

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.30 OF 2015**

M/S. SHAM HOTELS PVT. LTD.,
THROUGH ITS REPRESENTATIVE
MR. CHINMAY VISHWAS PATIL

....Petitioner

V/S

MR. JOHN FRANCIS DE SOUZA & 10 ORS.

...Respondents

Shri S.G. Dessai, Senior Advocate with Mr. Shivan Dessai, Advocate
for the Petitioner.

Mrs. A. Agni, Senior Advocate with Ms. K. Govekar, Advocate for
Respondents No.10 & 11.

CORAM : M.S. SANKLECHA, J.

Reserved on : 7th APRIL, 2015

Pronounced on : 13th APRIL, 2015

ORDER :

This petition under Article 227 of the Constitution takes exception to the order dated 5/07/2014 passed by the Civil Judge, Junior Division, Mapusa (Trial Court). By the impugned order, the petitioner's application for amendment of its plaint under Order 6 Rule 17 of the Civil Procedure Code, 1908 (CPC) was dismissed.

2. Briefly, the facts leading to this petition are as follows:

On 19/01/2007, the petitioner filed its plaint initiating the

present suit seeking a direction that the respondents (defendants in the plaint) convey the property described in schedule 1 to the plaint (suit property). This suit was filed on the basis of being co-owners of the suit property along with respondents no.1 to 9, who had conveyed the said property to respondents no.10 & 11. The suit was filed on the basis of the petitioner's right of preemption under the laws existing in the State of Goa.

3. In March, 2007, the respondents filed their written statement disputing the claim of the plaintiffs. On 7/02/2014, the petitioner filed an application for amendment of the plaint under Order 6 Rule 17 of the CPC. The application for amendment states that the amendment is sought to bring on record subsequent events, to clarify the existing pleadings and claim additional relief in seeking to have consent decree dated 16/03/2006 set aside by this Court. The respondents objected to the proposed amendment.

4. On 5/07/2014 the impugned order was passed by the Trial Court rejecting the petitioner's application for amendment of the plaint. This on the ground that the same are not required to decide the real controversy between the parties, the amendment changes the

nature of the suit and the additional reliefs sought are ex-facie barred by limitation on the date of the application.

5. Being aggrieved, the petitioner has filed the present petition and Mr. S.G. Dessai, learned Senior Counsel appearing for the petitioner states that challenge in this petition to the impugned order is to the extent it disallows the following amendments:

(a) In para 9 of the plaint the words “without any” structure is sought to be replaced with the words “with an existing” structure.

(b) In para 9 of the plaint the words “enclave property” is sought to be substituted with the words “enclosed property”; and

(c) The additional relief sought in seeking to have the consent decree dated 16/03/2006 passed by the Civil Judge, Senior Division at Mapusa, Goa be declared null and void.

6. Mr. S.G. Dessai, learned Senior Counsel in support of the petition submits as under :

(i) The Trial Court failed to exercise jurisdiction vested in it to allow amendments under Order 6 Rule 16 of the CPC to the plaint when the same is necessary to bring out the real controversy between the parties for effective adjudication of the dispute. In fact, the

application for amendment of the plaint was made before the commencement of the trial and thus, it ought to have been allowed.

(ii) In so far as the amendment in para 9 of the plaint is concerned to substitute the words “an existing” structure with the words “without any” structure was an amendment sought to clarify the original plaint. Similarly, substitution of the words “enclave property” with the words “enclosed property” was only to appropriately describe that the property was landlocked. Both these amendments ought to have been allowed as they were amendments only seeking to clarify and bring on record the actual state of affairs with regard to the suit property; and

(iii) So far as the additional relief sought by way of amendment in seeking to set aside the consent decree dated 16/03/2006, the facts substantially relevant for the aforesaid relief are already pleaded in the plaint as originally filed. Thus a mere omission to claim the aforesaid prayer/relief in the plaint is being sought to be corrected by this amendment to properly and effectively decide the dispute between the parties and more particularly avoid multiplicity of proceedings. In view of the above, it is submitted that the impugned order passed by the trial Judge is a refusal to exercise jurisdiction vested in law and thus this Court should exercise its

supervisory jurisdiction and set aside the impugned order.

7. As against the above, Mrs. A. Agni, learned Senior Counsel for the contesting respondents no.9 & 10 in support of the impugned order submits as under:

(a) The impugned order does not warrant interference by this Court in exercise of its jurisdiction under Article 227 of the constitution of India. The exercise of jurisdiction by the Trial Judge in the present facts was a proper exercise of discretion keeping in view the well settled principles of law to exercise its jurisdiction while rejecting the amendment application. This Court should not turn itself into an Court of appeal while exercising jurisdiction under Article 227 of the Constitution of India.

