shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 887 OF 2023 WITH WRIT PETITION NO. 892 OF 2023 WITH WRIT PETITION NO. 893 OF 2023 WITH WRIT PETITION NO. 257 OF 2024

WRIT PETITION NO. 887 OF 2023
WITH
WRIT PETITION NO. 892 OF 2023
WITH
WRIT PETITION NO. 893 OF 2023

1. Maria Meera Menezes D Souza,
Aged 97 years, Indian National,
Widow of the late Manuel Maria Rufino
de Souza, r/o No. 3 Dr. Peter Dias Road,
Bandra, Mumbai, Maharashtra through her son
and duly constituted attorney Sanjeev D'Souza
c/o Mr. Luis Ian Dias H.N. 190, Opp Goa
Reserve Police Altinho, Panaji, Goa ... PETITIONER

VERSUS

1. Mr. Ajay Mendes, Major of age,
Indian National, Plot no.215, Nagally,
Taleigao, Ilhas Goa. ...RESPONDENT

WITH
WRIT PETITION NO. 257 OF 2024

Mr. Ajay Mendes, aged about 55 years,
Indian National, residing at Ajmel 233/1,
Alto Nagali, Near Cidade Goa, NIO,
Dona-Paula, Tiswadi, Goa ...PETITIONER

VERSUS

Maria Meera Menezes DSouza,
Major of age, Indian National,
w/o Late Mr. Manuel Maria Rufino
Dsouza, r/o no.3, Dr. Peter Dias Road,
Bandra, Mumbai, Maharashtra,
Through duly constituted attorney holder
Mr. Luis Ian Dias, S/o Eugemiano Dias,
R/o H.No. 190, Opp. Goa Reserve Police,
Altinho, Panaji, Goa

Mr. M.B. Costa, Senior Advocate for the Petitioner(Original Plaintiffs) in W.P. Nos.887/2023, 892/2023 and 893/2023 and for the Respondent in WP.257/2024

Mr. Kaif Noorani, Advocate for the Respondent in W.P. Nos.887/2023, 892/2023 and 893/2023 and for the Petitioner in WP.257/2024.

CORAM:- A. G. GHAROTE, J.
DATED :- 14th March, 2024

ORAL ORDER

1. The petition questions the order dated 12.10.2023, passed by the learned Trial Court below exhibit-70, whereby the application for amendment filed by the plaintiff has been partly allowed, to the extent it relates to the deterioration of the state of health of the plaintiff, but rejects the same, in so far as it relates to the knowledge of the son of the plaintiff, regarding the state of affairs, vis-a-vis, the suit property, on the ground that though the plaintiff was aware of this, it could have been pleaded earlier and on account of the filing of the affidavit in lieu of the evidence, the trial had commenced and therefore, the proviso to Order VI Rule

17of the Civil Procedure Code (C.P.C.) acted as a bar.

2. Mr. M.B.Costa, learned senior counsel for the petitioner/original plaintiff submits that the amendment which relates to the knowledge of her son, vis-a-vis the affairs of the suit property, is infact a common knowledge, considering the fact that the petitioner/plaintiff, at the time of filing of the suit, which was in the year 2012, was 86 years of age, and is now 97 years old, and therefore, considering her condition, the position that she was accompanied by her son who was aware of the affairs regarding the suit property, on account of his earlier visits to it, is something, which is logical and has to be allowed. It is contended that though this is a factuality which exists, the same cannot be denied to be permitted to be brought on record, considering the relationship between the original plaintiff and attorney, of mother and son. It is, therefore, contended that the impugned order, in so far as it rejects the amendment in this regard, cannot be sustained and is required to be quashed and set aside and the amendment is required to be allowed in its entirety.

