

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 953 OF 2016

MRS. FATIMA CONCEICAO TONY
COLACO E FERNANDES, THR. HER ATT.
HOLDER AND ANR., Petitioners

Versus

MRS. URSULA RENHA RUMALDINA
SOARES AND 7 ORS., Respondents

Shri Agnelo F. Diniz, Advocate for the Petitioners.

Shri Nigel Costa Frias, Advocate for Respondent Nos.1 and 2.

CORAM:- C. V. BHADANG, J.

RESERVED ON:- 5th JANUARY, 2017

PRONOUNCED ON:- 6th JANUARY, 2017

ORDER:

The petitioners, who are the original defendant nos.1 and 2 in Civil Suit No.42/2012, before the learned Adhoc District Judge at South Goa, Margao, are challenging the order dated 28.07.2016 (below Exhibit-92). By the impugned order, the learned Trial Court has allowed the application (Exhibit-92) filed by respondent nos.1 and 2 (original plaintiffs), for amendment of the plaint.

2. For the sake of convenience, the parties are referred to in their original capacity as plaintiffs and defendants.

3. The brief facts necessary for the disposal of the petition may be stated thus:

The plaintiffs filed the aforesaid suit for injunction, restraining the defendant nos.1, 2 and 3 or anybody on their behalf from carrying out any construction in the property bearing survey no.68/8 of village Navelim, Salcette, Goa. The plaintiffs are also seeking mandatory injunction, directing the defendant nos.1, 2 and 3 to demolish the illegal construction already undertaken and to restore the land to its original condition.

4. The case made out in the plaint is that there are two buildings, Building-A and Building-B, being constructed in the land survey no.68/8. It is contended that the revised construction plan was approved on 01.04.2009. It is the specific case made out that, Building-A lies in plot nos.1, 2, 5 and 6 and encroaches on the 8 metres wide road and Building-B partly lies in plot no.4 and partly in the open space reserved for

the said sub division. It is contented that the open space and the 8 metres wide road, shown in the said sub division, are partly used for the construction of the building, which is in violation of conditions of approvals of Town and Country Planning Department and Village Panchayat of Navelim. As per the bye-laws, the open space can only be used for recreational purposes, such as playground and parks and no habitable construction, can be allowed therein. It is contended that inspection report dated 14.10.2009 with attached plan reflects the extent of encroachment in the said open space.

5. The defendant nos.1 and 2 contested the suit on various grounds, including a preliminary objection that the plaintiffs have no locus standi to file the suit, since they have no proprietary interest in the property. It appears that the plaintiffs led their evidence including the evidence of PW-3 Neelesh Laad, who is a Civil Engineer and has produced a report and a plan at Exhibits 77 and 78. After the plaintiffs closed their evidence, the defendants commenced their evidence and at this stage, the plaintiffs filed an application (Exhibit-92) for amendment of the plaint.

6. It is contended on behalf of the plaintiffs that defendant no.1 has carried out construction in the disputed land, surveyed under no.68/8, subsequent to the filing of the suit. It is contended that the application for amendment could not be filed earlier, before commencement of the trial, as the plaintiffs were required to verify facts, relating to the construction, obtain documents from the office of Assistant Engineer, Fatorda, Margao namely, the survey plan with set back line and proposed bypass road etc. Thereafter the plaintiffs again got the said site inspected by the Civil Engineer, Mr. Neelesh Laad, who has prepared the report dated 06.01.2016. It is contended that the proposed amendment will not change the nature of the suit.

7. The application was opposed on behalf of the contesting defendant nos.1 and 2. It was contended that the application is misconceived and mischievous and the plaintiffs have not pleaded due diligence and the amendment will be hit by the proviso to Order VI, Rule 17 of CPC. It was contended that the proposed amendment amounts to withdrawal of admission made by the plaintiffs and changes the nature of the suit and seeks to make out a new cause of action, which is not

permissible. It was contended that the amendment, if allowed, would cause prejudice to the defendants, as it changes the nature of the suit.

8. The learned Trial Court by the impugned order has allowed the application, which brings the petitioners to this Court.

9. I have heard Shri Diniz, the learned Counsel for the petitioners and Shri Frias, the learned Counsel appearing for the contesting respondent nos.1 and 2. With the assistance of the learned Counsel for the parties, I have perused the copy of the plan, the application for amendment and the impugned order passed.

