

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.757/2015

1. SMT OLIVIA D'SOUZA, wife
of Adv. Luis D'Souza, Indian
National, major in age, housewife
and her husband

2. ADV. LUIS D'SOUZA, major
in age, Indian National,

Both residing at Curca, Tiswadi
Taluka Goa.

... PETITIONERS

Versus

1. SHRI NARASINGH VISHNU
NAIK PANVELKAR, son of Late
Vishnu Naik Panvelkar, since
deceased through his LR's

1.(a) Mrs. Nisha Naik Panvelkar,
wife of Late Narsingh Vishnu
Naik Panvelkar

1.(b) Mr. Vikram Naik Panvelkar,
son of Late Narsingh Vishnu
Naik Panvelkar

1.(c) Mrs. Saikshama Vikram
Panvelkar, wife of Vikram Naik
Panvelkar

All above are residing at H.No.E-
80, Patto, Ribandar, Panaji Goa.

2. SMT. HEMA NAIK, D/o
Vishnu N. Panvelkar, R/o Near
Maruti Temple, Gogol, Margao
Goa.

3. SMT. SUNITA P.
VIRGINCAR @ USHADEVI,
D/o Vishnu N. Panvelkar,
R/o Near Maruti Temple, Gogol,
Margao Goa.

4. SMT. INDIRA RAIKAR,
D/o Vishnu N. Panvelkar,
R/o "Sweta" Plot No.35,
Airways Colony, Zuari Nagar,
Vasco-da-Gama, Goa.

5. MR VITHOBA PANVELKAR,
son of Vishnu N. Panvelkar,
R/o Garud, Near Nirmal
Institute, Altinho, Panaji Goa
(All above are major of age)

... RESPONDENTS

Mr. Ganesh Naik, Advocate for the Petitioners.
Mr. R. G. Ramani, Senior Advocate with Mr. P. Kakodkar,
Advocate for the Respondents 1. 1(a), 1(b) and 1(c).

CORAM: M. S. SONAK, J.

DATED: 17th February 2023

ORAL JUDGMENT:

1. Heard Mr Ganesh Naik for the petitioners and Mr R. G. Ramani, learned Senior Advocate, who appears along with Mr P. Kakodkar for respondents no.1(a), 1(b) and 1(c).

2. With the consent of the learned counsel for the parties, the matter is taken up for final disposal.

3. The challenge in this petition is to the Order dated 27.03.2015 made by the learned Trial Judge dismissing the petitioners' application at Exh.39 seeking leave to amend the plaint.

4. The leave to amend the plaint was declined on the following two grounds:-

(a) Since the issues had already been settled, the trial was deemed to have commenced. Therefore, relying upon the Proviso to Order 6 Rule 17 of the Code of Civil Procedure (CPC), the Trial Court declined leave by observing that no case of due diligence has been made out by the petitioners/plaintiffs;

(b) That the proposed amendment sought to raise mutually inconsistent pleas based on specific relief and adverse possession. The Trial Court held that this was not permissible.

5. Mr Ganesh Naik has relied on the decision of the Division Bench of this Court in *Mahadeo v/s. Balaji – 2012 (7) ALL*

MR 564, in which it is held that the trial commences from the date of filing affidavits in lieu of the examination-in-chief of the witnesses. Therefore, the Proviso to Order 6 Rule 17 of CPC will come into play after the stage of filing affidavits in lieu of the examination-in-chief and not merely upon settlement of issues. Mr Ganesh Naik also relied on *Abhay Arondekar v/s. Mrs. Helen Prisca Correia & Ors. - 2013 (6) ALL MR 712*, in which, according to him, it is held that a plea for declaration of title and specific performance are not mutually inconsistent pleas.

