

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 389 OF 2019**

1. Shri Mario Piedade Mores,
Major, aged 57 years,
2. Smt. Jennifer E. P. Moraes,
Major, aged 45 years
3. Smt. Myra Moraes e Coutinho,
Major, aged 56 years
4. Shri Corwin Coutinho,
Major, aged 61 years
5. Mrs. Michelle Moraes,
Major, aged 52 years.
(Legal representatives of late Minguel Moraes and Brigida
Fernandes)

All residents of H. No.2348,
Benclean Waddo,
Cuncolim, Salcete-Goa,
Petitioners nos.2 -5,
Represented by their power of attorney
holder of the petitioner no.1.

..... Petitioners

V e r s u s

1. Shri Rama Shanu Naik Dessai,
Son of Shanu Rama Naik Dessai,
Aged 84 years, Businessman,
Resident of H. No.1582,
Fool Waddo, Cuncolim,
Salcete-Goa.
2. Director Goa State Urban Development Agency
Shrama Shakti Bahavan,
Panaji-Goa

3. Government of Goa through
Chief Secretary,
Porvorim-Goa.
4. M/s. Jayashree Mallikarjun Constructions
Fatorda,
Margao-Goa.
5. The Chief Officer Cuncolim Municipal
Cuncolim, Salcete-Goa.
6. Chari and Chitari Crematorium Committee Demani
Cuncolim, Salcete-Goa Respondents

Ms. A. A. Agni, Senior Counsel with Adv. Ms. Jay Sawaikar for the Petitioners.

Mr. N. Sardesai, Senior Advocate with Adv. G. Panandikar for the Respondent no.1.

Mr. Deep Shirodkar, Additional Government Advocate for the Respondent no2. 2 and3.

Shri P. Phadte, Advocate for the Respondent no.5.

CORAM: C. V. BHADANG, J.

Reserved on: 02/08/2019

Pronounced on: 09/08/2019

J U D G M E N T:

Rule, made returnable forthwith. The counsel for the respective respondents waive service. Heard finally by consent of parties

2. The challenge in this petition is to the order dated 28/2/2019 (below Exhibit 32) passed by the learned Principal District Judge, South Goa at Margao in Civil Suit no.15/2018. By the impugned order the application

(Exhibit 32) filed by the petitioners for their impleadment has been rejected.

3. The brief facts are that, the first respondent has filed the aforesaid suit against the respondent nos.2 to 6 for permanent and mandatory injunction. The first respondent is seeking an injunction against the respondent nos.2 to 4 from interfering in the suit property or changing the nature of the same by effecting any construction and for a mandatory injunction directing these respondents to restore the suit property to its original condition. The first respondent is also seeking an injunction against the respondent nos.5 and 6 from cremating or permitting to cremate dead bodies at the place of the proposed construction in the suit property.

4. The subject matter of suit happens to be land survey no.435/1 admeasuring about 1,89,865 sq.mtrs of village Cuncolim, Salcete Goa, which is more particularly described in para nos.1 to 6 of the plaint. According to the first respondent he is the owner in possession of the suit property in which there is an attempt to cremate dead bodies of persons belonging to a particular community.

5. The petitioners filed an application (Exhibit 32) in the suit under Order 1 Rule 10 of Code of Civil Procedure (C.P.C., for short) on the ground

that the petitioners/intervenors are the owners of the land survey no.435/1. It is contended that the ownership of the petitioners has been decided, by the Inspector of Survey and Land Records in a case bearing no.725/CUM/81 filed by the first respondent. It is also contended that the learned District Judge has decreed the suit filed by the petitioners upholding the ownership of the petitioners over the suit property and they have been declared as owners in possession of land survey no.435/1 based on the title document no.11223 of Old series of village Cuncolim, upon considering the boundaries, nature of the property, name of the land, registration number and name of the registered owner. Reliance is also placed on a reference under section 30 of the Land Acquisition Act in respect of acquisition of a portion of the suit property by the Government for construction of Selaullim Irrigation Canal, in which the first respondent was party no.5. In short, it is contended that the ownership and possession of the petitioners of the suit property has been established in the aforesaid cases and therefore their intervention and presence in the suit is necessary. It is also contended that the first respondent is attempting to dispossess the petitioners, in respect of which a complaint is filed and a direction has been issued by the learned Judicial Magistrate on 22/1/2016 to the Cuncolim Police Station to register a F.I.R against the first respondent and four others under sections 143, 147, 148, 447, 427 and 506 r/w section 34 of I.P.C. The petitioners claim that a portion of the land where