3. Mr. Noorani, learned counsel for the respondent, vehemently opposes the contention and submits that once affidavit in lieu of evidence is filed, the trial commenced and the plaintiff,

cannot, in such circumstances, get over the bar created by the proviso, and therefore, the rejection of that portion of the proposed amendment which seeks to bring on record, the knowledge of the son of the plaintiff regarding the state of affairs, which led to the filing of the suit, has rightly been rejected by the learned Trial Court. It is also contended that the application for amendment at page 14 is not signed by the original plaintiff, but by her son as a Power of Attorney. Reliance is placed upon, for this proposition, on **Mahadev V/s Balaji, 2012 SCC OnLine Bombay 1283.**

4. Though, the bar of due diligence is a plea which has to be considered, for the purpose of granting amendment to the plaint, consequent to the fact that the affidavit in lieu of oral evidence stands filed on record, however, that is not an absolute bar. In the instant matter, the affidavit in lieu of oral evidence has been placed on record which affidavit is not by the plaintiff, but is by the son of the plaintiff as her attorney, which is a factor relevant to be considered for the purpose of deciding the application for amendment. The age of the plaintiff which at the time of filing of the suit was 86 years, and which is now admittedly 97 years would also be a factor which has to be taken into consideration. The relationship between the plaintiff and that of her attorney, being

that of mother and son is also a factor which needs to be taken into consideration.

5. The hon'ble Apex Court in **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and Another, 2022 SCC OnLine SC 1128**, has after considering the entire law in this regard, held that though the consideration of application for amendment of the plaintiff and that of the written statement, are based upon a different set of parameters, however, those parameters have to be considered in a pragmatic and practical manner, so as not to deprive the legitimate claim, of a party to an amendment. It also held that in case the Court feels appropriate that the issue in the suit cannot be decided without the amendment being permitted, the proviso, by itself, then cannot be held to act as a bar for allowing the amendment. The principles in that regard, have been culled out by the hon'ble Apex Court in para 70, which are as under:-

> *70. Our final conclusions may be summed up thus:*
> *(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence*

negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the

amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking which, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed."

6. Considering the facts in the present in matter, where the suit is for removal of encroachment, the plaintiff who is now 97 years of age, is seeking to amend the plaint, to bring on record the position that her son was also aware of the factuality of the situation and therefore is capable of deposing in relation to the facts in the Plaint, would be a situation, which logically flows from the fact of the relationship between the parties and the age of the

plaintiff, that a son can depose in place of his mother, considering the relationship, apart from which being her son, he would be aware of the factuality of the matter.

7. The proposed amendment nearly seeks to bring out a position on record to the effect that whenever the plaintiff visited the suit property, she was accompanied by her son who still continues to do so. That is a position, which needs to be permitted to be brought on record, considering the nature of the suit as that would be something which would be necessary to decide the controversy in the suit on merits in view of the age of the plaintiff and the fact that it does not change the nature of the suit, nor by permitting it to be so done, any valid defence is lost of, by the defendant.

8. Thus considering the principles as laid down in **Life Insurance Corporation of India**(supra) the impugned order cannot be sustained and is hereby quashed and set aside. The application below exhibit-70 filed by the plaintiff for amendment of plaint, which was partly allowed is fully allowed. Petition accordingly stands allowed in the above terms. The amendment shall be carried out within one week from today and a copy of the amended plaint shall be filed in the Court and also supplied to the

defendant on the same day. In case the Defendant wishes to file any consequential amendment, the same shall be done within a week thereafter and shall be decided within 15 days thereafter.

9. No order as to costs.

10. Writ petition Nos. 893/23, 887/2023 and 257/2024 challenge the order dated 26.10.2023 passed by the learned Trial Court at exhibit D-65 and D-66, which are based upon the plea that the son of the plaintiff has no authority to enter into the witness box as a plaintiff and the averments in the affidavit are beyond the pleading. The learned Trial Court in the impugned order has held that since the burden to prove the suit claim is always on the plaintiff and the plaintiff has not yet entered into the witness box, as and when the PW-1 steps into the witness box, it would be open for the defendant to raise all his objections at the time of examination-in-chief and cross examination. I do not consider that there is any infirmity in the said finding. In light of which all the three petitions are dismissed.

AVINASH G. GHAROTE, J.