

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.1053 OF 2016**

Jitendra Raghuraj Deshprabhu & Ors.
...Petitioners

vs.

Indian Oil Corporation Ltd.& Ors.

...Respondents

Mr.D. J. Pangam a/w Mr. Luis Fernandes for the Petitioner.

Mr.Sardessai, AGA for the Respondent Nos.2, 3 and 4.

Mr.Nigel Da Costa Frias a/w Ms. Laxmi Sawant for the Respondent No.1.

CORAM :- C. V. BHADANG, J

Reserved on : MARCH, 24 2017.

Pronounced on : APRIL, 4 2017.

(Through Video Conferencing)

ORDER :

. The Petitioners who are the original defendant Nos.1 to 3 are challenging the order dated 20/8/2016 passed by the Learned District Judge Panji in Civil Suit No.54/2009. By the impugned order Application (Exh.147) filed by the Respondent No.1(the Original Plaintiff) for amendment of plaint has been allowed.

2. The brief facts are that the first Respondent has filed the aforesaid suit for permanent and mandatory injunction directing the Petitioner to repair and restore the road surveyed under No.142/0 of village Torxem, Pernem and for an injunction restraining them from interfering with the said road. The case made out by the first Respondent is that the said kachha road is situated in between the land belonging to the Respondent No.1 and the National Highway-17 which is towards the northern side of the property of the Respondent

No.1 on which there is a retail Petrol outlet. It appears that by an order dated 31/8/2012, an application filed by the first Respondent under Order XXVI Rule 9 of the CPC for appointment of Commissioner was allowed by the Trial Court, which was challenged by the Petitioners before this Court in Writ Petition No.738/2012. That petition was disposed of by this Court on 27/2/2013. This Court found that it is for the first Respondent to first adduce evidence in support of the pleadings in the plaint and only thereafter the Commissioner would have to visit the suit property and furnish his report, else otherwise, the first Respondent may fashion his evidence in accordance with the said report. It appears that after the evidence of the Petitioners, site inspection came to be conducted by the Field Surveyor(Commissioner) from the office of Directorate of Settlement & Land Records, Panaji Goa on 3/3/2016 in the presence of both the parties. The Commissioner gave his report on 10/3/2016, which reads thus:

- 1. Petro pump area falls in Survey No.142/1 of Torxem village of Pernem Taluka.*
- 2. There exist an excavated trench as shown on plan falls in Survey No.142/1 of Torxem Village of Pernem Taluka.*
- 3. Position of existing tar road of National Highway is as shown on plan.*

The Commissioner's report was accompanied by a plan which showed the trench in green colour.

3. The first Respondent filed an application for amendment of the plaint on 21/7/2016 seeking addition of paragraph 21-A and prayer clauses b(1) and b(2) as set out in the application. In short, the first Respondent claimed that the trench dug by the Petitioners, which obstructs the access to the retail outlet, is within the property of the

first Respondent surveyed under No.142/o. The first Respondent further claimed that on 2/6/2016 the first Respondent filled the said trench, however, the Petitioners had trespassed into the property on 18/6/2016 and dig a fresh trench in the same place using an excavator, which matter was reported to police on 20/6/2016. The first Respondent, therefore sought a direction to the Petitioner to fill the said trench and restore the property to its original condition.

4. According to the first Respondent the amendment is necessitated on account of subsequent development in particular, the Commissioner's report.

5. The Petitioners filed a reply and opposed the application for amendment. It was contended that the report of the Commissioner makes a reference to the property survey under No.142/1 and not the property survey under No.142/o as claimed by the first Respondent. It was contended that the first Respondent has not objected to the Commissioner's report and as such has accepted the same. It was contended that the first Respondent can not seek amendment of the plaint incorporating certain averments relating to the property surveyed under No.142/o when the survey report makes a reference to the property survey No.142/1. It was next contended that the proposed amendment changes the nature of the suit, inasmuch as, the case originally made out in the plaint was that the said kacha road on which the Petitioners has allegedly dug a trench is between the National Highway-17 and the property belonging to the first Respondent and the proposed amendment now claims that the trench is dug on the property which is part of the property owned by the first Respondent.

6. The learned Trial Court by the impugned order has

allowed the Application. Hence, this Petition.

7. I have heard Mr.D. J. Pangam, learned counsel for the Petitioners, Mr.Niqel Da Costa Frias, learned counsel for the Respondent No.1 and Mr. Sardessai, learned AGA for the Respondent Nos.2, 3 and 4.

8. It is submitted by the learned counsel for the Petitioners that the Commissioner's report makes a reference to land surveyed under No.142/1 and not the land surveyed under No.142/o. Thus, the proposed amendment on the basis of the report of the Commissioner cannot be said to be bonafide. It is submitted that the proposed amendment also completely challenges the nature of the suit claim.

9. On the contrary, it is submitted by the learned counsel for the first Respondent that the proposed amendment is based on events subsequent to the commencement of trial and as such has rightly been allowed inorder to avoid multiplicity of proceedings which is the object of Order 2 Rule 2 of CPC. Insofar, as the mention of the land surveyed under No.142/1 in the report of the Commissioner is concerned, it is submitted that it is a mere typographical error which has crept in and which is corrected.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out. The learned District Judge has noted in paragraph 9 of the impugned order that there was a typographical error which has crept in the Commissioner's Report which is corrected and the property in dispute is surveyed under No.142/o and not surveyed under 142/1. Thus, the said contention raised on behalf of the

Petitioners cannot be accepted.

11. Insofar as the contention that the proposed amendment changes the nature of the suit is concerned, the learned District Judge has noticed that the dispute is with regard to the property surveyed under No.142/O. There are two developments which had occurred subsequent to the commencement of trial, firstly according to the first Respondent, the Petitioner No.1 dug the kachha road again on 18/6/2016 which matter had been reported to the police. Prior to that there is inspection carried out by the Commissioner on 3/3/2016, in which the Commissioner had come to the conclusion that the Petrol pump and the existing excavated trench as shown on the plan annexed to the report falls in land surveyed under No.142/1 (which has been corrected as Survey No.142/O. If that be so, the proposed amendment is clearly based on events subsequent to the commencement of the trial which the Court would normally allow to be incorporated in the plaint. It is now well settled that all such amendments which are necessary for deciding the real controversy in the matter have to be allowed. Apparently, the rigour of the proviso to Order VI Rule 17 CPC would not apply in this case. The material controversy is about digging of a trench on the access to the Petrol Retail outlet from National Highway-17. It is obvious that the merits of the amendment cannot be gone into at this stage and it would be for the first Respondent to establish its claim at the trial.

12. The contentions on behalf of the Petitioners that the proposed amendment materially changes the suit claim to my mind cannot be accepted. I have carefully gone through the impugned order passed by the learned District Judge and I see no reason to interfere with the same. The Petition is without any merits and is dismissed

with no order as to costs.

(C. V. BHADANG, J.)