

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 295 OF 2022

Clotildes Olinda Francisca Da Silva alias ... Petitioners
Clotildes Da Silva Braganca and Anr.

V e r s u s

Jai Bhuvan Builders Pvt. Ltd. Rep. By its ...Respondent
Director, Rajesh Sheth

Mr. Abhay Nachinolcar, Advocate with Mr. H. Vaze,
Advocate for the Petitioner.

Mr. Rohit Bras De Sa, Advocate with Mr. P. Navati,
Advocate for the Respondent.

CORAM: M. S. KARNIK, J
DATED: 8th MARCH 2023

ORAL ORDER

1. Heard the learned Counsel appearing for the Petitioners and the learned Counsel appearing for the Respondent.

2. The Petitioners are the Original Plaintiffs. The suit was filed for a declaration that the registered Sale Deed dated 18th November 2005 executed by Defendant Nos. 1 and 2 in favour of Defendant No.7 is null and void. Further relief for a permanent injunction restraining the Defendants from interfering in any manner in the suit plot along with ten metres of access on its northern side was prayed

for. The Respondent in this Petition is the original Defendant No.7. The suit was filed in the year 2008. The written statement was filed by Defendant No.7 on 10th September 2008.

3. After the issues were framed on 17th November 2015 and after the examination in chief of Pw.1 was over, an application for amendment of the written statement along with Counter Claim and Schedule of the Amendment was made by Defendant No.7 on 4th April 2019. The application was opposed by the Plaintiff by filing a say. The Trial Court by the impugned Order dated 18th April 2022 passed below Exhibit D-79, allowed the application.

4. The learned Counsel appearing for the Petitioners pointed out that though the Trial Court allowed the application for Amendment, however dismissed the request of Defendant No.7 for filing a Counter Claim. Learned Counsel for the Petitioners submitted that after the trial had commenced, the Trial Court ought not to have allowed the application for amendment in the absence of there being any material to establish due diligence on the part of Defendant No.7 in taking up this plea earlier. It is further submitted that Defendant No.7 has taken up new pleas which could not have been permitted by the Trial Court at this stage. Learned Counsel submits that there is no finding about there being any due diligence on the part of Defendant No.7 which is counter to the proviso to Order 6 Rule 7 of the Civil

Procedure Code, 1908 (CPC). Learned Counsel submitted that the written statement was signed by the Director of the Company and, therefore, the plea that it is due to the inadvertence of the Liaisoning Officer that some material facts could not be brought on record is not tenable at all. In support of his submission, learned Counsel relied upon the decision of the Supreme Court in the case of **Vidyabai & Ors. vs. Padmalatha & anr.**¹ and that of this Court in **Mr. Conception Fernandes & anr. vs. Mrs. Tasneem Shaikh & Ors.**²

5. Learned Counsel for the Respondent-Defendant No.7, on the other hand, supported the Order passed by the Trial Court.

6. Heard. The suit is filed for declaration of the Sale Deed executed by Defendant Nos. 1 and 2 in favour of Defendant No.7 as null and void. In the application for Amendment, what is sought to be placed on record by way of amendment is that Defendant No.7 had carried out due diligence while purchasing the suit property and that even the mutation was effected followed by the partition of the property. The order regarding partition is pursuant to the filing of the suit. The other plea taken up was that the Plaintiffs had no locus to file the suit as now the partition has been effected and the property

¹ (2009) 2 SCC 409

² 2014(5) All MR 751

has been allotted a separate survey number. It was then contended that the suit is barred by limitation as Plaintiff had knowledge of the transaction between Defendant Nos. 1 and 7.

7. The Supreme Court in the case of **Vidyabai & Ors. vs. Padmalatha & anr.** (supra) in Paragraph 19, has observed thus :

“19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the Court. It puts an embargo on exercise of its jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.”

8. In **Mr. Conception Fernandes & anr. vs. Mrs. Tasneem Shaikh & Ors.** (supra), this Court was dealing with the controversy where the application for amendment of the written statement was rejected by the Trial Court and, in the facts of that case, after referring to the well-settled legal propositions, this Court dismissed the Petition.

9. The decision in **Mr. Conception Fernandes & anr. vs. Mrs. Tasneem Shaikh & Ors.** (supra), in my opinion, will not support the contention of the Petitioner having regard to the

observations made by the Trial Court while exercising its discretion in allowing the Amendment application.

10. The learned Trial Judge observed that the Amendment is necessary for determining the facts and issues involved in the suit. Further, the Trial Court was satisfied with the explanation that due to inadvertence, the majority of the facts which had transpired prior to the filing of the written statement, could not be brought on record. Having regard to the nature of the amendment, if the Petitioners want to take up a contention regarding limitation, or regarding due diligence in purchasing the suit property followed by the partition, in my opinion, the same would be necessary to decide the real dispute between the parties. I am satisfied that the Trial Court has rightly in the exercise of its discretion held that to avoid multiplicity of the proceedings, the present amendment may be granted by awarding costs to the Defendant. Having gone through the reasons recorded by the Trial Court, the exercise of such discretion cannot be said to be perverse or unreasonable to warrant interference. Moreover, the Amendment to the written statement is allowed at the stage when the examination in chief of Pw.1 was over. Inconvenience to the Plaintiffs has been compensated by awarding cost.

11. The Writ Petition is therefore dismissed with no order as to costs.

M. S. KARNIK, J

ANDREZA PEREIRA  Digitally signed by ANDREZA PEREIRA
Date: 2023.03.08 17:52:19 +05'30'