

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.995 OF 2019.

ABDUL RAHIM KHAN AND ANR. ... Petitioners.

Versus

ABHUBAKAR YUSUF KHAND
ANR 3 ORS. ... Respondents

Shri J. A. Lobo, Advocate for the petitioners.

Shri Allan Andrade, Advocate for the respondent no.1.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 17th December 2019

ORAL ORDER

Facts:

The plaintiff is the husband and the 5th defendant is the wife. Together, they owned certain properties. From them the third defendant purchased the property. To be precise, the 5th defendant wife sold the property: She executed the deed of conveyance not only on her behalf but also on her husband's behalf, for she had claimed to be his power of attorney holder. Over time, she executed a deed of rectification, too.

2. But the husband, then abroad, returned and questioned

the sale. He filed Civil Suit No.25/2014, for a declaration that the sale deed and the rectification deed are void and that possession be restored to him.

3. In the suit, the first defendant is the State; the second defendant the Civil Registration Authority; the third and fourth defendants are the husband and wife respectively; the 5th defendant is the plaintiff's wife, who sold the property. It is the 4th defendant that has purchased the property. The sale transaction, it seems, is between the members of the same family or between those who are closely related. So is the dispute.

4. During the trial, in the cross-examination, the plaintiff has admitted that his marriage did not take place in Goa. Based on this admission, the third and fourth defendants—that is, the couple—applied under Order 6, Rule 17 of CPC, to have their written statement amended. In October 2019, the trial Court, however, rejected that application. Aggrieved, the third and fourth defendants have filed this writ petition.

5. Thus, the 3rd and 4th defendants are the petitioners; the plaintiff is the first respondent; the fifth defendant—that is,

the plaintiff's wife, who sold the property—is the second respondent; the Government and the Civil Registrar are the third and fourth respondents. But for ease of reference, let us refer to the parties as they have been arrayed in the suit.

6. Heard the learned counsel for the petitioners and the learned counsel for the respondents.

Discussion:

7. From the pleadings and the rival submissions, I gather the fourth defendant purchased a property from the 5th defendant, through a registered deed of conveyance. The fifth defendant represented to them that the property belonged to both her and her husband. So allege the third and fourth defendants. The fifth defendant is also said to have represented that her husband has authorized her to act as his agent. Then, they had the fifth defendant execute the sale deed in her dual capacity: both as the co-owner and as the GP agent of the other co-owner, her husband, though.

8. Tracing the title, the third and fourth defendants assert that the property originally belonged to the fifth defendant. As the personal laws would have it, if the marriage

takes place in Goa, by the law happens “communion of assets.” To elaborate, I may note when Goa attained liberation from Portugal in 1961, all Indian laws were extended to the State, except the family laws. Thus, Goa has continued to have the personal laws under the Portuguese Civil Code. Under this Code, by marriage both spouses will have equal property rights, as do their children. A shining example of gender justice, subject to certain exceptions, though.

9. In other words, after the marriage, both the spouses will have equal rights in the property owned by either before the marriage or acquired after the marriage. Neither can sell without the other’s consent. So under the belief—a mistaken one, though—that the plaintiff and the fifth defendant’s marriage took place in Goa, the fourth defendant secured the sale deed executed by both the wife and husband: the plaintiff and the fifth defendant. Of course, while executing the sale deed, the fifth defendant has acted as her husband’s attorney or agent.

10. During the cross-examination, the defendants 3 and 4 came to know that the 5th defendant alone owned the property,

having purchased it through a registered sale deed. And they also came to know through the cross-examination that the fifth defendant's marriage with the plaintiff took place outside Goa, so no communion of properties happened. The third and fourth defendants maintain that neither event—that the fifth defendant alone owned the property or that her marriage did not take place in Goa—was in their knowledge. For their lack of knowledge, they assert, they could not be accused of being negligent, lacking due diligence.

11. So the third and fourth defendants wanted to amend their written statement, incorporating pleas about the fifth respondent's exclusive title to the property and about the place of her marriage.

12. True, the plaintiff, as the first respondent here, asserted that both parties are close relatives: The plaintiff and the third defendant are brothers; the fourth and the fifth defendants are sisters-in-law. So the plaintiff contends that the defendants must have known both the facts, which they now want to incorporate in the written statement.

13. In fact, the plaintiff's counsel has contended that an

amendment under the amended Order 6, Rule 17 is not for the mere asking. On the question of due diligence, the plaintiff asserts that the third and fourth defendants have failed. The learned counsel quotes from the Black's Law Dictionary, besides relying on *J. Samuel v. Gattu Mhesh*¹.

