the exclusive estate of her parents and no title documents have been produced on record”.

E) After para no. 14(b) add para no. 14(c) to be read as follows:

“The present suit is required to be stayed till the final disposal of the inventory proceedings referred to herein above as whether the gifted property which is a subject matter of collation constitutes more than half of the disposal share of the parents can be addressed only in the inventory proceedings which has also been filed by this Hon'ble Court in its earlier order”.

3. It was contended that the proposed amendment is explanatory in nature and does not change the nature of the defence and is aimed at making reference to the documents, which are already allowed to be produced on record.

4. The amendment was opposed on behalf of the respondent.

5. The learned Trial Court by an order dated 03.04.2017, dismissed the application *inter alia* on the ground that earlier, a similar application was filed in the year 2014, which was withdrawn and on the ground that the petitioners have failed to demonstrate due diligence, in as much as, the amendment was sought after the commencement of trial. Feeling aggrieved the petitioners are before this Court.

6. I have heard Shri Kantak, the learned Counsel for the petitioners and Shri Karpe, the learned Counsel for the respondent. With the assistance of the learned Counsel for parties, I have perused record.

7. At the outset, it is necessary to state that the respondent-plaintiff had also filed an application for amendment of plaint, which was rejected by the Trial Court, against which, the respondent had filed Writ Petition No. 1036/2017, which has been allowed by this Court on 29.01.2018. Thus, the amendment sought by the respondent to the plaint stands allowed.

8. Coming back to the present petition, the petitioners had filed an application for amendment on 23.07.2014, seeking similar amendment to the written statement. By a subsequent application dated 15.09.2014, the petitioners had sought leave to withdraw the application, with liberty to file a fresh application. The learned Trial Court in view of the no objection expressed on behalf of the respondent, allowed the application for amendment to be withdrawn by order dated 26.09.2014. This is the first ground, which according to the learned Trial Court, dis-entitles the petitioners for seeking similar amendment. I do not find that the reason as articulated can be accepted. This is because the petitioners had sought withdrawal of the application, with liberty to file fresh application, to which there was no objection given by the respondent. In such circumstances, the learned Trial could have either allowed the application as prayed i.e. with liberty to file fresh application or in it's discretion could have refused permission for withdrawal. The learned Trial Court cannot allow the withdrawal and then refuse leave to file fresh application. In any event, the order dated 26.09.2014, does not show that such liberty has been refused. Be that as it may, when the petitioners had sought liberty to file a fresh

application, to which, the respondent had given no objection, I do not find that this can be a ground for refusing the amendment.

9. Coming to the aspect of due diligence, as noticed earlier, this Court has allowed amendment to the plaint and thus, the petitioners would be entitled to carry out amendment to the written statement, to the extent it is consequential in nature. During the course of the arguments at bar, Shri Kantak, the learned Counsel for the petitioners has submitted that in view of the fact that this Court has allowed amendment to the plaint to be carried out vide order dated 29.01.2018, passed in Writ Petition No. 1036/2016, the proposed amendment as set out in para 15(A), would not survive. He also does not press for amendment as set out in para 15(E). Thus, the claim is restricted to para 15(B), (C) and (D). If we compare the proposed amendment as set out in para 15(B), (C) and (D), with defence as raised in the written statement, it would appear that the proposed amendment is explanatory in nature to the defence already taken. The material issue in the suit is whether, the Will needs to be restricted to the disposable quota of the testator and whether, the Deed of Succession, is null and void. Considered in this context and the defence already

raised, the proposed amendment only tends to further amplify the defence and would neither change the nature of the defence nor seek to introduce a new plea.

10. This Court in the case of **Bharat Petroleum Corporation Limited Vs. Precious Finance Investment Pvt. Ltd., 2006 (6) All.M.R. 771**, after taking a survey of several decisions holding the field, has culled out the broad principles, which are germane while considering the application for amendment. These principles have been set out in para 33 of the judgment. It is now well settled that the Court can allow amendment at any stage of the suit and all such amendments, which are necessary for deciding the real controversy in the suit, have to be allowed. This is subject to the proviso as appended to Order VI, Rule 17 of CPC, where the amendment is brought after the commencement of the trial. This Court in the case of **Bharat Petroleum Corporation Limited** (supra) has held that the proviso to Order VI, Rule 17 of CPC is procedural and not a part of substantive law and the proviso in the present form and context is directory and not mandatory and it aims at weeding out applications which may be frivolous in nature or aimed at prolonging the lis.

11. Considering the nature of the amendment sought, I find that the amendment would be necessary for deciding the real controversy in the suit and the application cannot be said to be frivolous. It is further well settled that the Courts are required to take more liberal view in allowing amendment to written statement, in as much as, the question of prejudice is less likely to operate with same rigour in former than in latter case. Considering the overall circumstances, the amendment as proposed in para 15(B), (C) and (D) is allowed.

12. In that view of the matter, the following order is passed:

ORDER

- (a) The petition is allowed.
- (b) The impugned order is hereby set aside.
- (c) The application (Exhibit-91/D), is partly allowed.
- (d) The amendment as proposed in para 15(B), (C) and (D), is allowed to be carried out.
- (e) The suit is of the year 2007. The learned Trial Court shall decide the same as expeditiously as possible.
- (f) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.