

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 900 OF 2017.

1. Mr. Teotonio Faustino Vas,
major, age 63 years, son of
late Mr. Joaquim Aleixo Vas.

 2. Mrs. Bonifacia Fernandes,
major, age 59 years,
housewife, wife of Mr.
Teotonio Faustino Vas
daughter in law of late
Joaquim A Vas both r/o H.
no.E-257,Behind Avanti Bar
and Restaurant St. Tome
Road, Panaji-Goa.
- Petitioners.

Versus

1. Smt. Ana Maria Rodrigues,
widow of late Joaquim A.Vas
Aged 79 years, resident of H.
No. 406/76, (Plot No.34,)
Nova Cidade, Porvorim,
Bardez Goa.

2. Mr.Francisco Zeferino Vas,
major, age 55 years,
bachelor, son of late Joaquim
A.Vas bachelor, resident
care of Joao Caetano
Anacleto Barreto, H. No.
406/76, (Plot No.34,) Nova
Cidade, Porvorim, Bardez
Goa.

3. Mrs. Milagrina Sebastiana
Vas, major, age 59 years,
service, daughter of late
Joaquim A. Vas, wife of Mr.
Joao Caetano Anacleto
Barreto

4. Mr. Joao Caetano Anecleto Barreto, major, age 64 years, retired, son in law of late Joaquim A. Vas, both residents of H. No.406/76, (Plot No.34,) Nova Cidade, Porvorim, Bardez Goa.
 5. Mrs. Joaquina Francisca Socorrinha Vas, major, ae 57 years, service, daughter of late Joaquim A. Vas wife of Mr. Antonio Mariano Lumen Fernandes,
 6. Mr. Antonio Mariano Lumen Fernandes, major, age 58 years, self employed, son in law of late Joaquim Vas, both residents of Flat No.B-2, Neptune Leisure Chambers, Opposite Divar Ferry, Ribandar Goa.
- Respondents.

Shri Rohit Bras Desa, Advocate for the petitioners.

Shri V. Pangam, Advocate for the respondent nos.1 to 6.

Coram:-PRITHVIRAJ K. CHAVAN,J.

Reserved on:16th February, 2018.

Pronounced on:24th February,2018.

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the respective parties.

2. The petitioners have invoked jurisdiction of this Court under Article 227 of the Constitution of India challenging the order of rejection of application under Order 6 Rule 17 of Code of Civil Procedure, 1908("CPC" for short) dated 12.9.2017 by Ad-hoc Senior Civil Judge, Panaji in Regular Civil Suit No.124/2016/B.

3. The respondents/plaintiffs have filed a suit for partition and permanent injunction against the petitioners. The respondents have prayed for their 50% share in the suit property as well as 50% shares of the original defendant no.1, inter alia, sought relief of permanent injunction.

4. Petitioners in their Written statement admitted the relationship with the respondents. The petitioners have also admitted the existence of suit property which is a house described in paragraph 3 of the plaint as well as its ownership by late Shri Joaquim Aleixo Vas. The petitioners have also admitted the contents of paragraph 6 of the plaint stating that the Deed of Succession executed between universal heir of late Joaquim declaring the plaintiffs and defendants as his heirs.

5. Petitioners, thereafter have moved an application under Order 6 Rule 17 of CPC for amendment of the written statement. It is the contention of the petitioners that they have obtained certain

vital documents of the suit property on 27.12.2016, 5.1.2017 and 13.1.2017 from the Directorate of Archeology and Archives, Panaji. They have also obtained some documents from Directorate of Land Survey Panaji and some Death Certificates from the Church of Immaculate Conception, Panaji.

6. Learned Senior Civil Judge by the impugned order rejected the application.

7. I heard learned Counsel Shri Rohit Bras Desa for the petitioners. He drew my attention to paragraph 4 of the impugned order wherein the learned Civil Judge has wrongly stated that it was a proposed amendment by which the **plaintiffs** want to amend their plaint etc. which were subsequently got corrected by speaking to the minutes. This Court by order dated 11.10.2017 permitted the petitioners to file an application for speaking to the minutes of the order dated 12.9.2017 and also expected that the trial Court should be more cautious while checking and pronouncing the order.

