

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1036 OF 2016**

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.

.... Petitioner

Versus

1. Mr. Susruta Agnelo Paulo Gomes
Martins (deceased), son of late Dr. Jose
Francisco Xavier Antonio Martins, 46
years of age, Homeopathic Practitioner.
- 1(a) Miss Esmina Martins, 11 years of age,
student,
- 1(b) Miss Elizabeth Martins, 20 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.

.... Respondents

Shri Somnath Karpe, Advocate for the Petitioner.

Shri Ajit Kantak, Advocate for the Respondents.

CORAM:- C.V. BHADANG, J.

DATE:- 29th January, 2018.

ORAL JUDGMENT:

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

2. The challenge in this petition is to the order dated 01.06.2016, passed by the learned Trial Court, whereby an application for amendment of plaint (Exhibit-86/D) filed by the petitioner, has been dismissed.

3. The brief facts are that, the petitioner has filed a suit for permanent injunction, for “reduction of the Will” and for declaration of Deed of Succession, as null and void. After the commencement of the trial i.e. when the petitioner is under cross examination, an application (Exhibit-86/D), for amendment of the plaint, came to be filed. The proposed amendments are set out in para 2 of the application. Broadly speaking, the petitioner wants to add the properties bearing Survey Nos. 135/1, 149/1, 2, 8 to 15 and 19, as suit properties and to delete properties bearing Survey Nos. 159/1 and 170/15. The petitioner also proposes to delete the relief that the petitioner is the owner of the $3/8^{\text{th}}$ share of each of the properties and for averments stating that the Will needs to be read down i.e. restricted to the disposable quota of the testator.

4. The application was opposed by the respondents *inter alia* on the ground that it does not satisfy the requirements of the proviso to Order VI, Rule 17 of the Code of

Civil Procedure (CPC, for short). Secondly, the proposed amendment would change the nature of the suit, as it withdraws admission and lastly, on the ground of the amendment being barred by limitation.

5. The learned Trial Court negated the contention, raised on behalf of the respondents, that the amendment could not be allowed, being barred by limitation. In the opinion of the learned Trial Court, this aspect can be gone into at the trial of the suit. However, the learned Trial Court dismissed the application (Exhibit-86/D), mainly on the ground that the application for amendment did not set out the reasons for not bringing the amendment before the commencement of trial. Thus, essentially, the amendment has been rejected on the ground of non satisfaction of the requirement of proviso to Order VI, Rule 17 of CPC.

6. I have heard Shri Karpe, the learned Counsel for the petitioner and Shri Kantak, the learned Counsel for the respondents. Perused the record.

7. It is submitted by Shri Karpe, the learned Counsel for the petitioner that although, the application for amendment

did not set out the reasons for bringing the amendment before the commencement of trial, the reasons are stated in the written submissions. It is submitted that it was during the cross examination of PW-1 that it was realised that certain properties were required to be included in the suit and certain other properties were left out, which were belonging to the parents of the petitioner. It is submitted that the relief of reading down the Will was already there.

On behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of **Chakreshwari Construction Private Limited Vs. Manohar Lal, (2017) 5 SCC 212** and the decision of this Court in the case of **Bharat Petroleum Corporation Limited Vs. Precious Finance Investment Pvt. Ltd., 2006 (6) All.M.R. 771.**

8. On the contrary, it is submitted by Shri Kantak, the learned Counsel for the respondents that the application for amendment is cryptic and vague. It is submitted that the compliance of the requirements to the proviso of Order VI, Rule 17 of CPC is mandatory, where the amendment is brought after the commencement of the trial. Secondly, it is contended that the proposed amendment seeks withdrawal of an admission, in as much as, the petitioner had sought declaration that she is

owner of the 3/8th share, which now she wants to withdraw, which would change the nature of the suit. Except these, there are no other contentions raised.

9. I have carefully considered the rival circumstances and the submissions made. 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 between the parties, has to be allowed. This is subject to the proviso to Order VI, Rule 17 of CPC, which was introduced in the year 2002. The jurisdiction and the power of the Court to allow the amendment, in the face of the proviso to Order VI, Rule 17 of CPC, has been subject matter of several decisions and it is now well settled that, when the amendment is brought after the commencement of the trial, the party has to demonstrate that inspite of due diligence, the amendment could not be brought earlier. This Court in the case of **Bharat Petroleum Corporation Limited** (supra), after noticing several decisions holding the field, has culled out the broad principles, which emerge while considering the application for amendment in para 33 of the judgment.

10. Coming back to the present case, the part of the

amendment only seeks to delete the relief of declaration, that the petitioner is the owner of the suit properties to the extent of 3/8th share. It is difficult to accept that deletion of such a relief, would amount to withdrawal of admission, as contended on behalf of the respondents. It is trite that the party can either delete or rescind any part of the relief, at any stage of the proceedings. Coming back to deletion of certain properties, all that is claimed is that these properties are not belonging to the parents of the petitioner and thus, cannot be the subject matter of dispute. Here also, it is difficult to accept such a contention as to how it would result into change of the nature of the suit. As regards the aspect of introduction of certain properties, the petitioner has stated in the written notes that, it was during the cross examination of PW-1 that it was realised that certain properties, belonging to the parents of the petitioner, were not included as suit properties.

11. In my considered view, the Court has to take a broad and pragmatic view, while considering the case for amendment in the context of proviso to Order VI, Rule 17 of CPC. The Court cannot afford to be hypertechnical in this regard. This is because the basic premise, on which the amendment is allowed is that, it is necessary for deciding the real controversy between

the parties and also to avoid multiplicity of litigation. Applying this test and the principles culled out in the case of **Bharat Petroleum Corporation Limited** (supra), in my considered view, the petitioner has complied with the requirements of proviso to Order VI, Rule 17 of CPC.

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-86/D), for amendment is hereby allowed.
- (d) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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