

**IN THE HIGH COURT OF BOMBAY AT GOA****WRIT PETITION NO. 113 OF 2019**

Ajay Mendes, major of age, Indian  
National, Plot No. 215, Nagally,  
Taleigao, Ilhas, Goa.

.... Petitioner

Versus

Maria Meera Menezes D'Souza, major of  
age, Indian National, w/o late Mr.  
Manuel Maria Rufino D'Souza, r/o no. 3,  
Dr. Peter Dias Road, Bandra, Mumbai,  
Maharashtra.

Through duly constituted attorney  
holder, Mr. Luis Ian Dias, s/o Eugemiano  
Dias, R/o H. No. 190, Opp. Goa Reserve  
Police, Altinho, Panaji, Goa.

.... Respondent

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Mr. Kaif Noorani, Advocate for the Petitioner.

Mr. M.B. Costa, Senior Advocate with Ms. Karishma Betquecar,  
Advocate for the Respondent.

**CORAM:- C. V. BHADANG, J.**

**RESERVED ON: 17<sup>th</sup> JUNE, 2019**

**PRONOUNCED ON: 24<sup>th</sup> JUNE, 2019**

**ORDER:**

The challenge in this petition is to the order dated 14.01.2019 (below Exhibit-41), passed by the learned Trial Court in Regular Civil Suit No. 59/2012/C. By the impugned order, application Exhibit-41, filed by the respondent/plaintiff, for amendment of plaint has been allowed.

2. The respondent has filed the aforesaid suit against the petitioner, for declaration, mandatory and prohibitory

injunction. The subject matter of dispute is a plot bearing no. 216, admeasuring 500 square metres, forming part of survey no. 279/1 at Taleigao, within the limits of Taleigao Village Panchayat. The respondent is the owner of the said plot no. 216. The case made out in the plaint is that there is a culvert/nallah towards the northern boundary of the said plot and beyond that there is plot bearing no. 215, belonging to the petitioner. The petitioner is having a house situated in plot no. 215. The material case made out by the respondent is that on 13.04.2012, when the respondent visited the suit plot, he found that the petitioner had illegally encroached upon the suit plot to the extent of two metres, by constructing a compound wall. The matter was reported to the Village Panchayat and then to the police and thereafter, the suit came to be filed for declaration and mandatory injunction, directing the petitioner to remove the compound wall and to restore the suit plot to its original condition. The respondent also sought permanent injunction, thereby restraining the petitioner or anybody on his behalf from constructing and/or interfering with the possession of the suit plot.

3. The suit was resisted by the petitioner. It was denied that there was any encroachment made or that the construction of the compound wall was illegal.

4. The learned Trial Court framed as many as eight issues on 14.06.2018 and the suit was set down for evidence. It is at this stage that the respondent filed an application (Exhibit-41) on 28.08.2018, for amendment of the plaint. The respondent *inter alia* sought for introduction of paras 7(a) to 7(g) as under:

7(a) *During the course of the present suit the defendant moved an application on 2/5/2012 for permission to complete some works and along with the said application the defendant submitted a plan titled as "addendum" showing the said nullah/drain as per the defendant and the location of the new compound wall and also the location of 3 rows of PVC pipes of each 8 inches in diameter. The said plan forms part of the record of the suit.*

7(b) *The said plan produced by the defendant shows that the old compound wall was on the boundary of plot no. 215, that the new compound wall is located allegedly one meter inside the plaintiff's plot no. 216 and it shows the 3 PVC pipes each of 8 inches in diameter in the said nullah/drain which nullah/drain separates plot no. 215 and plot no. 216 and is about 1.5 metres in width.*

7(c) *During the pendency of the suit the defendant has further constructed a wall from the south western corner next to the nullah/drain, across the nullah and touched it to the new*

*compound wall built on the plaintiff's plot no. 216 and he has built another parallel wall from the south-west corner of plot no. 215 across the nullah to the new alleged compound wall illegally built by the defendant in the plaintiff's plot no. 216. Each of the said 2 walls built across the said nullah have 3 openings of 8 inches in diameter in line with the PVC pipes and thereby the width of about 1.5 mtrs. of the nullah is reduced to a total of 24 inches (3 x 8 inches) or about 50 cms.*

