

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 847 OF 2019

MANUELINA COELHO,

... Petitioner

Versus

NELSON THOMAS D'SILVA AND 2 ORS.,

... Respondents.

Shri Vibhav Rajiv Amonkar, Advocate for the petitioner.

Shri Ressano Hector Noronha, Advocate for the respondent nos.1 and 2.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 16th December 2019.

ORAL ORDER:

The petitioner is the first defendant, and the respondent nos. 1 and 2 are the plaintiffs in Regular Civil suit No.55/2017. The plaintiffs filed the suit for a declaration that they are the owners of the suit property; they also sought an injunction. The petitioner, as the first defendant, is the sole contesting defendant.

2. In March 2017, the petitioner filed his written statement and pleaded how he has secured title and possession over a part of the suit property. He explained that he purchased a piece of land in 1993 with an old house on it. He claims to have later dismantled it and raised a new structure.

3. In the face of this assertion in the written statement, the plaintiffs applied under Order 6 rule 17 of CPC for amendment. To be

precise, based on the petitioner's written statement, the trial Court framed the issues. In January 2018, before the trial could commence, the respondents applied for amendment.

4. Through that amendment, the respondents wanted an alternative relief incorporated: that the petitioner's sale deed be declared as void. Consequently, they also wanted the name of the petitioner's deceased son deleted from the inventory proceedings. That was allowed. Aggrieved, the petitioner has filed this writ petition.

5. In the above factual backdrop, Shri Vibhav Amonkar, the learned counsel for the petitioner, has submitted that the petitioner's son purchased this property in 1993 through a sale deed. As that document has been registered, there is deemed notice for the entire world, including the plaintiffs. So, first, their coming to know of the sale deed for the first time only through the petitioner's written statement does not arise.

6. Second, ever since 1993 the petitioner has been in exclusive possession of the property; therefore, it is presumed that the respondents must have known about the petitioner's exclusive possession. Viewed from either perspective, according to Shri Amonkar, the amendment is belated and betrays lack of *bona fides* on the respondents' part. Put differently, the respondents have not been diligent enough in inquiring into the petitioner's title before they rushed to the Court. To support his contentions, Shri Amonkar has relied on these judgments: 1. *Bhagirath v.*

Ramprasad, 2010 (6) *Mh.L. J.* 169; 2. *J. Samuel v. Gattu Mahesh*, (2012) 2 *SCC* 300; 3. *Sayed Ali Mallick v. Ramjan Ali*, (2012) 3 *CAL LT* 204(HC); 4. *Dilboo (Smt) (Dead) By Lrs. v. Dhanraji (Smt) (dead)*, (2000) 7 *SCC* 702.

7. Shri R. Noronha, the learned counsel for the respondents, has submitted that the respondents, as the plaintiffs, lacked neither *bona fides* nor vigilance, in pursuing the case. According to him, there may have been a general presumption about sale of property, but its impact affecting a party's right cannot be a matter of presumption under Section 3 of the Transfer of Property Act. So, he stresses that the doctrine of implied notice or deemed notice, as set out in Section 3 of the Transfer of Property Act, does not apply to the fact of this case.

8. About the delay in the respondents' applying for the amendment, Shri Noronha submits that the moment the respondents came to know about the petitioner's purchasing a part of the joint family property—and that was through the written statement—they have immediately taken steps to amend the pleadings. At any rate, if the amendment had not been asked for or not allowed after asked for, that would have led to multiplicity of proceeding. So Shri Noronha would have the Court to hold that the impugned order suffers from no legal latches.

9. Heard Shri Vibhav Amonkar, the learned counsel for the petitioner; and Shri Ressano Noronha, the learned counsel for the respondent nos.1 and 2.

10. Indeed, it emerges that the petitioner purchased a part of the suit property in 1993 from one particular lady who is said to have hailed from the same family as have the respondents. They have a common ancestor. The respondents contend that without any explicit division and demarcation of the property, no co-owner—including the petitioner's vendor—could have sold any specific piece of property with boundaries. Then, there could be no occasion for the petitioner's vendor to put him in exclusive possession of that piece of property.

11. At any rate as the respondents have been living away from Goa for many years, they claim that they have no occasion to know about the developments that affected the property. And these developments include a third party's trespassing upon or occupying the property—even under the guise of a sale deed. In fact, the respondents have argued that it is essential for the trial Court to frame an issue about whether the petitioner's vendor, a co-owner, could have sold any piece of land with metes and bounds and put the petitioner in exclusive possession of it. Indeed, even if we accept that the petitioner purchased the property, his possession matter. And that possession depends on his vendor's right to exclusive possession of a piece of joint property. To adjudicate that issue, the trial Court needs pleadings concerning that aspect, in the first place.

About the Precedents Cited at the Bar:

12. *Bhagirath* elaborates on Explanation (1) to section 3, T.P Act and

holds that it fixes every transferee with the possession of the knowledge of all the pre-existing transactions regarding the property effected by registered sale deeds. In *J. Samuel*, the Supreme Court has held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. The term 'Due diligence' is specifically used in the CPC so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. According to it, the term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

13. In *Sayed Ali Mallick* Calcutta High Court examines when a party may amend the pleadings. As the proviso says it should be before the trial begins, then the Court goes on to examine the legal concept of "the commencement of trial." It holds that the 'trial' in a civil suit begins when issues are framed and the case is set down for recording of evidence. In *Dilboo* the Supreme Court holds that whenever a document is registered, the date of registration becomes the date of deemed knowledge. In other cases, where a fact could be discovered by due diligence then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge.

Does the Doctrine of Constructive Notice apply to the Facts here?

14. Now about the deemed or implied notice under Section 3 of the TP Act. Section 3 dealing with notice reads:

“[A] person is said to have notice” of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, *any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration* or, where the property is not all situated in one sub-district . . . :

Provided that—

(1) . . .

(2) . . .

(3) . . .

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

15. True, Section 3 sets out under what circumstances “a person is said to have notice” of a fact. A person is said to have notice when he actually knows that fact, or when he failed to know about the fact only because of his wilful failure to enquire or search, which he ought to have done. This constructive notice applies even when that person remains ignorant of the fact owing to his gross negligence. But First Explanation puts this doctrine of constructive notice in perspective. According to it,

first, the transaction involving the immovable property must have been required to be registered under the law; and, second, it must have been actually registered. Then, a person must have acquired that property or a part of it after this registered transaction.

16. Cut to chase, the constructive notice under Section 3 of the TP Act applies to a person who acquires title in the property after the registration about which Section 3 speaks. That is, a later transferee cannot plead ignorance in the face of a registered instrument. Here the respondents claim to be, if ever, the co-owners along with the petitioner's vendor. It is the vendor who acquired the property from a co-owner—at least going by the pleadings. Thus, it is a converse case: a later sale cannot impute knowledge to a prior owner or co-owner.

17. I reckon there is no delay on the respondents' part in seeking the amendment, for they claim to have known about the sale and the third party interest only through the petitioner's written statement. Nor can we say that the proviso to Order 6, Rule 17 of CPC applies to this case. Here, the trial has not yet commenced. Besides, the respondents have laid sufficient foundation about why they could not have raised their plea earlier despite their due diligence.

18. At any rate, the amendment causes no prejudice to the petitioner; on the contrary, it leads a comprehensive adjudication. I see no laches on the respondents' part, either. So, the impugned order remains

unassailable.

Under these circumstances, I dismiss this Writ Petition, with no order on costs.

DAMA SESHADRI NAIDU, J.

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