8. Be that as it may, the argument of the learned Counsel for the petitioners is that the proposed amendment is very much essential to resolve the real controversy between the parties and that the proposed amendment will not cause any prejudice to the

plaintiffs/respondents. He placed reliance on some authorities which I shall refer hereinafter.

9. On the other hand, learned Counsel for the respondents submits that proposed amendment is absolutely unnecessary in view of the fact that the petitioners have admitted almost entire claim of the respondents and, therefore, respondents had moved an application under Order 12 Rule 6 of CPC to which the petitioners did not file any reply. It is also submitted that in view of the admission of contents of paragraphs no.1 to 7 of the plaint by the petitioners, the Court could have passed a judgment under Order 12 Rule 6 of CPC. It is further submitted that the plaintiffs are the dominus litis and the documents which are filed on record, more particularly the Deed of Succession has a presumptive value as per Section 105 of Goa Daman and Diu Land Revenue Code, 1968. It is also submitted that said document was executed by the petitioners also and, therefore, there is no substance in the petition.

10. The proposed amendment is thus:-

“11. After para 1 of the written statement add the following para as para 1A, 1B, 1C, 1D, 1E, 1F.

1A. The defendants state that the suit house was granted on emphyteusis by his Excellency the then Governor General of Goa by order dated 08 January, 1899 to late great grand-father of the

defendant no.1-Joaquim Aleixo Vas on the terms and conditions mentioned in the said order.

- 1B. The defendants state that the suit property which is property of residential houses with its adjacent property is described under No.9056 at page 48 overleaf of Book B-24(new) and also under no.10832 at page 160 of Book B-28(new) and under No.9668 at pages 165 overleaf of Book B-5(new) and is inscribed under no.5503 at page 19 overleaf of Book G-14 of the land registration records of Ilhas. The suit property was originally bounded on the East by the residential house of Mariano Jose Correa da Silva, on the West by the other half of Sebastiao Vas, on the North by the residential house of Caetano Manoel Fernandes and on the South by a major lane. The defendants state that they crave leave to refer to, rely upon and reproduce and reiterate all the contents of all the above documents herein as if the same were specifically reproduced herein for all legal purposes.*

(Annexed hereto is the certified true copy of all the above documents alongwith their English translation which are marked as Exh-I,II,III and IV resp.)

- 1C. The defendants state that on 03rd March 1986 his father gave a statement in mutation proceedings of Chalta No.150 of P. T. Sheet No.45 pertaining to the suit property before the Enquiry Officer, City Survey, Panaji and who subsequently passed the judgment dated 12th March 1986 which the defendants crave leave to refer to, rely upon and*

reproduce and reiterate all the contents of all the above documents herein as if the same were specifically reproduced herein for all legal purposes.

(Annexed hereto is the copy of both the statement dated 03/03/1986 and judgment dated 12/03/1986 which are marked as Exh-V and VI resp.)

- 1D. *The defendants state that the suit property was surveyed under Old Cadastral no.364 of Panaji City and is today surveyed under Chalta No.150 of P.T. Sheet No.45 of City Survey, Panaji and is shown as admeasuring 73 sq. mts. The defendants crave leave to refer to rely upon and reproduce and reiterate on the said Old Cadastral survey plan as if the same were specifically reproduced herein for all legal purposes.*

(Annexed hereto is the copy of the Old survey plan which is marked as Exh- VII)

- 1E *The defendants states that Joaquim Aleixo Vas dies on 14th February 1910 at Panaji, and his wife Maria Rosa Cardozo also died leaving behind them 7(seven) children; Teotonio Vas alias Teotonio Sebastiao Vas and Joaquim Vas being two of the seven children. The defendants state that they are unaware of the names of the remaining five children, but however efforts are being made to find their legal heirs.*

(Annexed hereto is the copy of death certificate which is marked as Exh.VIII.)

- 1F. *The defendants state that the said Teotonio Vas alias Teotonio Sebastiao Vas died on 26th June 1938 at Panaji leaving behind three children (i)*

Jose Antonio Raimunda Vas (ii) Pedro Vas and (iii) Joaquim Aleixo Vas.

