

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 458 OF 2016**

1. Mr. Satchit Nana Govenkar,
major of age, married,
occupation-business and his
wife,
2. Mrs. Satchit Govenkar, major of
age, married, housewife,
Both residents of Colvale,
Bardez-Goa. Petitioners

Versus

1. Mr. Raghuvir Bhikaji Morajkar,
major of age, agriculturist,
2. Mrs. Parvati Raghuvir Morajkar,
(since deceased), through her
legal representatives:
- 2a. Meghashyam Raghuvir Morajkar,
(since deceased), through his
legal representatives:
- 2a. i. Mrs. Manisha Meghashyam
Morajkar;
- 2a. ii. Ms. Maitale Meghashyam
Morajkar;
- 2a. iii. Mr. Mohit Meghashyam
Morajkar;
- 2a(ii) and 2a(iii), since
minors, through their guardian
Mrs. Manisha Meghashyam
Morajkar (2ai).
- 2b. Mrs. Manisha Meghashyam
Morajkar, major, housewife;
- 2c. Mr. Sudhakar Raghuvir Morajkar,
major, service,

2d. Mrs. Siddhi Sudhakar Morajkar,
major, service,

2e. Mr. Devanand Raghuvir Morajkar,
major, service,

2f. Mrs. Satvasheela Devanand
Morajkar, major, housewife,

2g. Mr. Shantaram Raghuvir
Morajkar, major, service,

2h. Mrs. Sweta Shantaram Morajkar,
housewife, major,

2a to 2h are residents of Conny
Vaddo, Colvale, Bardez-Goa.

2i. Mr. Gonedas Raghuvir Morajkar,
major, service,

2j. Mrs. Anjali Gurudas Morajkar,
major, housewife,

2i and 2j are residents of
Ramnagar, Colvale, Bardez-Goa.

2k. Mr. Dayanand Raghuvir Morajkar,
major, service,

2l. Mrs. Deepali Dayanand Morajkar,
major, housewife,
Both residents of Conny Vaddo,
Colvale, Bardez-Goa.

.... Respondents

Mr. Parag Rao, Advocate for the Petitioners.

Ms. Nishigandha Shet, Advocate for the
Respondents.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 27th SEPTEMBER, 2016

PRONOUNCED ON:- 28th SEPTEMBER, 2016

JUDGMENT:

Rule. Rule made returnable forthwith. The learned Counsel for the respondents waives service. Heard finally by consent of the parties.

2. By this petition, the petitioners, who are the original defendants (appellants before the learned District Court), are challenging the order dated 24.02.2016 passed by the learned Principal District Judge, Panaji in Regular Civil Appeal No. 422/2010. By the impugned order, an application filed by the petitioners for amendment of their counter claim, has been dismissed.

3. The brief facts are that the respondents had filed Regular Civil Suit No. 254/2001 for declaration and permanent injunction, claiming ownership and possession over the suit plot and alleging that the petitioners have encroached on the plot of respondents herein, to the extent of

one metre towards the southern corner. The petitioners raised a counter claim claiming that they are entitled to build a stone boundary wall between the plot survey no. 65/1 (belonging to the petitioners) and plot survey no. 65/2 (belonging to the respondents). The learned Trial Court dismissed the suit as well as the counter claim. The petitioners have challenged the judgment and order dismissing their counter claim in Regular Civil Appeal No. 422/2010, which is pending before the learned Principal District Judge at Panaji.

4. In the said appeal, the petitioners filed an application for amendment of the counter claim contending that during the pendency of the appeal on 08.01.2015, the respondents/plaintiffs extended their house in the southern side by erecting a loose laterite stone wall and by putting mangalore tiles and G.I. sheet roofing over the same. It is contended that the said illegal construction is without leaving the required set back. The petitioners seek to introduce paragraphs 4-A to

4-C in the counter claim and to introduce a prayer for directing the petitioners/plaintiffs to demolish the illegal construction/extension of the house and the illegal construction carried out in the set back area as shown in the report prepared by the Surveyor, Prazares Gonsalves on 17.01.2015.

5. The learned District Judge has rejected the application on the ground that the cause of action in the counter claim, as originally filed (which is for construction of a stone compound wall between plot nos. 65/1 and 65/2) and the proposed amendment are separate and distinct. The suit was decided on 31.07.2010, whereas the present cause of action is shown to have accrued on 08.01.2015 and if, the amendment is allowed, it would amount to re-opening of the entire issue.

6. I have heard Mr. Rao, the learned Counsel for the petitioners and Ms. Shet, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have

perused the impugned order.

7. It is submitted that in the counter claim as originally filed, the petitioners are praying for restraining the respondents from interfering with the construction of the compound wall. It is submitted that the encroachment now done by the respondents on the eastern side of the plot of the petitioners, would directly and materially affect the construction of the compound wall. It is submitted that the encroachment done by the respondents is by way of subsequent event and as such, ought to have been allowed to be brought on record by way of an amendment. It is submitted that the cause of action in respect of the encroachment is closely connected to the relief claimed in the counter claim and as such, in order to avoid multiplicity of the proceedings, the amendment ought to have been allowed. It is submitted that the petitioners cannot be expected to file a fresh suit, in such a case. It is submitted that the proposed amendment would not

cause any prejudice to the other side and would be necessary to decide the real controversy between the parties.