the respondent no.6 (the original defendant no.5 has a crematorium has been acquired by them from the petitioners under an agreement dated 27/4/2013.

6. The application was opposed on behalf of the first respondent on the ground that the petitioners, are neither necessary nor proper parties to the suit.

7. The learned trial court by the impugned order has rejected the application inter alia on the ground that the petitioners are neither necessary nor proper parties and the petitioners cannot seek impleadment thereby enlarging the scope of the suit. The learned trial court has held that merely because there are certain proceedings pending between the petitioners and the first respondent and some other matters are already disposed, will not give right to the petitioners to implead themselves, without the consent of the first respondent who is the dominus litis in the matter.

8. I have heard Mrs. Agni, the learned Senior Counsel for the petitioners and Mr. Sardesai, the learned Senior Counsel for the contesting respondent. I have also heard the learned Additional Government Advocate for the respondent nos.2 and 3. Perused record.

9. It is submitted by Mrs. Agni, the learned Senior Counsel for the petitioners that the petitioners are necessary parties to the suit, in as much as, the ownership and possession of the petitioners over the suit property has been established in the previous proceedings as referred to in the application for impleadment. It is submitted that the learned trial court has not referred to any of these proceedings and thus the finding recorded by the trial court that the petitioners are neither necessary nor proper parties is clearly illegal and not borne out of the record. The learned Senior Counsel submitted that in any event the petitioners are proper parties to the suit and the impleadment ought to have been allowed. It is submitted that the impleadment which is rejected on the ground that the first respondent is dominus litus is improper as the powers of the Court under Order 1 Rule 10 of C.P.C override the privilege of the plaintiff being a dominus litus.

Reliance on behalf of the petitioners is placed on the decision of the Supreme Court in the case of (i) **Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Private Ltd. And others (2010) 7 SCC 417** and (ii) **Sumtibai and others Vs. Paras Fiance Co. Regd. Partnership Firm Beawer (Raj) Through Mankanwar (Smt.) W/o Parasmal Chordia (dead) and others (2007) 10 SCC 82.**

10. On the contrary, Mr. Sardessai, the learned Senior Counsel for the first

respondent has supported the impugned order. It is submitted that the trial court has rightly come to the conclusion that the petitioners are neither necessary nor proper parties to the suit and thus their impleadment is not necessary, particularly in view of the fact, that the first respondent being the plaintiff is dominus litus and he cannot be forced to file any litigation against a party who is not a necessary nor a proper party. It is submitted that the suit filed by the first respondent is not for declaration of any title and is simplicitor for injunction, both permanent and mandatory, restraining the respondent from using a portion of the suit property as a crematorium and having regard to the nature of the suit claim, the impleadment is not necessary. The learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of **Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and others (1992) 2 SCC 524**, in order to submit that there is a distinction between a person being a necessary party and he or she being a necessary witness. It is submitted that if at all according to the petitioners, the respondent no.6 is claiming certain right through the petitioners, at the highest, the petitioners would become necessary witnesses and not necessary parties. The learned Senior Counsel submitted that the petitioners are neither necessary nor proper parties to the suit. Reliance is then placed on the decision of the Supreme Court in the case of **Shamshad Ahmad and others Vs. Tilak Raj Bajaj (deceased) through**

LRs and others (2008) 9 SCC 1 and others , in order to submit that the discretion in this regard having been properly exercised by the trial court, the order is not amenable to interference in the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. The learned Senior Counsel has also referred to the observations of the Supreme Court in the case of **Mumbai International Airport** in para 25 of the judgment, in order to submit that no person has a right to insist that he should be impleaded as a party merely because he is a proper party.