6. Mr Ganesh Naik further pointed out that even in the plaint as instituted initially, in paragraphs 9 and 13, the petitioner/plaintiff had already pleaded about exclusive possession and enjoyment of the suit property since 1984 without interference from any person, including the defendant. He pointed out that in paragraph 13, there was a specific plea about the petitioner/plaintiff being the owner in possession of the suit property. He submitted that the proposed amendment had merely elaborated on this issue and sought a formal declaration regarding the original pleadings. He pointed out that the balance proposed amendments were only to clearly describe the property or correct the typographical errors that had unintentionally crept into the pleadings. Therefore, Mr Ganesh Naik submitted that the impugned order warrants interference.

7. Mr Ramani, learned Senior Advocate for the respondents/defendants, submitted that there is a qualitative difference between the amendments to the plaint and amendments to the written statement. He pointed out that whilst the defendants can always raise inconsistent defence pleas, such a course was impermissible to the plaintiffs. Further, Mr Ramani pointed out that the plaintiffs had already deleted the necessary parties. He submitted that permitting such mutually inconsistent pleas would embarrass the trial in the suit; therefore, the learned Trial Court was justified in making the impugned Order. Mr Ramani relied on *Baldev Singh & Ors. v/s. Manohar Singh & Anr. - (2006) 6 SCC 498* in support of his contentions.

8. The rival contentions now fall for my determination.

9. Insofar as the first ground relied upon by the learned Trial Court to dismiss the application for amendment is concerned, the same is contrary to the law in *Mahadeo v/s. Balaji (supra)*. The Division Bench, on a reference, endorsed the view that the trial in a civil suit commences from the date of filing of affidavits in lieu of examination-in-chief of the witnesses and the Proviso to Order 6 Rule 17 of the CPC will come into play only after the stage of filing of affidavits in lieu of examination-in-chief of the witnesses.

However, the Division Bench disapproved of the contrary view adopted by some decisions.

10. Accordingly, the first ground for rejecting the application for amendment will have to be set aside. Based on such ground, the learned Trial Court was not justified in declining leave to amend the plaint.

11. Insofar as the second ground is concerned, the issue is certainly arguable. Mr Ramani learned Senior Advocate for the respondents/defendants justifiably relied upon *Baldev Singh (supra)*, in which the Hon'ble Supreme Court has explained that it is now well settled that exactly the same principle does not necessarily govern an amendment of a plaint and amendment of a written statement. Indeed, some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of

the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

12. The Hon'ble Supreme Court, at paragraph 16, further observed that the defendants could raise inconsistent pleas in the written statement, although the same may not be permissible in the case of plaint. In this decision, the Hon'ble Supreme Court has also taken cognizance of the Proviso to Order 6 Rule 17 of CPC, which provides that amendment of pleadings shall generally not be allowed when the trial of the suit has already commenced. The Hon'ble Supreme Court noted that the suit was not on the verge of conclusion, as the High Court and the Trial Court found. That apart, the commencement of trial as used in Proviso to Order 6 Rule 17 of CPC must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. The Court found that the parties are yet to file their documents, and therefore, the two courts were not justified in rejecting the application for amendment of the written statement by adverting to the Proviso to Order 6 Rule 17 CPC, which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings.

13. Now although *prima facie*, the pleas of specific performance and plea of ownership based on adverse possession appear to be mutually inconsistent, this is not a case where such pleas were sought to be introduced by amending the plaint. On the contrary, in paragraphs 9 and 13 of the plaint, as they stand are perused then, the plea of some sort of adverse possession appears to have already been raised by the petitioners/plaintiffs.

14. For the convenience of reference, the pleadings in paragraphs 9 and 13 are transcribed below:-

"9. The plaintiff states that she has been in possession and enjoyment of the suit property since the year 1984. She states that she has enclosed the suit property with the cement poles and barbed wires. She has also planted some mango saplings in the suit property. She states that her husband has purchased la "Cantor" along with his brother Shri Xavier D'Souza in the said village and extracted mud from the suit property to fill the said Cantor.