(Annexed hereto is the copy of death certificate which is marked as Exh.IX.)

1G. The defendants state that the said Joaquim Vas died on 3rd May 1958 at Panaji leaving behind four sons.

(Annexed hereto is the copy of death certificate which is marked as Exh.X.)

1H. The defendants state that his father-Joaquim Aleixo Vas died on 20th September 2005 at Panaji leaving behind the Plaintiff no.1 as is half sharer and moiety holder and the Plaintiff no.2,3,5 and defendant no.1 as his universal heirs.

(Annexed hereto is the copy of death certificate which are marked as Exh.XI.)

1I. The defendants therefore state that the suit property along with the suit existing therein belongs to all the legal representatives/heirs of late Joaquim Aleixo Vas as it was granted to him, by order dated 08th January, 1899. On his death on 14/02/1910 his son Teotonio Vas alias Teotonio Sebastiao Vas inherited 1/7th (One Seventh) undivided right, title and interest therein. On the death of Teotonio Vas alias Teotonio Sebastiao Vas 26/06/1938, his son - Joaquim Aleixo Vas inherited one-third of the 1/7th right, title and interest in the suit property, that is 1/21th right, title and interest.

1J. The defendants state that on the death of Joaquim Aleixo Vas, the plaintiff no.1 inherited half(50%) of the 1/21 right, title and interest in the suit property and the plaintiff no.2,3, 5 and defendant

no.1 inherited the balance 50% of the 1/21 right, title and interest in the suit property.”

11. It has been laid down by a catena of decisions that as per order 6 Rule 17 of CPC amendment of pleadings by the defendant ought to be allowed where purpose of the proposed amendment is to elaborate the defence and to take additional plea in support of the case. It has also been laid down that where there is a direct admission in the original pleadings, it is open to the defendants to explain the same.

12. It is not the contention of the respondents that the petitioners are trying to add new ground of defence by substituting or altering the defence which has already been raised in the written statement. The law is well settled that the defendant can take inconsistent pleas in the written statement although the same may not be permitted in case of plaint. Powers of the Court under Order 6 Rule 17 CPC to allow amendment of pleadings are wide.

13. Learned Counsel for the respondents vehemently argued that the petitioners have not filed any reply to their application under Order 12 Rule 6 of CPC in the light of the fact that the petitioners have admitted paragraph nos. 1 to 7 of the plaint. There is no legal bar for delivering judgment on admission

in view of Order 12 Rule 6 of CPC on admission of facts in the pleadings. The trial Court may very well, at any stage of the suit, either on the application of the party or on its own motion or without waiting for determination of any other question between the parties, pass a judgment. Here the learned Trial Court may proceed to decide the application of the respondents filed under Order 12 Rule 6 of CPC, however, that may not be a reason for not allowing the proposed amendment to the written statement by the petitioners which according to the petitioners are made only for elaboration of certain facts and to bring about more clarity in the pleadings regarding share of the parties vis-a-vis the suit property. In case of ***Estralla Rubber Vs Dass Estate(P) Ltd, (2001)8 SCC 97*** while discussing the scope of Article 227 on the aspect of findings of fact of Lower Court, it is held by the Supreme Court that High Court under Article 227 can set aside the finding of the Lower Court if they are passed on no evidence at all or so perverse that no reasonable person would come to such a conclusion. It would be apposite to refer to paragraphs 3 to 7 of that case which reads thus:-

“3. The learned counsel for the appellant strongly contended that the High Court was not right and justified in exercising power under Article 227 of the Constitution of India as an appellate or a revisional court without bearing in mind that the power under Article 227 is one of the

superintendence; it was not correct to say that the defendant wanted to withdraw the so-called admission said to have been made in favour of the plaintiff, when no such admission was there as a matter of fact. He added that the proposed amendment was only to support the defence already taken by elaboration based on the revenue records. It was not shown as to how any prejudice would be caused to the plaintiff by allowing the amendment; a mere delay in filing application for amendment is itself not a ground to reject the same; the proposed amendment was necessary to adjudicate the dispute between the parties and to avoid further litigation.

