

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 468 OF 2019**

Mrs. Nutan Gopal Prabhu Malkarnekar, w/o
Mr. Gopal Krishna Prabhu Malkarnekar, 45
years in age, widow, Housewife, Indian
National, resident of Pulwado, next to
Bhandari's workshop, Benaulim, Salcete,
Goa.

.... Petitioner

Versus

1. Mr. Gopal Tandon, son of Shri R. Tandon, aged about 63 years, 35, Galaxy Apartments, Near Cine Vishant, Aquem, Margao, Salcete, Goa.
2. Mrs. Muktabhai Prabhu Malkarekar, w/o late Mr. N.P.P. Malkarnekar, 55 years in age, H.No. Not known, Pulwado, next to Bhandari's workshop, Benaulim, Salcete, Goa.
3. Late Mr. Gopal Krishna Prabhu Malkarnekar, son of Mr. Pandurang Baburao Prabhu Malkarnekar, since deceased through his legal representatives:-
 - a) Ms. Simran Gopal Malkarnekar, daughter of Mr. Gopal Krishna Malkarnekar, major in age, r/o H.no. 199, next to Bhandari's workshop, Benaulim, Salcete, Goa.
 - b) Mr. Manguesh Gopal Malkarnekar, son of Mr. Gopal Krishna Malkarnekar, major in age, r/o H. No. 199, Pulwado, next to Bhandari's workshop, Benaulim, Salcete, Goa.

.... Respondents

Mr. Shivan Desai with Mr. Jatin Ramaiya, Advocates for the Petitioner.

Mr. Jawahar L. Dias, Advocate for Respondent No. 1.

CORAM : C.V. BHADANG, J.

DATE : 1st July, 2019

ORAL JUDGMENT:

Rule made returnable forthwith. The learned Counsel for the respondent no. 1, waives service. Heard finally by consent of parties.

2. The challenge in this petition is to the order dated 17.07.2018 (below Exhibit-63) and the order dated 30.04.2019 (below Exhibit-95), passed by the learned Senior Civil Judge at Margao in Special Civil Suit No. 19/2010/II.

3. The learned Counsel for the petitioner on 10.06.2019 has restricted the challenge to the order dated 30.04.2019, dismissing the application (Exhibit-95).

4. The brief facts necessary for the disposal of the petition may be stated thus:

That the first respondent has filed the aforesaid suit against the petitioner and the respondent nos. 2 and 3. The petitioner happens to be the defendant no. 2, while the respondent no. 2 is the original defendant no. 1. The petitioner is the widow of the respondent no. 3, late Gopal Malkarnekar,

who was defendant no. 3 in the suit. That suit is filed by the respondent no. 1 for recovery of possession, damages and permanent injunction.

5. It appears that the suit came to be decreed ex-parte on 21.11.2012. The petitioner and the respondent no. 3 (defendant nos. 2 and 3) filed an application for setting aside the ex-parte decree on 11.02.2013 and consequently, the decree was set aside.

6. The petitioner and the respondent no. 3 had already filed a written statement on 27.11.2011. The respondent no. 2 (defendant no. 1) filed her written statement on 08.02.2018.

7. As the challenge to the order dated 17.07.2018 (below Exhibit-63) is abandoned, it is not necessary to refer to the said application.

8. The petitioner filed yet another application (Exhibit-95) for amendment of the written statement as set out in annexure A-1 to the said application. By virtue of the said amendment, the petitioner proposes to add certain portion to para 4, raising a plea of non joinder of necessary party, namely,

the successors of late Nageush Malkarnekar and late Pandurang Malkarnekar. The petitioner also sought incorporation of paras 4A, 4B and 16A. By virtue of para 4A, the petitioner wants to raise a plea about misjoinder of causes of action and a dispute regarding the identity of the property. The proposed amendment by addition of para 16A is based on the petitioner having obtained an information under the Right to Information Act from the office of the Excise Inspector to the effect that the respondent no. 1 had no permission to store liquor.

9. The learned Trial Court has rejected this application on the ground that the petitioner has not shown due diligence as required under the proviso to Order VI, Rule 17 of CPC. Significantly enough in the order dated 30.04.2019, the Trial Court has found that already there are substantial pleadings in the written statement as regards the amendment which is now sought to be effected and according to the learned Trial Court, “the contents of each and every document is not required to be pleaded”. Insofar as plea of non joinder is concerned, the learned Trial Court has found that the defendant no. 3 has already raised the said plea in her written statement and the point of non joinder and misjoinder being a question of law can be raised by the petitioner “during the final arguments”.

10. I have heard the learned Counsel for the parties and perused record and I find that the proposed amendment deserves to be granted. The learned Trial Court while dismissing application (Exhibit-94) has noticed that the pleadings now sought to be raised have already been raised in the written statement. Some of the grounds, which are now sought to be raised, for instance, the non joinder and misjoinder of the parties, the Trial Court found that the same can be raised at the time of final arguments. The learned Trial Court has also found that the issue about non joinder of the party, namely, the successors of the Pandurang Malkarnekar and Naguesh Malkarnekar has already been raised by the defendant no. 1. Significantly enough in both the orders, the Trial Court has in effect found that there are not new facts sought to be introduced by any of the amendment particularly when, these facts are already come on record. In the written statement filed by the defendant no. 3. If that be so, it cannot be said that the defendants are trying to “raise the matter for the first time” after the commencement of the trial.

11. It is true that there are two conditions, which need to be satisfied, before the Court can allow any amendment. First is that the amendment should be necessary for deciding the real

question in controversy between the parties and second, the compliance with proviso to Order VI, Rule 17 of CPC, namely, to show that inspite of due diligence, the matter could not have been raised prior to the commencement of the trial. The second requirement would come into play only where the amendment is sought after the commencement of trial. It is not in dispute that the amendment is sought, in this case, after the commencement of the trial. However, what is significant is that the proposed amendment does not raise any matter, which is not already raised prior to the commencement of the trial. It is significant to note that as held by the learned Trial Court, the issue that the pleadings insofar as non joinder and those relating to the gift deed are concerned, are already raised by the co-defendant. Thus, the proposed amendment neither involves any surprise nor any prejudice to the respondent no. 1/plaintiff.

12. The Supreme Court in the case of **Kailash Vs. Nanhku & Others (2005) 4 SCC 480** has *inter alia* held that the proviso to Order VI, Rule 17 of CPC, is directory in nature.

In the case of **Revajeetu Builders and Developers Vs. Narayanswamy, (2009) 10 SCC 626**, the Supreme Court

has culled out the following principles, which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case ?
- (2) Whether the application for amendment is bonafide or mala fide ?
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and
- (6) As a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

13. If we apply the aforesaid principles, the proposed amendment can neither be said to be malafide nor one which would cause prejudice to the respondents. The proposed amendment also, does not change the nature or the fundamental character of the case. That apart, in the present case, the Trial Court has allowed the production of the

documents, namely, all the four gift deeds and even the letters dated 23.02.2019 and 27.03.2019 by virtue of order dated 30.04.2019 below Exhibit-94. Insofar as these letters are concerned, the Trial Court has found that they are by way of subsequent events. Taking an overall view of the matter, I find that the amendment needs to be granted.

14. In the result, the following order is passed:

O R D E R

- (i) The petition is accordingly allowed.
- (ii) The impugned order dated 30.04.2019, is hereby set aside.
- (iii) The application (Exhibit-95) is allowed as prayed.
- (iv) The petitioner shall carry out the amendment, within four weeks from today.
- (v) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

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