- 7(d) Thereafter the defendant has demolished the old compound wall which was on the boundary of his plot no. 215 after which was the nullah/drain and thereby illegally extended the area in his occupation on to the nullah/drain and even beyond into the plaintiff's plot.*
- 7(e) As a result of effectively narrowing the said width of nullah/drain to about 50 cms or 24 inches, the normal quantum of flow of the monsoon waters came to be partially blocked and as such, the major part of the monsoon waters came to be diverted and continues to be diverted by the defendant towards and into the plaintiff's plot, by the side of the new compound wall built by the defendant encroaching about 2 mtrs. of the plaintiff's plot bearing no. 216.*
- 7(f) This is how the plaintiff's plot is being adversely affected as mentioned in para 10 of the plaint apart from the said encroachment of*

2 mtrs.

7(g) *As the encroachment of 2 mtrs. wide strip of the plaintiff's property along the nullah has been enclosed by the defendant, the plaintiff is entitled to recover the possession of the said strip of 2 mtrs. width.*

5. The respondent sought addition of the following portion in para 13:

*"Ever since the construction of the said 2 parallel walls built by the defendant across the nullah/drain as mentioned above, most of the monsoon waters during every monsoon get diverted and flow into the plaintiff's plot bearing no. 216 just beyond the illegal wall built by the defendant, encroaching into the plaintiff's plot and thus every monsoon the plaintiff's plot gets eroded with the said flow of the monsoon waters and the cause of action is continuous."*

6. The respondent also sought amendment of the prayer clause by adding the words "the said adjoining nullah" after the words "suit plot" and a new prayer clause (f)(i), for handing over of the possession of two metres wide strip, which has been encroached. The respondent also sought correction of a typographical error in para 7, thereby replacing the word "seek" by the word "sell" which is an inadvertent typographical mistake.

7. The application was opposed by the petitioner. It was contended that the respondent has not complied with the requirements of proviso to Order VI Rule 17 of CPC and has not shown as to why the amendment could not have been brought prior to the commencement of trial. It was contended that the trial commenced, when the issues were framed.

8. The learned Trial Court by the impugned order found that the amendment is material for proper adjudication of the matter and the amendment of the prayer clause is also necessary to avoid multiplicity of the proceedings and in that view of the matter, has granted the amendment.

9. I have heard Mr. Noorani, the learned Counsel for the petitioner and Mr. Costa, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record.

10. Mr. Noorani, the learned Counsel for the petitioner has strenuously urged that the application for amendment was not competent, after the commencement of the trial and in the absence of the respondent satisfying the requirement of the proviso to Order VI Rule 17 of CPC. Reliance is placed on the

decision of the Supreme Court in the case of **Kailash Vs. Nanhku & Others (2005) 4 SCC 480** and **Ajendraprasadji N. Pandey & Another Vs. Swami Keshavprakeshdasji N. & Others (2006) 12 SCC 1**, in order to submit that the trial commences when the issues are framed. It is submitted that the application for amendment is totally silent and there is no whisper about as to why the respondent could not have brought the amendment before the commencement of trial, inspite of due diligence. It is submitted that the learned Trial Court has not considered this aspect properly. It is submitted that the proposed amendment also changes the nature of the suit and the reliefs claimed, which is not permissible.

11. On the contrary, Mr. Costa, the learned Senior Counsel for the respondent has supported the impugned order. It is submitted that the first and foremost requirement is to see whether, the proposed amendment is required for deciding the real controversy in the matter and the learned Trial Court has rightly found that the amendment is so necessary. It is submitted that the amendment, which is necessary for deciding the real controversy in the matter, can be allowed, at any stage of the suit. Insofar as the requirement of the proviso to Order VI Rule 17 of CPC is concerned, it is submitted that the

respondent is yet to file the affidavit in evidence and thus, no prejudice would be caused to the petitioner, if the amendment is allowed. The learned Senior Counsel for the respondent pointed out that the matter, which is part of the proposed amendment has already been raised in the plaint and the proposed amendment is only clarificatory in nature.