11. I have given my anxious consideration to the rival circumstances and the submissions made.

12. Undoubtedly the plaintiff being the dominus litus is entitled to decide as to who should be arrayed as defendants in the suit and he cannot be compelled to prosecute the suit against a party who is neither necessary nor a proper party as held by the learned District Judge. However, the question is whether a party who seeks impleadment is indeed a necessary or a proper party. This would obviously depend upon facts and circumstances of each case. The privilege of the plaintiff as a dominus litus is subject to the overriding powers of the court to add or strike off parties. Albeit such a power can only be exercised when the Court finds that a particular party is a

necessary or a proper party. As held by the Hon'ble Supreme Court in the case of **Mumbai International Airport Ltd. (supra)** that the discretion exercised by the Court being a judicial discretion, has to be exercised according to reason and fairplay. The Court is required to weigh the facts and circumstances carefully in order to find out whether a party seeking impleadment is necessary or a proper party and then to decide the issue of impleadment.

13. Coming to the present case, it is true that the suit filed by the first respondent is not for declaration of title. However, the first respondent is claiming to be the owner in possession of the suit property. The case made out by the first respondent is that his ancestors had permitted Hindu families to burn their bodies in the part of the survey no.435/1. The case made out by the respondent no.6 (the defendant no.5) is that an area admeasuring 11200 sq.mts. from out of the suit property which was belonging to late Mr. Frank Moraes bearing land registration no.11223 and the ancestors of late Frank Moraes had permitted the said respondent to use land admeasuring 11200 sq.mtrs as a crematorium. The said case made out by the respondent no.6 has to be considered in the context of the case made out by the petitioners in their application for impleadment in which it is claimed that under an agreement dated 27/4/2013 the petitioner had granted an area admeasuring 11200

sq.mtrs to the respondent no.6 “in pursuance of a long standing possession of defendant no.5 over the crematorium site”. Prima facie it can thus be seen that the defendant no.6 is also claiming the site which is used as a crematorium through the petitioners. Thus it cannot be accepted that the petitioner would not even be proper parties to the suit. It is now well settled that a proper party is a party whose presence would enable the court to completely effectively and adequately adjudicate upon all matters in the suit though he need not be a person in favour of or against whom the decree is to be made. Thus in my considered view the impleadment of the petitioners ought to have been allowed.

14. The principles apart, the decision in the case of **Ramesh Kundanmal (supra)** turned on its own facts. That was a case where the appellant who was in possession of a service station under a dealership agreement with the respondent no.2 (Hindustan Petrol Corporation) as a lessee, had filed a suit against the respondent no.1 Municipal Corporation of Greater Bombay challenging a notice directing demolition of two structures erected on the terrace of the premises, on the ground that these were unauthorized structures. The second respondent HPCL sought intervention in the suit in order to support the notice issued by the first respondent for demolition. The Hon'ble Supreme Court found that the demolition notice was not relating to

the structure which was subject matter of lease but in relation to two separate structures erected by the appellant unauthorizedly and the second respondent HPCL had no direct interest in the litigation and therefore the impleadment was refused.

15. I have already noted that the discretion which the Court is expected to exercise while considering a plea for impleadment is a judicial discretion and has to be exercised in the facts and circumstances of the case. Having regard to the fact that the respondent no.6 is claiming the right as to the crematorium through the petitioner, the petitioner would be a proper party to the suit.

16. Mrs. Agni, the learned Senior Counsel for the petitioners submitted that the petitioners are not desirous of filing any counter claim seeking declaration of title or otherwise so as to enlarge the scope of the suit. Thus the mere addition of the petitioners as party defendants is not likely to enlarge the scope of the suit and in that view of the matter the impleadment in my considered view has to be allowed. In the result the petition is allowed. The impugned order is hereby set aside. The application (Exhibit 32) filed by the petitioners is hereby allowed. The respondents shall carry out necessary amendment to the cause title, within four weeks from today. Rule is made

absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/