

Esha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 436 OF 2021

1) Anthony Andrew Goncalo Carvalho, s/o
late Edwardo Joao Antonio Carvalho & late
Delia Carvalho alias Dulcina, 47 years of
age,

2) Mrs. Myra Carvalho, w/o Anthony
Andrew Goncalo Carvalho, 45 years of age,

Both r/o House No. 168, Castel Waddo,
Pirni, Nagao, Verna-Goa.

Presently r/o Flat No. 001 Dempo Odyssey
Nx, Nr. St. Andrew Church, Vasco Da
Gama-Goa.

... PETITIONERS

Versus

1) Mr. Joseph Anthony Louis Gonsalo
Carvalho, s/o late Edwardo Joao Antonio
Carvalho & late Delia Carvalho alias
Dulcina, 47 years of age, and his wife

2) Mrs. Carol Carvalho, w/o Joseph
Anthony Louis Gonsalo Carvalho, 45 years
of age,

Both r/o House No. 168, Castel Waddo,
Pirni, Nagao, Verna-Goa.

... RESPONDENTS

Mr. Balkrishna Sardessai with Mr. V.B. Gadnis, Advocates
for the Petitioners.

Ms. Winnie Coutinho with Mr. Sujay Kamulkar, Advocates
for the Respondents.

CORAM: B.P. DESHPANDE, J.

DATED: 7th SEPTEMBER 2023

ORAL JUDGMENT:

1. Rule. Rule is made returnable forthwith. The matter is taken up for final disposal with consent of the learned Counsel for the parties.

2. The Petitioners who are the Plaintiffs in Regular Civil Suit No. 3 of 2019 are challenging the impugned order dated 07.12.2021. The learned Trial Court allowed the Application filed by the Defendants permitting them to file a reply to the amendment Application and re-hearing the said Application.

3. Heard Mr. Sardesai for the Petitioners and Ms. Winnie Coutinho for the Respondents.

4. Mr. Sardesai would submit that the Plaintiffs filed a suit along with an injunction Application against the Respondents/ Defendants. However, during the pendency of such proceedings, the Plaintiffs filed an Application for amendment on 14.01.2021. The matter was kept for reply by the Defendants. The matter was adjourned from time to time. However, inspite of granting

opportunities, no reply was filed. The matter was taken up by the Trial Court on 16.11.2021 and since by that date no reply was filed, the amendment Application was allowed by passing a handwritten order on Exhibit-22.

5. Mr. Sardessai would submit that after passing all such orders, the Defendants appeared through their Advocate and filed an Application stating that the Advocate was unable to remain present due to a vehicular accident on the road and prayed for taking the reply on record. The Plaintiffs filed a reply to such Application opposing it.

6. The learned Trial Court after hearing both sides passed the impugned order dated 07.12.2021 on Exhibit-24 thereby allowing the Defendants to file a reply to the amendment Application subject to costs and fixing the amendment Application for arguments.

7. Mr. Sardessai would submit that once the order is passed allowing the amendment Application, the Trial Court was not having any power to allow the Defendants to file a reply and to re-hear the matter. He submits that at the most, it was open for the Defendants to challenge such orders before the appropriate

forum. According to him, the impugned order is without jurisdiction and without considering any provisions.

8. The learned Counsel for the Respondents would submit that though the matter was fixed on 16.11.2021, she reached the Court a bit late and that too because of some vehicular accident on the road. On reaching the Court, she realized that an order was already passed on Exhibit-22 thereby allowing such an Application and then a handwritten Application was filed at Exhibit-24 requesting the Trial Court to take the reply on record and to hear the Application Exhibit-22 afresh. She would submit that under the inherent powers, the Trial Court allowed such prayer as it was found genuine. She submits that no interference is warranted as no prejudice would be caused to the Plaintiffs since the Application for amendment is pending for arguments.

9. The short question which requires consideration is whether the learned Trial Court is justified in allowing Exhibit-24 i.e. the Application filed by the Respondents/Defendants thereby allowing them to file a reply and to re-hear the Application at Exhibit-22 without re-calling such order.

10. Admittedly, the amendment Application was allowed on 16.11.2021 and therefore, the Defendants if considered to be aggrieved, ought to have challenged the order before the appropriate forum.

11. The Application filed at Exhibit-24 states that the Advocate reached the Court late and by that time the Application was allowed. The prayer made in the Application at Exhibit-24 is only to allow the Defendants to file a reply and the same be taken on record. First of all, there is no prayer in the said Application for re-calling of the order dated 16.11.2021 below Exhibit-22. Secondly, the powers of review of the Trial Court are limited and that too, if there is any clerical error or mistake apparent on the face of the record. It is not the case of the Defendants that the order dated 16.11.2021 needs to be reviewed.

12. The option that the Defendants had, was to challenge such an order before the appropriate forum, but instead of that, an Application was filed vide Exhibit-24 with a prayer to take the reply on record.

13. The impugned order is also confusing as it only says of allowing Exhibit-24 and taking the reply on record. However, Mr.

Sardesai points out that the Roznama dated 07.12.2021 shows that the matter is kept for arguments. Though such Roznama is not clear, Mr. Sardesai states that the matter is pending for arguments on Exhibit-22. This fact is not disputed by the learned Counsel for the Respondents.

14. First of all, when the Application for amendment was allowed on 06.11.2021, the question of re-calling such an order, allowing the Defendants to file a reply and again to fix the matter for arguments would not arise. The order dated 16.11.2021 allowing the amendment Application though cryptic, could have been challenged before the appropriate forum.

15. The contentions of the learned Counsel for the Respondents that the impugned order was passed invoking the provisions of Section 151 of CPC, cannot be accepted as neither such argument was raised nor the impugned order suggests of exercising such powers. The question of re-calling the order dated 16.11.2021 is also not found in the impugned order. The learned Trial Court nowhere mentioned in the impugned order that she is recalling the order dated 16.11.2021 and keeping the matter for arguments. Though such powers are not available under the pretext of exercising jurisdiction under Section 151 of CPC, the entire

exercise carried out by the Trial Court seems to be only on the aspect of the Advocate reaching the Court, after passing of the order. No doubt the parties should not suffer for the fault of the Advocate, however, the Court has to keep in mind the powers which could be exercised in recalling its own order.

16. It is an admitted fact that the Defendants/Respondents herein did not challenge the order dated 16.11.2021 passed on Exhibit-22 before the appropriate forum. Thus, the impugned order is clearly without jurisdiction and needs interference.

17. The impugned order dated 07.12.2021 passed in Regular Civil Suit No. 3 of 2019 is hereby quashed and set aside.

18. Rule is made absolute in the above terms.

19. Writ Petition stands disposed of.

B.P. DESHPANDE, J.

VAIGANKAR
ESHA SAINATH

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VAIGANKAR ESHA SAINATH
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