12. I have carefully considered the rival circumstances and the submissions made.

13. Under Order VI Rule 17 of CPC, the Court may at “any stage of the proceedings”, allow the amendment of the pleadings, as may be necessary for the purpose of determining the real “questions in controversy between the parties”. This is the first requirement for allowing any amendment. After the introduction of the proviso to Rule 17, in the year 2002, there is an additional requirement to be satisfied by the party bringing the amendment where, the amendment is sought for after the commencement of the trial. The proviso says that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have “raised the matter” before the commencement of the trial. The question

whether, the proposed amendment is necessary for deciding the real questions in controversy between the parties and whether, the requirement of proviso to Rule 17 of CPC is satisfied or not (where the amendment is sought for after the commencement of the trial), would depend upon facts and circumstances of each case.

14. There was some debate during the course of the arguments at bar, as to when, the trial can be said to have commenced. The Supreme Court in the case of **Kailash** (supra) and **Ajendraprasadji N. Pandey** (supra) has held that the trial commences when the issues are framed. In the present case, as noticed earlier, the issues were framed on 14.06.2018 and the application (Exhibit-41) was filed on 28.08.2018, however, before the plaintiff had actually commenced or filed his evidence. The Supreme Court in the case of **Mohinder Kumar Mehra Vs. Roop Rani Mehra & Others (2018) 2 SCC 132** in para 20 of the judgment has in similar circumstances made out a distinction. It has been held that although, technically trial commenced when the date was fixed for leading evidence by the plaintiff, but, actually the amendment application was filed before the evidence was led by the plaintiff. In the case of **Mohinder Kumar Mehra** (supra) such a distinction has been

drawn after noticing its earlier decision in the case of **Vidyabai & Others Vs. Padmalatha & Another (2009) 2 SCC 409**. Be that as it may, as the issues were framed, I have to proceed on the footing that the trial has commenced. However, what is significant to note is that the proviso creates an embargo, from “raising” any matter, if such a matter is not already “raised”, before the commencement of the trial. In the given case, where the amendment is found to be only clarificatory in nature, it will have to be assumed that the material case has already been raised prior to the commencement of the trial. The question would evidently depend upon facts and circumstances of each case.

15. Coming to the present case, the material case made out by the petitioner is that the respondent has encroached by two metres in plot no. 216. Incidentally, according to the respondent, there is a nallah/drain between plot no. 215 and plot no. 216. A careful perusal of paras 7(a) to 7(g) would show that the petitioner had moved an application dated 02.05.2012, for completion of some works and that application was accompanied by a plan showing the said nallah/drain and the location of the new compound wall and also the location of the three rows of PVC pipes, 8 inches each in diameter.

16. The perusal of these paras show that the amendment is not at all in variance with the original case made out by the respondent. It only seeks to explain the nature of the encroachment, which has resulted into reducing the width of nallah from 1.5 metres to 24 inches and the claim that the flow of the rain water is partially blocked, eroding the suit plot. This is the circumstance, the respondent wants to plead to show the alleged erosion of the suit plot and the consequential damage to the suit plot. The original plaint contains a prayer for mandatory injunction, directing the petitioner to remove the compound wall and for restoration of the suit plot to its original condition and now a specific prayer clause is sought seeking possession of the said two metres wide strip of the suit plot. The rest of the amendment is due to some typographical error. On the overall consideration of the nature of the amendment sought and the case made out in the plaint, I do find that the substantial part of the amendment contains matters, which are already raised before the commencement of the trial. The proviso cannot be read as an absolute bar on the powers to grant amendment.

17. I have carefully gone through the impugned order and I do not find that the impugned order results into any

manifest injustice, so as to require interference. The respondent will get an opportunity to meet the effect of the amendment. In that view of the matter, I decline to entertain the petition, which is accordingly dismissed, with no order as to costs.

18. At this stage, the learned Counsel for the petitioner prays for continuation of stay.

19. The learned Counsel for the respondent has opposed the prayer.

20. Considering the fact that the interim relief was operating from 28.01.2019, the interim relief shall continue to operate for a period of four weeks.

**C. V. BHADANG, J.**

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