

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 732 OF 2019****TULSHIDAS MADKAIKAR (DEC) THR.
LRS., AND ANR.,****... Petitioners****Versus****BEATRICE D'SOUZA (DEC) THR. HER
LRS. AND 2 ORS.,****... Respondents**

Adv. Suraj Rohidas Naik for the Petitioner.

Adv. Dajvip Vilas Patkar for Respondent No. 1(a)(i).

Coram:- C. V. BHADANG, J.**Date:- 18th September, 2019.**

Oral Order:

The challenge in this petition is to the order dated 17/2/2018 passed by the learned Civil Judge, Junior Division, Mapusa in Regular Civil Suit no.114/2009/D. By the impugned order, the learned trial court has allowed application (Exhibit 56) filed by the respondents/plaintiffs, for amendment of the plaint.

2. The respondents have filed the aforesaid suit for a declaration that the Deed of Sale dated 24/10/1988 executed by one of the co- owners, in favour of the petitioners, is null and void and for cancellation of the said sale deed

and other consequential reliefs. The case made out in the plaint is that the respondents were all along in possession of the suit property. The petitioners filed their written statement in the year 2008 and claimed that they are in possession of the suit property.

3. The application (Exhibit 56) was filed by the respondent for amendment of the plaint to incorporate prayer clause "bb" as under :

“(bb) In case this Honourable Court comes to a conclusion that the possession of the suit property is with the defendants, then the defendants be directed to deliver vacant and peaceful possession of the suit property to the plaintiff.”

4. The learned trial court by the impugned order has allowed the said amendment, as according to the learned trial court it is necessary for deciding the real controversy between the parties.

5. I have heard Mr. Naik, the learned counsel for the petitioners and Mr. Patkar, the learned counsel for the respondents. Perused record.

6. Mr. Naik, the learned counsel for the petitioners has submitted that in the year 2008 when the petitioners filed their written statement, they claimed

that they are in possession of the suit property and the present application for amendment is filed in the year 2017 seeking an alternate relief of grant of possession in the event the court comes to the conclusion that the petitioners are in possession of the suit property, which is not permissible. The learned counsel states that in any event the relief of possession now sought to be introduced by prayer clause “bb” would be barred by limitation and it cannot relate back to the filing of the suit.

7. Mr. Patkar, the learned counsel for the respondents has supported the impugned order. It is submitted that the amendment sought is by way of abundant caution and in the event the court comes to the conclusion that the respondents have lost possession and it neither changes the nature of the suit nor cause of action. It is also pointed out that it is a pre -trial amendment.

8. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. Admittedly the trial has not commenced in the suit and thus the rigors of the proviso to Order VI Rule 17 C.P.C are not applicable. All that the respondents have claimed by virtue of the amendment is an alternate relief seeking possession in the event the court comes to the conclusion that the respondents have lost possession. As rightly submitted by the learned

counsel for the respondents it neither changes the nature of the suit nor the cause of action in as much as the suit is principally based on the challenge to the sale deed. It is neither necessary nor appropriate to go into the merits of the amendment at this stage. Even so far as whether the amendment would relate back to the filing of the suit or not, the said issue is specifically left open which can be gone into by the trial court at the trial of the suit. With this the petition is dismissed with no order as to costs.

C. V. BHADANG, J

Ap/-