14. If we examine the statutory scheme, Order 6, Rule 17 of CPC reads:

17. Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

15. Plainly put, the provision allows courts to allow either party to “alter or amend” the pleadings “at any stage of the proceedings.” That said, the amendment ought to be “necessary for determining the real questions in controver-

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(2012) 2 SCC 300

sy.” True, the 2002 amendment has hedged the trial Court’s otherwise all-pervasive procedural power. The proviso to the provision mandates that (a) no application for amendment shall be allowed after the trial has commenced; (b) on the contrary, to allow the amendment in the midst of trial, the court must conclude that the party seeking amendment could not raise that plea before the trial began—despite his “due diligence.”

16. If we revisit the facts, the fifth defendant sold the property to the fourth defendant, allegedly representing that she jointly owned the property with her husband and that she could sell the property, representing her husband, too. That sale was in 1989. Later, after over a couple of decades, in 2014, the husband sued for a declaration that his wife had no authority to execute the sale deed on his behalf. He wanted the deeds of sale and rectification declared void, besides the possession restored to him.

17. Now, the third and fourth defendants want to bring on record, in their written statement, the facts that affect the

case. And those facts they came to know from the plaintiff when he was cross-examined. Or at least, those defendants claim so.

18. I reckon once a fact affecting the case is admitted, what follows from that admitted fact is a question of law: its impact on the rights of the parties. Here, the petitioners want to assert that the fifth defendant was the owner, and the plaintiff has nothing to do with the property.

19. The plaintiff's counsel has rightly contended that the statutory rigour of Order 6, Rule 17 of CPC applies to both the plaintiff and the defendant, equally. But by judicial interpretation, the courts have held that the defendants enjoy more latitude in amending the pleadings. He may take all and sundry pleas—even inconsistent ones—to non-suit the plaintiff. But the plaintiff, with the legal burden constantly fixed on him, must present in the pleadings a definite case. If he pleads in the alternative bordering on inconsistency, he is usually put to election: He should choose a definite plea from among many he may have put forward and proceed with the case to prove that particular plea. On the other hand, the

defendant suffers no such limitation; he can plead and persist with inconsistent pleas—falling short of contradiction.

20. I reckon, here, the defendants could take advantage of the plaintiff's alleged admission on the title to the property and the place of his matrimony. As the witness's evidence is a matter of record, that record need not be reintroduced in the form of an amendment.

21. It seems the third and fourth defendants, as a matter of abundant caution, wanted to amend their written statement, incorporating what the plaintiff deposed. So the amendment causes him no prejudice. True, Black's Law Dictionary defines "due diligence" as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. It is also termed reasonable diligence, common diligence.

22. The primary aim of the court, according to the Supreme Court in *J. Samuel*, is to try the case on its merits and "ensure that the rule of justice prevails." For this, the true facts of the case are to be placed before the court, so that the court may access to all the relevant information before its deciding

the case. And this, at times, requires the parties to amend their pleadings. The court's discretion to grant permission for a party to amend his pleadings lies on two conditions: first, no injustice must be done to the other side; second, the amendment must be necessary for determining the real question in controversy between the parties.

23. *J. Samuel* further observes that the proviso has been added to “balance the interests of the parties in pursuit of doing justice.” In this context, it has emphasised that, before allowing the amendment, the court ought to conclude that despite due diligence, the party could not have raised the matter before the commencement of the trial. Elaborating on “due diligence”, *J. Samuel* holds thus:

13. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term ‘Due diligence’ is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14. A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

24. In *J. Samuel*, the party seeking amendment pleaded that he wanted to correct a "typographical error." No other reason was supplied. So the Supreme Court has observed in that case "there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview of a typographical error." According to the Apex Court, a person neglecting to perform an action which he is obliged to do cannot be called a typographical error. That typographical error, if anything, betrays the party's lack of due diligence.

25. Here, the question of due diligence does not arise. The third and fourth defendants plead that over 25 years ago, they acted on the vendor's representation and secured the sale deed. Now that sale deed questioned decades later, they wanted to place on record the facts which emerged in the plaintiff's cross-examination. As I have already noted, the defendants wanted to amend the written statement to set the record

straight on facts, though those facts have already come on record during the trial. It is more a cautionary step than a compulsory one. That said, I must note the amendment causes no prejudice to the plaintiff.

26. Under these circumstances, I reckon the trial Court has erred in dismissing the defendants' amendment application. I, therefore, set aside the order dated 31.10.2019 and allow the petitioners' application for amendment. As a result, the trial Court will allow the parties to take all permissible consequential steps, including the defendants' carrying out the amendment.

No order on costs.

DAMA SESHADRI NAIDU, J.

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