10. On behalf of the petitioners, two contentions are raised, firstly, it is contended that the plaintiffs have not shown or established due diligence, as the application for amendment was filed, after the commencement of the trial and as such, the amendment would be hit by proviso to Order VI, Rule 17 of CPC. Secondly, it is contended that the proposed amendment changes the nature of the suit and seeks to introduce a new cause of

action. The learned Counsel for the petitioners was at pains to point out that, when the suit was originally filed, the plaintiffs claimed that the construction is illegal, on account of it being carried out on reserved open space and 8 metres wide road, which are part of the sanctioned layout area/sub division. It is submitted that now, a case is tried to be introduced by claiming that the construction is illegal, on account of the construction of Building-A being carried out in the road widening area and the set back area. It is submitted that the plaintiffs are now trying to introduce a case that the construction is illegal, having regard to the essential set back area to be kept from the National Highway and the proposed bypass road. It is submitted that this was never the case made out in the plaint. The learned Counsel submits that the plaintiffs cannot rely on the fresh report submitted by Mr. Neelesh Laad, when the said witness has already been examined on behalf of the plaintiffs and had given certain admissions in his cross examination in favour of the defendants.

On behalf of the petitioners, reliance is placed on the decision of this Court in the case of **Sunita Devendra Deshprabhu & Another Vs. Sitadevi Deshprabhu & Others, 2016(6) Bom.C.R. 567** and **Chandrashekhar Pandurang**

Tumsare Vs. Dr. Balkrishna Shivkaran Changani Sharma & Others, 2016(4) Mh.L.J. He submits that the learned Trial Court was in error in allowing the amendment.

11. On the contrary, it is submitted by Shri Frias, the learned Counsel for the respondent nos.1 and 2 that the proposed amendment is based on a subsequent event, as the construction is undertaken after filing of the suit. It is submitted that the plaintiffs have made out a case that they were required to obtain documents from the office of the Assistant Engineer, Fatorda, Margao and a fresh report from the Civil Engineer, Mr. Neelesh Laad, who had given his report on 06.01.2016. It is submitted that shortly thereafter, the plaintiffs filed the application for amendment on 15.01.2016 and as such, plaintiffs have demonstrated due diligence. It is submitted that the material controversy in the suit is about illegal construction of Building-A and Building-B in land survey no. 68/8 and as such, the proposed amendment cannot change the nature of the suit or the cause of action. The learned Counsel has pointed out that the plaintiffs are also challenging the No Objection Certificate (NOC) dated 01.04.2009 issued by the Sarpanch, Village Panchayat of Navelim (defendant no.4) and the

construction license issued on 02.05.2009.

On behalf of the plaintiffs, reliance is placed on the decision of this Court in the case of **Shri Rajaram Naik Vs. The State of Goa & Others, 2016(1) ALL MR 5** and the decision of the Supreme Court in the case of **Abdul Rehman & Another Vs. Mohd. Ruldu & Others, (2012) 11 SCC 341**. He submits that the Trial Court has rightly allowed the application and the impugned order does not call for any interference.

12. I have carefully considered the rival circumstances and the submissions made. A perusal of the plaint would make it clear that the suit is filed alleging illegal construction namely, of Building-A and Building-B in land survey no.68/8 of village Navelim, on the ground that the construction is encroaching on the open space and the 8 metres wide road, which are part of layout/sub division. The plaintiffs are also challenging the construction permission dated 01.04.2009. When the suit was filed, out of the two buildings, the defendants had started construction of Building-B, while the construction of Building-A was yet to start. The plaintiffs came with a case that insofar as Building-A is concerned, the defendants had stacked

construction material and were proposing to start the construction of Building-A. It is true that primarily, the construction is alleged to be illegal on account of the same encroaching in the open space and the 8 metres wide road. It is also a matter of record that Mr. Neelesh Laad had earlier given an inspection report dated 14.10.2009 and he was examined as PW-3 and thereafter, when the witness for the defendants (DW-1) was being examined, the application for amendment came to be made.

13. In the application for amendment, the plaintiffs claim that there is certain construction, which is being carried out subsequent to the filing of the suit, which construction is still in progress. The plaintiffs also claim that the application for amendment could not be filed prior to commencement of the trial as they were required to obtain certain documents, such as, survey plan with particulars of set back lines and the proposed bypass road and thereafter, got the site inspected from Mr. Neelesh Laad, who gave his report on 06.01.2016 and the application was filed on 15.01.2016. The question in such case is whether, the proposed amendment would be hit by proviso to Order VI, Rule 17 of CPC and whether, it would be

impermissible, on the ground that it changes the nature of the suit and/or seeks to introduce a new case. The learned Trial Court has found in para 7 of the impugned order that the construction being subsequent to filing of the suit and was still going on, the plaintiffs could not have brought the amendment prior to the commencement of the trial, inspite of due diligence. In this view of the matter, the learned Trial Court has held that the plaintiffs have shown that inspite of due diligence, the plaintiffs could not have raised the matter before the commencement of the trial.