*13. The plaintiff states that she has been in exclusive possession and enjoyment of the suit property since the year 1984 without the interference of anyone including the defendant or anyone under him. She states that she has paid Rs.30,000/- in all to the defendant. However, he failed to perform his duty of execution of the sale deed. **She states that she is the owner in possession and enjoyment of the suit property by virtue of the agreement and also by means of adverse possession and therefore she is entitled to a decree from this Court accordingly."***

15. At this stage, we are unconcerned with the merits or demerits of such a plea. That will be a matter which will ultimately have to be decided by the Trial Court after the parties lead evidence. Similarly, at this stage, we are unconcerned with the issues of deletion of necessary or unnecessary parties. That is again an issue which will have to be decided by the Trial Court on merits. But, one thing that is certain is that the plea which is now proposed to be raised by amending the plaint was already raised or at least the seeds for such a plea already exist in the plaint as it now stands. All the proposed amendment seeks to achieve is perhaps to amplify such a plea and, based upon such a plea, seek a formal relief. The Trial Court failed to perhaps examine the original plaint before making the impugned Order.

16. The decision in *Abhay Arondekar (supra)* is not directly on the point. There, the learned Single Judge of this Court held that the learned Trial Judge was not justified in rejecting the leave to amend on the ground of specific performance and declaration of title or mutually inconsistent pleas. The learned Single Judge held that such an issue did not arise in the case before it. Accordingly, leave was granted to amend the pleadings subject to payment of costs of ₹10,000/- as a condition precedent.

17. Besides, there was no justification to reject the amendment to the extent it sought to correct typographical errors or better describe the suit property. Accordingly, based on the second ground referred to above, the application for leave to amend could not have been rejected entirely. This was a clear error in the decision-making process.

18. The issue of the pleas being mutually inconsistent or even mutually destructive is and will have to be left open. However, considering the original pleadings and the proposed amendment, it cannot be said that the petitioners/plaintiff seek to alter materially or substitute her cause of action or the nature of her claim. Assuming that the nature of the petitioners' claim right from its inception was defective, as contended by Mr Ramani, the amendment only seeks to amplify or elaborate on the alleged defect. The respondents/defendants will undoubtedly have the full opportunity to deal with these kinds of pleas by filing an additional written statement.

19. The prejudice, if any, by allowing the amendment will not exceed the prejudice by the petitioners/plaintiffs leading evidence based upon the unamended plaint. Besides, the amendment to correct typographical errors or better description of the suit property is necessary for effective adjudication of the Suit.

Moreover, the prejudice, if any, can always be compensated by costs.

20. The costs, in this case, can be quantified at ₹20,000/- considering that the Suit trial has been prolonged. Moreover, Mr Ganesh Naik admitted that the Suit is in respect of a plot admeasuring 2000 sq. mtrs. at Curca Goa. Considering all these factors, the petitioners will have to pay costs of ₹20,000/- as a pre-condition for leave to amend the plaint as proposed.

21. Therefore, the impugned Order is set aside for all the above reasons. Accordingly, leave is granted to amend the plaint as proposed. This shall, however, be subject to the petitioners paying costs of ₹20,000/- to the respondents within four weeks from today. Such costs can be deposited before the Trial Court within four weeks. Upon deposit, the respondents would be at liberty to withdraw the same unconditionally.

22. Further, it is clarified that the Trial Court must grant the respondents opportunity of filing additional written statement after necessary amendments are carried out. Mr Ganesh Naik states that amendments will be carried out within two weeks from the deposit of costs since, the costs are made condition precedent.

This statement is accepted, and the Trial Court will allow the petitioners/plaintiffs to act accordingly.

23. Mr Ramani states that an additional written statement would be filed within four weeks from the service of the amended copy of the plaint. It is clarified that the respondents/defendants will be free to raise all permissible pleas, including defence of inconsistent pleas, limitation, etc. All these matters will ultimately have to be decided on merits by the Trial Court.

24. The Rule is made absolute in the above terms. All concerned to act on the authenticated copy of this Order.

M. S. SONAK, J.

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