

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 271 OF 2019

1. Mrs. Maria Fernandes, aged 71 years,
wife of late Romeo Fernandes,
 2. Mr. Xavier Fernandes, aged 44 years,
son of late Romeo Fernandes,
Both residents of H. No. 272/A,
Dovalkazon, Agonda, Canacona, Goa.
 3. Mrs. Conceicao Joselina Fernandes,
aged 56 years, unmarried, d/o Adriano
Antonio Severino Fernandes, residents
of H.No. 273, Dovalkazon, Agonda,
Canacona, Goa.
 4. Mrs. Mariani Fernandes, aged 38 years,
wife of Filipe Fernandes,
All residents of H.No. 273, Dovalkazon,
Agonda, Canacona, Goa.
- Petitioners

Versus

1. Smt. Manik Vinayak Prabhu Gaonkar,
aged 68 years, d/o late Srinivas Bhau
Pai and her husband,
2. Shri Vinayak Bhiku Prabhugaonkar,
aged 73 years, son of Bhiku
Prabhugaonkar,
3. Mrs. Nayan Dinkar Kamat, aged 65
years, daughter of late Srinivas Bhau
Pai, wife of Dinkar Vishwanath Kamat,
and her husband,
4. Mr. Dinkar Vishwanath Kamat, aged
71 years, son of Vishwanath Kamat,
5. Mrs. Kiran Gurudas Sakhardande,
aged 61 years, daughter of late
Srinivas Bhau Pai, wife of Gurudas N.
Sakhardande and her husband,
6. Shri Gurudas N. Sakhardande, aged 63
years, son of Narhari Sakhardande,
7. Mrs. Shivangui Pundalik Shenvi
Nagarcenkar, aged 59 years, d/o late
Srinivas Bhau Pai, wife of Pundalik
Nagarcenkar,

8. Mr. Pundalik Shripad Shenvi Nagarcenkar, aged 63 years, son of Shripad S. Nagarcenkar,
9. Mrs. Shobhana Deepak Shenoy, aged 54 years, daughter of late Srinivas Bhau Pai, wife of Deepak Vishnu Shenoy and her husband,
10. Mr. Deepak Vishnu Shenoy, aged 59 years, son of Vishnu Shenoy,
11. Mrs. Vandana Srinivas Pai, aged 50 years, d/o late Srinivas Bhau Pai, w/o Ramakant Prabhu,
12. Mr. Ramakant Prabhu, aged 55 years, son of Prabhu,
All the above residents of Patnem, Canacona, Goa.
13. Mr. Dhiraj Naik Gaonkar, aged 35 years, son of N. Gaonkar, resident of Dellem Canacona, Goa.
14. Mr. Shyam Dessai, aged 45 years, son of Dessai, resident of Patnem, Canacona, Goa.
15. Mrs. Joaquina Fernandes, aged 81 years, wife of late Adriano Antonio Severino Fernandes, residents of H. No. 273, Dovalkazon, Agonda, Canacona, Goa.
16. Mr. Filipe Fernandes, aged 53 years, son of late Adriano Antonio Severino Fernandes, residents of H. No. 273, Dovalkazon, Agonda, Canacona, Goa. Respondents

Mr. Ravi Gawas, Advocate for the Petitioners.

Mr. R.G. Ramani with Mr. Pranav Kakodkar, Advocates for Respondent Nos. 11 and 12.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 28th JUNE, 2019.

PRONOUNCED ON: 2nd JULY, 2019.

JUDGMENT:

On 16.03.2019, a notice for final disposal was issued in this case. I have heard Mr. Gawas, the learned Counsel for the petitioner and Mr. Ramani, the learned Counsel for the contesting respondent nos. 11 and 12. The rest of the respondents have chosen not to appear, inspite of service.

2. The challenge in this petition is to the order dated 21.09.2018, passed by the learned Trial Court, in Regular Civil Suit No. 58/2017. By the impugned order, the learned Trial Court has partly allowed an application (Exhibit-18), filed by the petitioners, for amendment of the plaint. The petitioners are aggrieved by the part of the order, refusing to allow the amendment as proposed.

3. The petitioners are original plaintiff nos. 1,2, 4 and 6. The petitioners alongwith respondent nos. 15 and 16 (plaintiff nos. 3 and 5), have filed the aforesaid suit against the respondent nos. 1 to 14, for injunction and consequential reliefs, under Section 38 and 39 of the Specific Relief Act. For the sake of convenience, the parties are referred in their original capacity as plaintiffs and defendants.

