



inita

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.299 OF 2024

- 1 Shri Francis D'Souza, Son of late
Shri Joaquim D'Souza, Age 68
years, r/o H. No. 491/3,
Boutavaddo, Assagao, Bardez –
Goa.
 - 2 Smt. Luiza Francis D'Souza, Wife
of Shri Francis D'Souza, Age 58
years, r/o H. No. 491/3,
Boutavaddo, Assagao, Bardez –
Goa.
- Petitioners.

Versus

- 1 Smt. Rozy D'Souza alias Rosa
Isabela Zuzarte alias Isabela Rosa
Zuzurate, Daughter of late Domnic
Avelinho Zuzarte, Major of age, r/o
Domnic Colony, 2nd Road, Orlem
Malad, Mumbai Presently residing
at Guirim, Bardez – Goa.
- 2 Smt. Agnes Carmelina D'Souza alias
Agnes Salian, Daughter of Antoni
D'Souza, Major of age, r/o Domnic
Colony, 2nd Road, Orlem Malad,
Mumbai Presently residing at
Guirim, Bardez – Goa.
- 3 Shri Harish Salian, Son of Ranga
Salian, Major of age, r/o Domnic
Colony, 2nd Road, Orlem Malad,
Mumbai Presently residing at
Guirim, Bardez Goa.
- 4 Shri Maxmillian Victor D'lima, Son
of John D'lima, Major of age,
Residing at 81, Domnic Colony, 2nd
Road, Orlem, Malad, Mumbai.

- 5 Mrs. Angela Jennifer D'Lima, d/o Sebastian A. Pereira, major of age, Residing at Dd/203, 2nd Floor, Opp. Bhor Industries, Western Express Highway, Borivali (East), Mumbai - 400 066.
- 6 Mr. Vasant P. Joshi, s/o late Prakash R. Joshi, major of age r/o H. No. 296/4, Sonar Vado, Verla, Bardez - Goa. 403 510.
- 7 Mrs. Vasant Joshi, Wife of Mr. Vasant P. Joshi, Major of age, r/o H. No. 296/4, Sonar Vado, Verla, Bardez - Goa. 403 510.
- 8 Mr. Raja R. Gadekar, s/o Shri Ramesh D. Gadekar, major of age, r/o H. No. 349/B-4, Shetye Wado, Duler, Mapusa, Bardez Goa.
- 9 Mrs. Raja Gadekar, Wife of Shri Raja R. Gadekar, Major of age, r/o H. No. 349/B-4, Shetye Wado, Duler, Mapusa, Bardez Goa. Respondents.

Mr Ashwin Bhobe and Ms Shaizeen Shaikh, Advocate for the petitioners.

Ms Priyanka Kamat, Advocate for the respondent nos. 6 to 9.

CORAM:

BHARAT P. DESHPANDE, J

Dated :

15th October 2024.

ORAL JUDGMENT:

1. In this petition, order refusing amendment to the plaint is challenged on various grounds.

2. Mr. Bhobe would submit that the petitioners/plaintiffs filed an amendment application though after examination of PW1 and PW2 and even after recalling of such witness, only to clarify the title of the plaintiffs which they got through Maria and that original property was belonging to Comunidade of Tivim.

3. He submits that such amendment is necessary in view of the stand taken by the defendants during cross examination of PW1. Mr Bhobe submits that plaintiffs have clarified in their application about due diligence which has not been accepted by the trial Court. He submits that since some aspects are brought on record during the cross examination of PW1, it was necessary for the plaintiffs to amend the plaint on the clarificatory nature so that title of the Maria which she got through Comunidade is brought on record. He submits that no prejudice is going to cause to the respondents/defendants since they have already denied about the claim of the plaintiffs by fling specific Written Statement. Mr Bhobe would submit that though the plaintiffs have pleaded in the plaint that Maria was the owner of the suit property by giving Land Registration Number/boundaries, survey numbers, certain clarifications are required as to how title passed from Tivim Comunidade to Maria so as to identify the property properly. Mr Bhobe while placing reliance in the case of **J. Samuel and others vs. Gattu Mahesh and others,¹** and **Life Insurance Corporation of India Vs Sanjeev Builders**

1 (2012) 2 SCC 300

Private Limited² would submit that observations of the learned trial Court in rejecting the application needs interference as such observations are perverse and though the plaintiffs have shown due diligence, the same has not been accepted.

4. Per contra, Ms Kamat appearing for respondent nos.6 to 9 would submit that petitioners by filing amendment application at a very belated stage, is firstly trying to fill up lacuna in the plaint and to get away with the admission which PW1 has deposed about improper description of the suit property. Ms Kamat submits that plaintiff failed to prove due diligence as suit is filed in the year 2013 whereas amendment application was filed somewhere in the year 2023. She submits that issues were framed in the year 2019 and the plaintiffs have already examined PW1 and PW2. According to her, learned trial Court has rightly observed that proviso to Order VI Rule 17 of CPC applies to the present matter and since there is no due diligence as well as amendment if allowed would take away the admission, rightly rejected. Ms Kamat placed reliance in the case of **Basavaraj Vs Indira and others**.³

5. Rival contentions fall for determination.

6. Suit filed by the plaintiffs in the year 2013 is for declaration with regard to Succession Deed dated 19.11.1991 to be declared as null and void. It is further claimed that the Sale Deed dated 20.9.1994 be

² (2022) 16 SCC 1

³ (2024) 3 SCC 705

declared as null and void. Further relief claimed that plaintiff be declared as sole owner of the suit property along with dilapidated house situated therein and there are other consequential reliefs claimed in the suit.