14. At this stage, it would be worthwhile to reproduce the amendment sought by the plaintiffs as under:

"25(D): The plaintiff states that the suit property bearing survey no.68/8 and survey no.68/8 A of village Navelim was inspected by Shri Neelesh G. Laad, Civil Engineer at her request on 6/1/16 and during the inspection he noticed that the construction of building A in survey no.68/8 was in progress partly in the road widening area admeasuring 187.0 square metres and partly in the set back area admeasuring 112.20 square metres, since there was no set back maintained from the road the construction of the said structure admeasuring 299.20 square metres is

illegal. Similarly the other building B which has been constructed in the suit property has been constructed partly in the road widening area and partly in the set back area admeasuring 55.25 square metres and 33.15 square metres respectively. Hence the total illegal area constructed is 88.40 square metres as far as building B is concerned.

The plaintiff states that the findings of the said engineer are based on a plan issued by the Assistant Engineer Sub Divsiion III, WD, XIV(NH), PWD, Fatorda, Margao-Goa under the Right to Information Act to the plaintiff on 14.09.2015 wherein he has shown the centre line with regard to the National Highway 17, centre line with regard to the proposed bypass road and set back lines in respect of survey no.68/8 of village Navelim. The surveyor Shri Laad has concluded that there is a misrepresentation of facts and furnishing of wrong information by the defendant no.1 at the time of applying for the construction license and that the construction is in violation of condition no.2 of the NOC issued by the Town and Country Planning Department, conditions of the construction license and the provisions of the Goa Land Development and Building Construction Regulations, 2010.

The centre line of the proposed bypass road and

NH-17, road widening area of NH-17, road widening line of the proposed bypass are all shown on the plan prepared by Shri Laad and annexed to his report dated 06.01.2016.

The plaintiff shall rely upon the plan issued to her by the Assistant Engineer Sub Division III, WD, XIV (NH) PWD, Fatorda, Margao-Goa under the Right to Information Act and the report dated 06.01.2016 of Shri Neelesh G. Laad."

15. It can thus be seen that according to the plaintiffs, when the Civil Engineer, Mr. Neelesh Laad inspected the site on 06.01.2016, found that the construction of Building-A was in progress, partly in the road widening area admeasuring 187.0 square metres and partly in the set back area admeasuring 112.20 square metres and thus, the construction to the extent of 299.20 square metres is illegal. Similarly, Building-B, which has been constructed partly in the road widening area and partly in the set back area, admeasuring 55.25 square metres and 33.15 square metres respectively, there is an illegal construction to the extent of 88.40 square metres. Although it would appear that the plaintiffs are now claiming that the construction is illegal on account of it being partly in the road widening area and partly in the set back area with reference to

national highway and proposed bypass road, the material challenge in the suit is to the alleged illegal construction undertaken by the defendants. Thus, in my considered view, it cannot be said that the plaintiffs have introduced a new cause of action or the amendment changes the nature of the suit. The plaintiffs are also claiming that the construction of Building-A was started, subsequent to the filing of the suit and was in progress on 06.01.2016, when the site was inspected by the Civil Engineer, Mr. Neelesh Laad. Thus, in my considered view, no exception can be taken to the finding recorded by the Trial Court that the plaintiffs have satisfied the requirement of Order VI, Rule 17 of CPC. It is trite, that at this stage, it is not necessary to go into the merits of the amended claim, which will have to be gone into at the trial. The defendants would get an opportunity to contest the same by filing additional written statement and by leading evidence, if any, on all permissible grounds including the ground of limitation. Thus, it cannot be accepted that the impugned order results into manifest injustice or prejudice to the defendants.

16. The facts in the case of **Chandrashekhar Tumsare** (supra) and **Sunita Deshprabhu** (supra), relied on behalf of

the petitioners, are clearly distinguishable. It is well settled that all such amendments, which are necessary for deciding the real controversy in issue have to be allowed, albeit, subject to the embargo placed under proviso to Order VI, Rule 17 of CPC.

17. It is well settled that the supervisory jurisdiction under Article 227 of the Constitution of India, is aimed at ensuring that the Courts and the Tribunal stay within the bounds of their authority. Thus, unless and until, it is shown that the impugned order is perverse or suffers from a jurisdictional error, resulting into manifest injustice, no interference is called for.

The petition is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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