(b) In so far as the amendment sought in para 9 of the plaint to replace the words "an existing" structure with the words "without any" structure would lead to a material change in the facts as originally pleaded. Moreover, it is submitted that the aforesaid amendment sought is not bonafide as by virtue of the above statement of fact in the plaint, the respondents have filed proceedings against the petitioners in this Court which have now been transferred to the National Green Tribunal, alleging violation of CRZ notification. It is

only to escape the consequences of the alleged violation of the CRZ notification that the respondent is seeking to amend the plaint. Further the substitution of the words "enclave property" with the words "enclosed property" would amount to change of facts as stated in the plaint originally filed. The words "enclave" and "enclosed" have different meanings and one cannot be substituted for the other. None of the two proposed amendments are clarificatory.

(c) So far as the additional relief sought to be claimed in the plaint by the proposed amendment viz. setting aside the consent decree dated 16/03/2006 as null and void, has correctly not been allowed by the impugned order. This is so as the same not only changes the nature of the suit but is ex-facie time barred. An independent suit if brought by the respondents to set aside the consent decree dated 16/03/2006 on the date of the application for amendment would be ex-facie time barred by virtue of Article 58 of Limitation Act, 1963. Allowing of this amendment by adding relief would take away accrued/vested rights in favour of the respondents and hence the impugned order calls for no interference.

8. So far as the objection of the respondents is concerned that this Court should not exercise jurisdiction under Article 227 of the

Constitution of India from an order rejecting an amendment application under Order 6 Rule 17 of the CPC. This issue to exercise jurisdiction or not under Article 227 of the Constitution of India would depend upon the result of the examination of the grievance of the petitioners with regard to the impugned order. In case the impugned order has cast away the well settled principles of law and has exercised jurisdiction beyond the bounds of its authority, or there is a patent perversity in the orders of the subordinate Court leading to manifest injustice then this Court is duty bound to exercise its supervisory powers under Article 227 of the Constitution of India. The exercise of the power under Article 227 of the constitution of India does not depend upon the nature of jurisdiction exercised by the sub-ordinate Court but more in the manner in which the jurisdiction was exercised. Thus the preliminary objection raised by the respondents can only be considered after examining the challenge to the impugned order raised by the petitioners.

9. The two cardinal rules to be applied while considering an application to amend the pleadings are :

(a) Is it necessary to bring out the real controversy between the parties; and

(b) Would allowing of the amendment lead to injustice/prejudice to the other side;

The various facets of the above tests as and by way of illustrative list has been set out by the Apex Court in ***Revajeetu Builders & Developers V/s. Narayanswamy and Sons & Ors.*** reported in ***(2009) 10 SCC 84*** as under:

“63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.”

10. Mr. Dessai, learned Senior Counsel for the petitioners points out that in the present case amendment to the plaint is being sought much before the trial has commenced, therefore the application for amendment is not hit by the proviso to Order 6 Rule 17 of the CPC. Therefore, the Trial Judge ought to have been liberal in allowing the amendment application if it is necessary to decide the real controversy between the parties. There can be no quarrel with the above submission subject to a caveat that an amendment application is not a matter of right for the applicant, it is to be granted only if it is necessary to decide the real controversy between the parties but the other tests of no prejudice to the other side etc. have also to be satisfied. It may be pointed out that the impugned order itself accepts the position that at pretrial stage amendment applications are to be liberally construed but states that it would be allowed only on sufficient ground being made out.

11. Keeping the above broad parameters in mind, the proposed amendments are to be examined. So far as the two amendments sought in para 9 of the plaint, the petitioner states that replacement of words “an existing” with the words “without any” and also the word

“enclave” by the word “enclosed” are merely clarificatory and therefore ought to have been allowed. By clarifying is meant explaining and not replacing the words with a completely different meaning. It is substitution and not clarification. In fact the Supreme Court in *Gautam Sarup V/s. Leela Jetly & Ors.* reported in (2008) 7 SCC 85 has observed as under:

“28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

29. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.”

(emphasis supplied)

The substitution is by words having a different meaning. This does have an impact on the entire basis of the case with which the plaintiff had originally come to Court. In fact, so far as the amendment sought with regard to the words “an existing” with the words “without any” and the words “enclave” with the words “enclosed” is to be seen in the context that the substitution of words is with regard to a factual situation. The plaint as originally filed states

that there is an existing structure the amendment proposed is to state that there is no structure by use of the words “without any” structure. Similarly, the words “enclave” means a portion of territory surrounded by a larger territory i.e. a factual description of the surrounding property while “enclosed” means surrounded on all sides i.e. fenced. (See-The Oxford English Dictionary 12th Indian Edition). Thus the impugned order has while exercising its jurisdiction to refuse the amendment application has held that the proposed amendments change the meaning of the sentence and cannot be allowed.

