

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 830 OF 2018**

John Vincent Fernandes & Another Petitioners

Versus

Victor Loudoricus D'Souza (since
deceased) & 4 others Respondents

Mr. Nigel Da Costa Frias, Advocate for the Petitioners.

Mr. Guru Shirodkar, Advocate for Respondent Nos. 1(a) to 1(d),
2 and 5.

Mr. R.G. Ramani, Advocate for Respondent Nos. 3 and 4.

CORAM : C.V. BHADANG, J.

DATE : 24th September, 2019

ORAL ORDER:

The challenge in this Petition is to the order dated 23.02.2018, passed by the learned Senior Civil Judge at Mapusa, in Special Civil Suit No. 96/2015/B, by which, an application (Exhibit D-28), filed by the petitioners/plaintiffs, for amendment of the plaint and for addition of parties, has been dismissed.

2. The brief facts are that the petitioners have filed the aforesaid suit against the respondents for declaration that the petitioners are the owners in possession of the suit property, admeasuring 667 square metres, forming part of the land surveyed under no. 43/16 of Village Pilerne, Bardez and for

declaration of the sale deeds dated 21.05.2008 and 05.01.2015, as null and void and for other consequential reliefs, including recovery of possession.

3. The case made out in the plaint is that the original defendant nos. 1 and 2 have executed a sale deed in respect of land including the suit property in favour of original defendant nos. 3 and 4 on 21.05.2008, which property has been developed by the original defendant nos. 3 and 4 and a sale deed dated 05.01.2015, has been executed by defendant nos. 3 and 4 in favour of defendant no. 5, in respect of one of the plots.

4. The petitioners filed an application (Exhibit D/28), for amendment of the plaint and for joinder of parties, on the ground that they came to know of yet another sale deed executed in favour of Mr. Bhiva Sawant on 12.01.2015. The said application for amendment is filed on 07.04.2017.

5. The learned Trial Court has dismissed the said application, *inter alia*, on the ground that the deed of sale dated 12.01.2015, which is now sought to be challenged by way of amendment, is not in connection with defendant nos. 1, 2

and 5 and is in respect of some other portion of the suit property and the proposed amendment would lead to misjoinder of causes of action and embarrass the trial.

6. I have heard Mr. Costa Frias, the learned Counsel for the petitioners, Mr. Shirodkar, the learned Counsel for the respondent nos. 1(a) to 1(d), 2 and 5 and Mr. Ramani, the learned Counsel for the respondent nos. 3 and 4. With the assistance of the learned Counsel for the parties, I have gone through the record.

7. Mr. Costa Frias, the learned Counsel for the petitioners has placed reliance on the decision of the Supreme Court in the case of **Revajeetu Builders and Developers Vs. Narayanswamy (2009) 10 SCC 626**, in order to submit that the amendment, which is necessary for deciding the real controversy in the matter, has to be allowed. It is submitted that the basic challenge is to the sale deed dated 21.05.2008, executed by the defendant nos. 1 and 2, in favour of defendant nos. 3 and 4 and the sale deed, which is now sought to be challenged, is only consequential, in as much as, the defendant nos. 3 and 4, after developing the property, has executed a sale deed of another plot in favour of Mr. Bhiva Sawant. It is

submitted that there is no misjoinder of the causes of action and the amendment cannot embarrass the trial, as has been held by the learned Trial Court.

8. Mr. Ramani, the learned Counsel for the respondent nos. 3 and 4 has placed reliance on the decision of the Supreme Court in the case of **Alkapuri Cooperative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) (2009) 3 SCC 467**, in order to submit that where the amendment also requires addition of a third party, the question of limitation would be relevant. For this purpose, reliance is placed on para 15 of the judgment in the case of **Alkapuri Cooperative Housing Society Ltd.** (supra).

9. Mr. Shirodkar, the learned Counsel for the respondent nos. 1(a) to 1(d), 2 and 5 has supported the impugned order on similar grounds.

10. I have carefully considered the rival circumstances and the submissions made. *Prima facie*, it appears that by way of the proposed amendment, the petitioners are now seeking to challenge the sale deed dated 12.01.2015. The amendment application is filed on 07.04.2017. It also appears that the

learned Trial Court, before deciding the application (Exhibit D-28), which incidentally also involves a prayer for addition of parties, had not issued notice to the proposed defendant. Considering the overall circumstances, it would be appropriate if the application (Exhibit D/28) is remitted back to the learned Trial Court for deciding it afresh on its own merits, after issuing a notice to the proposed defendant, Mr. Bhiva Sawant.

11. In the result, the following order is passed:

ORDER

- (i) The Petition is partly allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exhibit D/28) is remitted back to the learned Trial Court, for deciding it afresh on its own merits and in accordance with law, after issuing notice to the proposed defendant, Mr. Bhiva Sawant.
- (iv) Rival contentions of the parties are left open.
- (v) In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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