

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 545 OF 2017**

1. Roberto Gonsalves
Major of age, married
2. Tito Gonsalves
Major of age, married,
3. Mary Lourdes Gonsalves,
wife of Mr. Tito Gonsalves
4. Ornelas Gonsalves
Represented through his
Constituted Power of Attorney
Mr. Tito Gonsalves,
Petitioner No. 2 herein.

All r/o vhorche bhat
Caranzalem.

.... Petitioners

Versus

1. Jose Olympia Martins,
c/o 'O' Cozineiro,
Near Football Ground,
Caranzalem-Goa.

.... Respondent

Mr. Chaitanya P. Padgaonkar, Advocate for the petitioners.
Mr. Rohit Bras De Sa, Advocate for the Respondent.

Coram :- C. V. BHADANG, J
Date : 06th November, 2017.

ORDER:

Heard Shri Padgaonkar, learned Counsel for the Petitioners and
Shri Rohit Bras De Sa, learned Counsel for the Respondent.

2. The challenge in this petition is to the Order dated 15.03.2017 by
which the learned Trial Court has allowed application at Exhibit-36 filed

by the Respondent/Plaintiff for amendment of plaint.

3. The Respondent has filed a suit for declaration of access by way of easement. The suit was filed somewhere in the year 2007. Application Exhibit-36 for amendment of the plaint was filed a year thereafter in 2008. Significantly, that application was decided by the impugned order in the year 2017. It is not disputed that the amendment sought was at a pre-trial stage and thus the proviso to Order VI Rule 17 of CPC is not attracted in this case. By the amendment the Respondent no. 1 has incorporated a challenge to the Outline Development Plan approved by the Respondent no. 3(Original Defendant no. 3).

4. The only contention raised on behalf of the Petitioner is that the proposed amendment is not competent in view of Section 38 of the Goa Daman & Diu Town And Country Planning Act, 1974. In other words, it is submitted that under Section 38 of the said Act any person aggrieved by the provisions contained in the Development Plan has a remedy of filing an appeal before the District Court questioning the legality of the Development Plan. It is submitted that the Civil Court would lack jurisdiction to examine the challenge to the validity of the Development Plan and thus the proposed amendment was incompetent.

3. On the contrary, it is submitted by Shri De Sa, the learned Counsel for the Respondent no. 1 that the ground based on Section 38 of the Act

was never raised before the Trial Court. It is submitted that the Petitioner even did not file a reply opposing the application for amendment and as such the Trial Court had no occasion to look into the ground based on section 38 of the Act. Secondly, it is submitted that the jurisdiction of the Civil Court cannot be said to be barred altogether as in a given case where the statutory authority has not followed the requisite procedure in finalising the Development Plan, the Civil Court can look into the validity of the same. In this regard, reliance is placed in the decision of the Supreme Court in the case of ***Dhulabhai, etc. v/s. State of Madhya Pradesh and Another; AIR (1969) SC 78***, more particularly, para 35 thereof.

4. I have carefully considered the rival contentions and the submissions made and I do not find that any case for interference is made out.

5. The record discloses that the Petitioners had not even filed the reply opposing the application for amendment. Perusal of the impugned order shows that even at the hearing of the application apart from the Respondent no. 1 the only other party which was present was the original defendant no. 2, i.e. City Corporation of Panaji. It can thus be seen that the ground based on Section 38 of the Act was not raised before the Trial Court and thus the Trial Court had no occasion to examine the same. Be that as it may, the amendment is sought at pre-

trial stage and the Petitioners would get an opportunity to effect consequential amendment in the written statement raising all such contentions which may be available including the one based on Section 38 of the Act. The Trial Court can then examine the question about the jurisdiction of the Civil Court at the hearing of the suit.

6. In the case of **Dhulabai**, (supra) the Apex Court has, inter alia, held that where the statute gives a finality to the orders of the special Tribunals, the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. It has further been held that the said provision does not exclude such cases where the provisions of the Act have not been complied with or the statutory authority has not acted in conformity with the judicial procedure. Be that as it may, I would hasten to add that this Court has not examined the question whether the Civil Court can go into the validity of the Development Plan, which is for the Trial Court to examine at the trial. Subject to this, no case for interference is made out. The Petition is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J

msr.