12. The plaint as originally filed was duly verified. The facts stated in the plaint have been verified to the effect that whatever is stated in para 9 of the plaint is partly to the knowledge of the defendant and partly on legal advise. The amendment application makes no whisper of which part of para 9 was not known to him while declaring the plaint. The averments sought to be substituted are factual matters and not matters based on legal advise. Therefore, matters of fact cannot be substituted without assigning some reason to the Court for the proposed substitution. There is sanctity attached to the verification of

the plaint as originally filed. Even if one assumes a mistake on fact was made in the plaint then the plaintiff would have attempted to correct it at the earliest and not after almost eight years of filing the plaint, that too without a whisper on how the mistake occurred and the reason for the consequent delay.

13. Besides, so far as the stand of the petitioner in the plaint that there was an existing structure on the suit property when the plaint was filed, led the respondents to file proceedings against the petitioner. This admission is an important piece of evidence in the proceedings filed against the petitioner by the respondents. The impugned order also keeps the above fact in view while refusing to exercise discretion of amendment in rejecting the substitution of the words “and existing” structure with “without any”. Thus no fault can be found in the exercise of discretion by the trial Judge in not granting the amendments sought in para 9 of the plaint.

14. So far as the proposed amendment to add a prayer for setting aside of the consent decree dated 16/03/2006 is concerned the petitioner states that the facts necessary for the above relief are

already stated in the plaint, thus the same ought to have been allowed. In support reliance is placed upon the decision of the Supreme Court in *Abdul Rehman and Anr. V/s. Mohd. Ruldu & Ors.* reported in *(2012) 11 SCC 341* wherein the Apex Court has laid down that where there is no change in the factual basis then merely because an additional relief is sought by way of amendment, that by itself would not change the nature of the suit. Thus it is claimed that as the relief claimed is not only necessary to decide the controversy between the parties but it would also avoid multiplicity of proceedings. Further, it is contended that the impugned order proceeds to deny the amendment for seeking additional relief of setting aside the consent terms dated 16/03/2006 on the ground that the same would be time barred. This question of limitation according to the petitioner is not to be considered by the Court while considering the amendment applications. These are matters which could be decided at the time of the trial of the suit. In support reliance was placed upon the decision of this Court in *N.C. Banerjee & Company V/s. Manoj Balkrishn Shah & Ors.* reported in *2012 (2) Bom.C.R. 775*, wherein it has been observed to the effect that at the stage of consideration of amendment applications, the issue of limitation is not to be gone into.

Thus according to the petitioners the impugned order has applied an incorrect test in rejecting the amendment application.

15. The impugned order has considered the above submissions. So far as the facts necessary to set aside the consent decree dated 16/03/2006 is concerned, the plaint merely records the existence of the consent decree. The impugned order records that the petitioner became aware of the registration of the consent decree on 17/03/2007 and yet no application for amendment was made till February 2014. There is no explanation for the delay. Besides, the impugned order holds that the applicants cannot be allowed to add a relief which if independently sought is ex-facie time barred. In both the cases relied upon by the petitioner indisputedly the amendments which were sought to be made, if brought by a separate suit, would be within the period of limitation. In this case, a suit to declare the consent decree dated 16/03/2006 as null and void would be time barred under Article 58 of the Limitation Act, thus the amendment as prayed was ex-facie time barred. Thus the impugned order while considering/dealing with the applications for amendment correctly considered the issue whether the allowing of the amendment would cause prejudice to the other side by defeating its vested/accrued right and held it would.

16. Besides, the impugned order also disallows the proposed amendment as it would result in a change in the nature of the suit. The plaint as originally filed was on the basis of right of preemption where the title of the respondents no.10 & 11 was accepted. By seeking to declare the consent decree dated 16/03/2006 null and void, the title of respondents no.10 & 11 is being denied. Thus it was held that the proposed amendment cannot be allowed.

17. In view of the fact that the exercise of discretion by the trial Judge in passing the impugned order cannot even remotely be said to be in flagrant abuse of fundamental principles of law or that it is perverse or that it is refusal to exercise jurisdiction or was in any manner beyond the bounds of its jurisdiction. Thus, no interference is warranted under Article 227 of the Constitution of India.

18. Thus for all the above reasons, I see no reason to interfere with the impugned order dated 5/07/2014 rejecting the petitioner's application for amendment. Accordingly, petition dismissed. No order as to costs.

M.S. SANKLECHA, J.

NH/-