- 4. Per contra, the learned counsel for the respondent made submissions supporting the impugned order passed by the High Court. He urged that in the proposed amendment application, the defendant has taken inconsistent plea; he wanted to take away the effect of admission made earlier in favour of the plaintiff.*
- 5. We have considered the submissions made on behalf of either side. The High Court set aside the order passed by the learned District Judge stating that the proposed amendment will have the effect of displacing the plaintiff from admission made by the defendant in its petition filed under Sections 17(2) and 17(2A) of the Act and that such admission could not be permitted to be withdrawn. We have perused the relevant records including the original application and the proposed amendments. We are not able to see any admission made by the defendant as such, which was sought to be*

withdrawn. By the proposed amendment the defendant wanted to say that Ala Mohan Das was a permissive occupier instead of owner. The further amendment sought was based on the entries made in the revenue records. It is not shown how the proposed amendment prejudiced the case of the plaintiff. It is also not the case of the plaintiff that any accrued right to it was tried to be taken away by the proposed amendment. The proposed amendment is to elaborate the defence and to take additional plea in support of its case. Assuming that there was some admission indirectly, it is open to the defendant to explain the same. Looking to the proposed amendments it is clear that they are required for proper adjudication of the controversy between the parties and to avoid multiplicity of judicial proceedings. The High Court also found fault with the defendant on the ground that there was delay of three years in seeking amendment to introduce new defence. From the records it cannot be said that any new defence was sought to be introduced. Even otherwise, it was open for the defendant to take alternate or additional defence. Merely because there was delay in making the amendment application, when no serious prejudice is shown to have been caused to the plaintiff so as to take away any accrued right, the application could not be rejected. At any rate, it cannot be said that allowing amendment caused irretrievable prejudice to the plaintiff. Further, the plaintiff can file his reply to the amended written statement and fight the case on merits. The impugned order passed by

the High Court exercising jurisdiction under Article 227 of the Constitution to set aside the order passed by the learned District Judge in revision under Section 115A of the CPC allowing the amendment application filed by the defendant, is patently erroneous and unsustainable. In the impugned order the High Court observed that the order of the learned District Judge was apparently wrong but in our view it is otherwise.

- 6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in number of decisions of this Court. The exercise of power under this Article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required by them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the courts subordinate or tribunals. Exercise of this power and interfering with the orders of the courts or tribunal is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this Article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court*

can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or Tribunal has come to.

7. *This Court in Ahmedabad Mfg. & Calico Ptg. Co. Ltd Vs. Ram Tahel Ramnand and ors. [AIR 1972 SC 1598] in para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case Waryam Singh & Anr. Vs. Amarnath & Anr. [1954 SCR 565]. This court in . [AIR Babhutmal Raichand Oswal vs. Laxmibai R. Tarte and Anr 1975 SC 1297] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order."*

14. In the light of the ratio laid down in the aforesaid ruling, proposed amendment in the written statement is required

for proper adjudication of the controversy between the parties and also to avoid multiplicity of the proceedings. The trial Court in the impugned order failed to appreciate the real scope of Order 6 Rule 17 of CPC and various pronouncements by the High Court and Supreme Court. It has been erroneously observed that the defendants have nowhere in the application spelt out as to what prejudice would be caused to them if the application is not allowed. This is altogether a wrong approach in the sense that defendants need not prove negative when it propose to amend a written statement. The trial Court, on the contrary went on to observe that "if proposed amendments are allowed more prejudice would be caused to the defendants" which indicates non application of judicious mind to the facts of the case. Since there is a flagrant disregard of Fundamental Principles of Law, interference of this Court under Article 227 is very much essential. The trial Court had failed to exercise its jurisdiction, in view of the ratio laid down in the case of ***Estralla Rubber*** (Supra).

15. In the light of the aforesaid observations, the impugned order passed by the Ad-hoc Senior Civil Judge below Exh.19-D on 12.9.2017 is quashed and set aside. The petitioners are allowed to amend the Written Statement within a period of 8 days from the date of receipt of this order by the Trial court. After amending the Written Statement the trial Court shall proceed further with the

suit as per law.

16. Rule is made absolute in the aforesaid terms.

PRITHVIRAJ K. CHAVAN, J.

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