4. The case made out in the plaint is that land survey no. 123/2 of village Agonda, Canacona Taluka, more specifically described in plaint para no 3, was owned by late Gongai Poina and late Chandrabhaga Poina, who are ancestors of defendant nos. 1, 3, 5, 7 and 11. Late Gongai and late Chandrabhaga had leased the said property to the ancestors/predecessors of late Caetano Piedade Fernandes on aframento basis, by a registered deed dated 18.11.1924. Caetano expired on 20.05.1937. The plaintiffs claim to be the successors of late Caetano. The name of Shrinivas Bhau Poi, father of defendant nos. 1, 3, 5, 7, 9 and 11 figures in Form No. I and XIV of the said property. Be that as it may, the material case made out in the plaint is that the plaintiffs, as legal heirs of Caetano, are in peaceful possession of plot no. A, plot no. C and plot no. C-1, existing in the said property, as shown in the plan annexed to the plaint for the last 90 years. Plaintiffs nos. 1 and 2 are in possession of plot no. A, while plaintiffs nos. 2, 3, 4 and 5 are in possession of plot no. C and C-1. There is a house bearing no. 271/A in plot no. A, belonging to the plaintiff nos. 1 and 2, which was constructed by late Romio Fernandes and is shown in the survey record.

5. On 10.12.2017 and subsequent there to, there was interference by defendant nos. 13 and 14 with the peaceful

possession and user of the said house of the plaintiffs as these defendants with the help of some labourers made an attempt to demolish the compound wall existing in plot no. A. The matter was reported to the police. It is also claimed that due to timely intervention of the police, the attempt of defendants nos. 13 and 14 to erect seasonal huts in the said property was thwarted.

6. In such circumstances, the suit came to be filed for injunction, restraining the defendants from interfering with the suit plot nos. A, C and C-1 or making any construction therein or creating third party interest in the suit plots.

7. The plaintiffs filed an application (Exhibit-18), for amendment of the plaint as under:

4. Amend para 3 of the plaint as follows:

On the first line of para no. 3, the plaintiff want to incorporate the word "allegedly claiming to be" after the words in 3rd para of the plaint "The plaintiff states that defendants No. 1 to 12 are

*Last para of 3 to be read as
(The above mentioned property shall hereinafter referred to as the said property/suit property).*

5. Amend para 4 of the plaint as follows:

4. The plaintiff states that late Gongai Poina and late Chandrabaga Poina were the absolute owners of the said property. However the plaintiff do not admit that the defendants no. 1

and 12 are the legal heirs of Smt. Gongai Poina and late Chandrabhaga Poina.

6. *Amend para 5 of the plaint as follows:
5. (Delete the words from the first line of para 5)..... the ancestors of the defendant no. 1, 3, 5, 7, 9 namely*
7. *Add after para 14
..... which is recently noted by the plaintiff for the first time, when form I and XIV of the said property was applied for the purpose of filing the suit.*
8. *Amendment to para 8.
That the plaintiffs are the legal heirs of late Caetano Piedade Fernandes, who had been in peaceful and exclusive possession of the suit property shown on the plan annexed herewith this suit consisting of plot no. A, plot no. C and plot no. C-1, since last from 90 years, however, Smt. Joanita Fernandes and her sons are in possession of the property consisting of plot no. B.*
9. *Add para 15A:
The plaintiffs state that the plaintiffs are the legal heirs of late Caetano Piedade Fernandes who had been in peaceful possession of the said property during his life time as tenants and after his death his heirs continued to be in possession of the said property and till today the plaintiffs, Mrs. Joanita Fernandes and other co-owners are in possession of the said property/suit property with their exclusive possession on their respective shares of the said property where they are independently enjoying. Mrs. Joanita Fernandes is in exclusive possession of the plot no. B shown on the plan annexed to this suit since from last many years and before that her ancestors were in exclusive possession of the same.*

Add para 15B:

The said property/suit property is clearly shown on the plan annexed to the plan were plots have been categorically shown. The plaintiff states that the bifurcation of the said property in terms of the plots was done by Smt. Sunilabai Srinivas Pai in the year 1995 when they have approached the plaintiffs to purchase the said property and handed over the said plan to the plaintiffs. Further it was also informed to the plaintiffs that they are selling the part of property which is in possession of Mrs. Joanita Fernandes to her at the rate of market price and asked the plaintiffs to purchase the suit property which were in the plaintiffs possession, to which the plaintiffs herein have requested for time since the plaintiffs wanted to take legal advise before assuring any contract. The plaintiff herein after taking the advise learnt that they are the deemed purchasers of the property after coming into force of Agricultural Tenancy Act and after the commencement of tillers day, therefore the plaintiff refused to purchase the land @market price and informed Smt. Sunilabai Srinivas Poi accordingly. However the plan which was submitted by Smt. Sunilabai Srinivas Poi remained in the possession of the plaintiffs.