7. The basic contention of the plaintiffs in the suit is that suit property belonged to late Smt Maria Esperanca Lobo and upon her death plaintiff being her grandson and plaintiff no.2 being the grand daughter in law became the owner of the said property. Description of the suit property is specifically found in paragraph nos. 1 and 2, apart from Land Registration number, area as well as boundaries. It is contention of the plaintiffs that such property is surveyed under no. 121/30 of Tivim village.

8. Defendants appeared and contested the suit by filing separate written statement. Written statement filed by the defendant no. 5 would clearly go to show that contention of the plaintiffs regarding suit property has been denied.

9. By specific defence, defendant no. 5 denied that the suit property is registered in the land registration office. Said defendant no. 5 claimed said survey number 121/20 is in their possession since last 70 years. It is their contention that said property was sold to defendant no. 5 by defendant no. 4 in the year 1994. It is specifically denied that the suit property was originally owned by Maria.

10. Defendant nos. 6 and 7 in their written statement, apart from preliminary objection, denied the averments of paragraphs 1 and 2 and specifically claimed that property bearing survey no.121/20 is not corresponding to the Land Registration Number or other description mentioned in the plaint. It is their contention that originally the said property was owned to defendant nos. 1 to 3 which was then sold to defendant no. 4 and subsequently it was divided by defendant no. 4 into two plots and by registered Sale Deed executed in the year 2011, it was purchased by defendant nos. 6 and 7 i.e. plot B.

11. The issues were framed by the learned Trial Court in the year 2019. Issue no.3 specifically reads thus:-

“Whether plaintiff proves that they are entitled for declaration that they are sole owner of the suit property along with dilapidated house situated therein?”

12. Record clearly goes to show that on multiple occasions plaint was amended and thereafter the plaintiff no.1 examined himself as well as one witness. It shows that the plaintiff no.1 was recalled and cross examined at length.

13. Mr Bhobe, would submit that during cross examination a question was put to the PW1 that there is no proper identification of the suit property. He submits that the plaintiff no.1 answered such a question in the affirmative. However, thereafter the plaintiffs searched the document with Comuidade and finally with the survey

authority and accordingly received a relevant document showing how Maria was allotted said property by Comunidade.

14. Proposed amendment as found in application would go to show that the plaintiffs are now trying to explain how Maria received said property through Comunidade.

15. This aspect of ownership of Maria is already discussed in the plaint. Written statement filed by the defendants is not specifically disputing the ownership of Maria with regard to property shown in Land Registration documents. It is their defence that suit property is not the one as claimed by plaintiff. Thus, clarification which the plaintiffs are trying to introduce in the present amendment application is otherwise of no use. Besides, this fact was known to the plaintiffs but was not incorporated in the plaint or even prior to framing of the issues.

16. The learned trial Court observed that the plaintiffs knew that the property was belonging to Maria, but they should have incorporated such amendment in the said itself or to say prior to settlement of issues. Only after cross examination of the plaintiff no.1 and his witness, carrying out search of the documents was certainly not proving due diligence.

17. The aspect of identification of the property is quite separate and distinct from the question or identification of a title. Even otherwise proposed amendment is only with regards to title in favour

of Maria from the Comunidade. The suit filed before the trial Court is admittedly based on the title of the Maria which the plaintiffs claimed of acquiring after the demise of said Maria. However, issue in the suit is not only with regard to title but to the identification of the property as described in the plaint.

18. Observation of the learned trial Court that plaintiffs failed to prove the due diligence thus cannot be faulted with. The contention of Mr Bhobe that the plaintiff searched said document after cross examination of PW1 was over, itself shows that the plaintiffs were negligent in making proper pleadings in the plaint or to say prior to settlement of issues. Proviso to Order VI Rule 17 of CPC would certainly apply to the matter as amendment is filed at a belated stage and that too for the purpose of introducing the story with regard to the title of Maria. Observations of the Apex Court in the Case of *J. Samuel* (supra) would not be of any help to the petitioners since it is not only clarificatory nature amendment but trying to reproduce case with regard to title of Maria as well as that of Comunidade prior to allotment to Marie.

19. Prior to amendment of the proviso to Order VI Rule 17 of CPC, it was a trend of allowing the amendment liberally. However, after introduction of the proviso, parties must disclose due diligence. Apart from such due diligence, it is the duty of the Court to find out whether such amendment is in fact necessary for deciding the issue in the suit.

The other parameters are also required to be established. First hurdle which the plaintiff or party as the case may be, has to cross is to prove due diligence and to explain as to why such amendment was not incorporated in the plaint prior to settlement of issues and only thereafter other parameters as far as allowing or rejecting of the amendment application could be considered.

20. In the case of **Basavaraj** (supra) the Apex Court discussed this aspect and observed that when the party failed to establish due diligence, other aspects need not be gone into.

21. Matter in hand would clearly go to show that the application was filed after examination of plaintiff no.1 and his witness and that too for the purpose of countering so called admission of the plaintiffs.

22. In such circumstance, the impugned order cannot be faulted with.

23. Petition thus needs to be rejected. However, it is made clear that parties are entitled to raise such an issue, at the appropriate stage i.e. in the appeal in case a decision adverse to such party is passed.

24. Rule is made absolute in the above terms.

25. Petition stands disposed of accordingly. Pending applications, if any, stand disposed of.

BHARAT P. DESHPANDE, J.