8. On the contrary, the learned Counsel for the respondents has supported the impugned order. It is submitted that the cause of action, if any, in respect of the alleged construction, made by the respondents is distinct and separate than the cause of action in the counter claim and the amendment cannot be allowed at the appellate stage.

9. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. A perusal of the judgment of the Trial Court dated 31.07.2010 would show that the Trial Court had framed three issues, out of which issue no. 1 was whether the respondents prove that they are the absolute owners in possession of the suit plot vide gift deed dated 09.10.1967 and the

encroachment done to the extent of one metre towards south western corner of the suit plot without any rights whatsoever. The issue no. 2 is whether the defendant nos. 1 and 2 (i.e. the petitioners herein), are entitled to build a stone boundary wall between survey nos. 65/1 and 65/2 as shown in the Government Plan as per re-fixation order dated 18.12.2001 of the Deputy Collector and SDO, Mapusa. Both these issues are answered in the negative by the Trial Court.

10. It can thus be seen that the only issue in the counter claim as originally filed is about a claim by the petitioners to construct a compound wall between survey nos. 65/1 and 65/2. The cause of action for filing the counter claim is shown to have accrued when the respondents have filed the suit i.e. in the year 2001 (para 6 of the counter claim). The proposed amendment is based on a subsequent event in which it is claimed that the respondents have extended their house on the southern side on 08.01.2015, by which they have

encroached into the property of the petitioners to the extent of 2.85 metres and breadth varying from 0 to 0.40 metres. Thus, the cause of action for filing the counter claim is subsequent. The question is whether such an amendment can be permitted on the ground that it is necessary for deciding the real controversy in dispute and to avoid multiplicity of proceedings. The claim made in the counter claim, as originally filed, is only about construction of a compound wall in between the two plots. What is sought to be introduced is a relief, on the basis of subsequent event, wherein it is claimed that the respondents have effected certain construction in the south western corner, thereby causing encroachment in plot no. 65/1. Thus, the controversy is substantially enlarged, if the amendment is allowed, which would require recording of evidence. That is why the learned District Judge has observed that if, the amendment is allowed, it would amount to reopening of the entire issue. Insofar as the question of avoiding multiplicity of proceedings is concerned,

although avoidance of multiplicity of proceedings is desirable that cannot always be a paramount consideration.

11. In my considered view, the amendment cannot be allowed for yet another reason. Under Order VIII, Rule 6-A of CPC, a counter claim can be justifiably lodged in respect of a cause of action, which may arise either before or after the filing of the suit, till the delivery of defence or till the time for delivery of defence expires. In the present case, the cause of action on the basis of which the counter claim is sought to be amended is much after the delivery of the defence.

12. It is submitted by the learned Counsel for the petitioners that the requirement under Order VIII, Rule 6-A of CPC, that the counter claim should relate to a cause of action till the filing of the defence or till the time for delivery of defence expires, would only apply at the inception. It is submitted that once the counter

claim is filed, the same can be amended to include a claim in respect of a cause of action, which may arise subsequent to delivery of defence. In the submission of the learned Counsel for the petitioners, a conjoint reading of Order VIII, Rule 6-A to 6-D of CPC would show that a counter claim is to be treated as a plaint and thus, its amendment, which would be governed by Order VI, Rule 17 of CPC, cannot be fettered by the requirement that cause of action, on the basis of which, the amendment of counter claim is sought, is prior to the deliver of defence.

Reliance is placed on the decision of the Supreme Court in the case of **Bollepanda P. Poonacha and Another**, (2008) 13 SCC 179, a judgment of this Court in the case of **Joao Felicio Rodrigues and Another Vs. Jose Maximiano Rodrigues and Another**, 2013 BCI 720 and that of the Karnataka High Court in the case of **Sri. Ryaz Ahmed Jani Vs. Lalith Kumar Chopra Builders**, ILR 2007 KAR 2489.

13. In my considered view, the submission cannot be accepted. There is a clear interdict under Order VIII, Rule 6 of CPC that any counter claim can be lodged in respect of a cause of action, which may accrue either before or after the filing of the suit, however, not after the delivery of the defence or the expiry of time for delivery of defence. Merely because a counter claim for all practical purposes, is treated as a plaint, it cannot whittle down the requirement of Order VIII, Rule 6-A of CPC. The authorities cited on behalf of the petitioners do not support the contention as raised on behalf of the petitioners. On the contrary, paragraph-11 of the judgment in the case of **Bollepanda P. Poonacha** (supra), would clearly show that a counter claim may be filed in respect of any right or claim, the cause of action therefore, however, must accrue either before or after filing the suit, but before the defendant has raised his defence.

For these reasons, no case for interference in the impugned order is made out. The petition is without any merit and is accordingly dismissed with no order as to costs.

C.V. BHADANG, J.

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