

Santosh

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 208 OF 2021**

1. IGNATIOUS BRAGANZA

S/O. late Francisco Ambrose Braganza, 65 years
of age, Indian National, r/o. H.No.4/147B, Agar
waddo, Calangute, Bardez, Goa.

...Petitioner.

Versus

1. THOMAS AMBROSE BRAGANZA

S/o. Late Francisco Ambrose Braganza, major of
age, Indian National, r/o. H.No.4/147B, Agar
waddo, Calangute, Bardez, Goa.

2. ANA FRANCISCA LOBO E BRAGANZA

W/o. Thomas Braganza, major of age, Indian
National, r/o. H.No.4/147B, Agar Waddo,
Calangute, Bardez, Goa.

...Respondent.

Mr. Kapil D. Kerkar, Advocate *for the Petitioner.*

Mr. Pranav S. Shenvi Kakodkar, Advocate for the Respondents.

CORAM: M. S. SONAK, J

DATED: 27th July 2021

ORAL JUDGMENT.:-

1. Heard Mr. Kapil Kerkar for the Petitioner and Mr. Pranav
Kakodkar for the Respondents.

2. Rule. Rule is made returnable forthwith with the consent of and at the request of the learned Counsel for the parties.

3. The challenge in this Petition is to the order dated 8/2/2021, by which the learned Trial Judge has allowed the Respondents'/ Defendants' application to amend the counter-claim and, *inter alia*, to seek a decree of eviction against the Petitioner herein from the suit house.

4. Mr. Kerkar, the learned Counsel for the Petitioner submits that this amendment was allowed after the trial was concluded and the matter was posted for final hearing. He submits that the application for amendment was made almost after 18 years. He submits that this is nothing, but an attempt to plug the lacunae in the Respondents' case. He submits that the nature of the proceedings will virtually change if such an amendment is to be allowed.

5. Mr. Kerkar also submits that the relief by way of amendment, is *ex facie* barred by law of limitation. He points out that in earlier proceedings, similar relief was applied for, but was rejected and, therefore, such relief will also to be barred under the principles of *res judicata*.

6. Mr. Kerkar submits that the aforesaid significant issues have not even been considered by the learned Trial Judge and, therefore, the impugned order warrants interference.

7. Mr. Kakodkar, the learned Counsel for the Respondents defends the impugned order based on the reasoning reflected therein. He submits that the Respondents have already prayed for setting aside the Gift Deed dated 2/1/1979, on which the alleged title claim of the Petitioner, is based. He submits that the Respondents have also prayed for permanent injunction and mandatory injunction to demolish the structure raised by the Petitioner. By amendment, the Respondents only propose to seek a formal decree of eviction, so that the Respondents secure the vacant possession of the suit premises. He submits that the nature of the proceedings will not change and even the contentions based on limitation and *res judicata*, are not correct and, in any case, such contentions can always be left open for adjudication in the suit. He submits that the Trial Court has exercised the discretion in this matter and, therefore, there is no ground to warrant any interference.

8. Rival contentions now fall for my determination.

9. The Respondents, in the present case, by raising a counter-claim, have already applied for a declaration that the Gift Deed dated 2/1/1979, which is to a great extent fulcrum of the Petitioner's claim, be declared null and void. Besides, the Respondents, in their counter-claim, have also prayed for a mandatory injunction, seeking demolition of the structure. Now, what is proposed to be added is a formal decree of eviction, so that the possession is also restored to the Respondents, should they succeed in their main relief in the counter-claim. To this extent, Mr. Kakodkar is right in contending that this is not some drastic change in the nature of proceedings, on account of which the amendment should have been refused.

10. The learned Trial Judge is also quite right in observing that this amendment will, to a great extent, prevent multiplicity. The amendment, to some extent, is also necessary to determine the real controversy between the parties and to facilitate grant of complete reliefs, should a case is made out for grant of the same.

11. The circumstances in which such reliefs could not be claimed earlier, have also been explained. The explanation can be accepted. But, the learned Trial Judge should have imposed costs on the Respondents, particularly because allowing of the amendment will further delay the proceedings and even require the Petitioner to take

further steps to deal with this additional relief, at this stage. The impugned order, to the extent it imposes no costs whatsoever on the Respondents, warrants interference.

12. The defences like limitation and *res judicata*, are always open and the Petitioner is, in no manner, precluded from raising the same merely because the leave has been granted to amend the counter-claim. In any case, it is clarified that the issues of limitation, *res judicata* and for that matter, all other permissible defences, are expressly kept open for the Petitioner to raise and establish.

13. This Petition is, therefore, disposed of by making the following order :

(A) The impugned order, to the extent it grants leave to amend the counter-claim, is not interfered with. But, the same is made conditional upon the Respondents paying costs of ₹ 25,000/-, to the Petitioner within a period of 2 weeks from today.

(B) The costs to be either directly paid to the Petitioner or deposited before the Trial Court, within two weeks from today. If this is not done, the impugned order dated 8/2/2021 shall be deemed to have been set aside, without reference to this Court.

(C) If, the Petitioner desires further opportunity to lead evidence in the matter or to recall any witnesses, then, the Trial Court should consider such applications on their own merits, having regard to the fact that the amendment was applied for at the belated stage and has now been granted.

14. The Rule is disposed of in the aforesaid terms. All contentions of all parties, on merits, are left open.

15. All concerned to act based on an authenticated copy of this order.

M. S. SONAK, J.

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