

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION No. 967 OF 2019

Mr. Suraj S. Deshpande,
(since deceased represented by
legal heirs)

1(a) Mr. Sadanand Narayan Deshpande,
79 years of age,
s/o. Late Narayan Deshpande,

1(b) Mrs. Surekha Sadanand Deshpande,
69 years of age,
w/o. Mr. Sadanand Deshpande,
both r/o. H. No.178,
Bagwada, Sanvordem-Goa.

.... Petitioners

V e r s u s

Mr. Ganesh R. Dessai,
major of age,
s/o. Late Ramchandra Dessai,
r/o. H. No.5, Ghotborod,
Kakoda, P.O., Curchorem-Goa.

.....Respondent

Mr. Ashwin D. Bhobe, Advocate for the Petitioners.

Mr. Byron Rodrigues, Advocate for the Respondent.

CORAM : M. S. SONAK, J

DATE : 7th July, 2021

ORAL JUDGMENT:

Heard Mr. A. D. Bhobe, the learned Counsel for the petitioners

and Mr. Byron Rodrigues, the learned Counsel for the respondent.

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

3. This petition challenges the order dated 06.11.2019 made by the learned Trial Judge rejecting the petitioner's/plaintiff's application seeking leave to amend the plaint and to add parties.

4. The record bears out that there was an agreement dated 29.01.2005 between the son of the petitioner (original plaintiff) and the respondent (defendant) for the purchase of the suit property. In terms of this agreement, the respondent was on the verge of purchasing a large property out of which, he had agreed to sell a small portion to the original plaintiff. The respondent received an amount of ₹60,000/- towards such purchase and there was a balance of ₹1,35,000/- which was to be paid at the stage of execution of the sale deed.

5. Since, the respondent resisted the execution of the sale deed, the original plaintiff instituted the present suit seeking specific performance. Necessary averments about readiness and willingness were also made in this suit which was instituted sometime in the year 2014.

6. On 26.06.2014, the respondent filed a written statement opposing the grant of relief. In the written statement the respondent pleaded that he

was in a position to complete the sale of the larger property and therefore he was in a position to execute the sale deed in favour of the original plaintiff. Thus, in the year 2014, the respondent came up with a clear plea that he was in a position to sell the agreed property to the original plaintiff because, he was unable to purchase the larger property, though he expected to purchase the same when he entered into the agreement dated 29.01.2005.

7. Based upon these pleadings issues were cast and the parties went to trial. Sometime in February 2019, the petitioners came to know that the respondent, sometime in the year 2009 had not only acquired a larger property but further sold a portion thereof to his wife. To this deed, the respondent had signed as a consenting party. It is pertinent to note that there was no reference to this transaction in the written statement which was filed on 26.06.2014. Today, Mr. Rodrigues explained that what was sold to the wife of the respondent was a different portion of the larger property. That is a matter which will have to be gone into at the stage of trial. However, what was expected of the respondent was a disclosure in the written statement filed, if necessary, put an explanation as to how that portion was different. Instead, the respondent chose not to make any disclosures whatsoever in the written statement.

8. The petitioners, upon coming to know about the sale deed of 2009 applied for leave to produce the said documents. This leave was declined by the trial court, mainly on the basis that there were no pleadings

in support of such documents. The trial court also held that the sale deed pertains to a different portion of the larger property and therefore not relevant to the issue of specific performance in the suit. At that stage, it is rather surprising as to how the trial court could have recorded such a finding. Such a finding is understandable once the party leads their evidence but such a finding could never have been recorded based on the assertion of the respondent more particularly since the respondent, had chosen not to be candid to the court at the time when he filed his written statement in the year 2014. Some credibility could have been extended to the statement of the respondent were the respondent to be candid to the Court in the year 2014 itself.

9. Be that as it may, the evidence proceeded and in the course of the cross-examination of the respondent, the respondent was forced to admit the execution of the sale deed of 2009. This sale deed has now been ordered to be exhibited by the trial court. Now that the document was ordered to be exhibited, the petitioners took out an application seeking leave to amend the plaint to raise the contentions concerning this issue. Further, leave was applied to implead the respondent's wife as a defendant in the suit since it was the case of the original plaintiff that the property which was agreed to be sold to him was now surreptitiously sold or caused to be sold by the respondent to his wife.

10. The trial court, by the impugned order, has however rejected

the petitioner's application and declined leave to amend the complaint. Mr. Rodrigues, the learned counsel for the respondent submits that this was a suit for specific performance and therefore, the controversy in such a suit could not have been widened. He submits that in such a suit the wife of the respondent was neither a necessary party nor a proper party. He further reiterates that the sale deed of 2009 is in respect of some other portion of the larger property that was never agreed to be sold to the original plaintiff. He, therefore, submits that the amendment is irrelevant and the addition of any party is prohibited.

11. According to me, given the gross factual situation, the learned trial court should have granted leave to amend the complaint so that the petitioners, are in a position to prove their case. At this stage, the trial court was not required to go into the issue as to whether the subject matter of the 2009 sale deed and the subject matter of the agreement for sale was the same or not. At least *prima facie*, it cannot be said that the claim of the petitioners was frivolous or irrelevant. In any case, all this will have to await trial. But, to deny the petitioners an opportunity to even amend their pleadings in these circumstances was not proper. Besides, at this stage, the trial court could not have accepted the version of the respondent at its face value particularly, since the respondent has been far from candid to the Court.

12. In a case of this nature, the wife of the respondent is at least a

proper party if not a necessary party. Since, the proposed amendment seeks to point out that the respondent surreptitiously caused the suit property to be sold to his wife and further, did not even disclose this fact in the pleadings, it is important that the respondent's wife is a party to such a suit, though, Mr. Rodrigues is quite right in his submission that the issues in a suit for specific performance is quite limited and there is no scope for enlargement of such issue.

13. Since, the impugned order has not considered all these aspects, the same is required to be set aside. At one stage, this Court was considering the imposition of costs upon the petitioners. However, the record bears out that the petitioners have not shown any lack of diligence in pursuing the matter. The petitioners made an attempt to produce the 2009 sale deed on record. Such an attempt was resisted by the respondent. Ultimately, in the course of the cross-examination of the respondent, the sale deed had to be produced and even exhibited. This event took place on 06.08.2019 and it is on 13.08.2019 i.e. within 7 days, the petitioners applied for leave to amend. Accordingly, this is not a case where any costs are required to be imposed upon the petitioners. Rather, this is a fit case where the respondent should be made to pay costs for unreasonably resisting leave to amend and that too, after the respondent, failed to disclose about the 2009 sale deed in his written statement filed in the year 2014.

14. Accordingly, the impugned order is set aside. The petitioners

are granted leave to amend the plaint and add parties. The amendment to be carried out within 15 days and copies of the amended plaint to be served upon the respondent. The trial court, to make further consequential orders, including the grant of liberty to the respondent as well as the newly added parties to file written statement or additional written statement, as the case may be.

15. In the facts of the present case, the respondent is directed to pay costs of ₹5,000/-.

16. All concerned to act based on the authenticated copy of this order.

M. S. SONAK, J.

msr.