Add para 15C:

That the plaintiff states that the suit was filed on urgent basis since the defendants no. 13 and 14 were interfering with the possession of the plaintiff over the suit plots in the suit property which are in their exclusive possession and in such scenario the plaintiffs have handed over all the documents which were available with them to the advocate representing plaintiffs for getting an interim relief on urgent basis and as such when the advocate asked for the plan of the said property, the plaintiff no. 1 has handed over the plan on which plots were drawn to the advocate and the same has been relied upon in the present suit.

8. It was objected to on behalf of the defendants on the ground that it will prejudice the defendants.

9. The learned Trial Court, by the impugned order has partly allowed the application to the extent of the addition of proposed para no. 38(a) and payer clause (i). Feeling aggrieved, by rejection of the rest of the amendment, the petitioners have approached this Court.

10. Mr. Gawas, the learned Counsel for the petitioners on instructions submitted that the petitioners will not press for the proposed amendment to paras 3, 4, 5 and 14 of the plaint as above. He submits that the petitioners would restrict the prayer in so far as amendment to para 8 and addition of paras 15A, 15B and 15C are concerned. It is submitted that the suit was required to be filed in a hurry and therefore, there were certain omissions, which have crept in, which need to be corrected. It is submitted that the suit is at a preliminary stage and no prejudice will be caused to the defendants, if the amendment as prayed, is allowed.

11. Mr. Ramani, the learned Counsel for the respondent nos. 11 and 12 has submitted that the proposed amendment

seeks to withdraw a categorical admission made on behalf of the plaintiffs, which has rightly been refused. However, in view of the fact that the petitioners are not now pressing for the said part of the amendment, it is submitted that even the amendment, as proposed in paras 8 and addition of paras 15A, 15B and 15C, is not necessary for deciding the real controversy in the matter, in as much as Mrs. Joanita Fernandes, is not a party to the suit nor plot no. B, which is said to be in her possession, is subject matter of dispute. He, therefore, submits that the petition be dismissed.

12. As noticed earlier, the learned Trial Court has allowed the amendment to the extent of introduction of para 38(a) and the prayer clause (i). The learned Counsel for the petitioners has not pressed the amendment as proposed in paras 3, 4, 5 and 14. Thus, the only question is about the amendment as proposed in para 8 and the addition of paras 15A, 15B and 15C.

13. Insofar as para 8 is concerned, the petitioners have already made out a case that they are legal heirs of late Caetano Fernandes and that the plaintiff nos. 1 and 2 being in possession of plot A, while plaintiff nos. 2, 3, 4 and 5 being in possession of

plot nos. C and C1. Thus, this part of the addition to para 8 is superfluous. Insofar as Joanita Fernandes alongwith her sons being in possession of plot no. B, is concerned, plot no. B is neither the subject matter of the suit nor Joanita Fernandes is a plaintiff. In that view of the matter, the proposed amendment to para 8, in my considered view, cannot be allowed. For the similar reason, the amendment by addition of para 15A also, cannot be allowed, which again refers to the possession of Joanita Fernandes in respect of plot no. B.

14. The addition of proposed para 15C is also not necessary, as by virtue of the said para, the petitioners are only trying to set out the reasons as to why the plaintiffs were required to file the suit in a hurried manner. Para 15C does not contain any new pleadings as such, which are necessary for deciding the real controversy between the parties.

15. This takes me to para 15B, in which, the petitioners claim to be deemed purchasers of the property after coming into force of the fifth amendment to the Goa, Daman & Diu Agricultural Tenancy Act, 1964. In this regard, it is significant to note that, in the plaint, the case is already made out by the plaintiffs/petitioners that late Gongai Poina and late

Chandrabhaga Poina had leased the said property to the ancestors/predecessors of late Caetano Fernandes on aframento basis by a registered deed dated 18.11.1924 and the petitioners/plaintiffs claim to be the successors of late Caetano Fernandes. Thus, this part of the amendment, to my mind, can only be allowed. The suit is at a preliminary stage, in which, trial is yet to commence. Therefore, the rigor of proviso to Order VI, Rule 17 of CPC is not applicable.

16. In that view of the matter, the following order is passed:

ORDER

- (i) The petition is partly allowed.
- (ii) The impugned order is hereby modified.
- (iii) In addition to the amendment already allowed, the amendment as proposed in para 15B of the plaint, is hereby allowed.
- (iv) Necessary amendment to be carried out, within three 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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