

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 857 OF 2018**

VISHRAM KRISHNA KANTAK (DEC)
THR. LRs THR. POA BY PETITIONER
NO. 2 & ANR.

... PETITIONERS

Versus

THE CANACONA MUNICIPAL COUNCIL
THR. ITS CHIEF OFFICER & 21 ORS.

... RESPONDENTS

Mr. H. D. Naik, Advocate for the Petitioners.

Ms. Rosette Pereira, Advocate for the Respondent No. 1.

Mr. R.G. Ramani, Advocate for the Respondent Nos. 4 and 6 to 9.

Mr. M.B. D'Costa, Senior Advocate with Mr. P.A. Kamat, Advocate for the Respondent Nos. 13 to 22.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 12th December, 2019

PRONOUNCED ON: 8th March, 2019

ORDER:

By this petition, the petitioners/plaintiffs are challenging the common order dated 09.08.2018, passed by the learned Trial Court, thereby dismissing three applications, Exhibits 234, 238 and 244, for addition of parties under Order I, Rule 10(2) of Civil Procedure Code, 1908 (CPC, for short).

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

Regular Civil Suit No. 109/2010 was filed by now deceased Vishram Kantak against the respondent nos. 1 and 2 (original defendant nos. 1 and 2). Respondent no. 2 has since been deleted by the Trial Court, by an order dated 14.11.2011.

3. The subject matter of the suit is a property better known as 'Coller' admeasuring 97,475 square metres of village Nagarcem, Palolem, within the limits of Cancona Municipal Council. The said property is enrolled under matríz no. 529 and is surveyed under various survey numbers including survey nos. 36/15 and 36/16. Plaintiff no. 1 claimed that the suit property was originally owned by Ananta Nagarsekar and his wife Durgabai Nagarsekar. After the death of Ananta Nagarsekar, 1/8th share out of the said property was allotted to his wife, Durgabai Nagarsekar. Incidentally, Durgabai Nagarsekar executed a will dated 22.06.1957 bequeathing 1/6th share to her grandsons, namely, Vishram Kantak, Haridas Kantak, Pandurang Kantak, Govind Kantak and Ananta Kantak. However, according to Vishram Kantak, the property was exclusively possessed and enjoyed by him without interference or obstruction from any other persons. After the death of the

wife of Vishram Katak, the said property was allotted exclusively in favour of the deceased plaintiff no. 1, Vishram Katak. Shantanand Katak (defendant no. 3), who is the son of Vishram Katak and who was transposed as plaintiff no. 2, is claiming the property on the basis of a deed of sale dated 22.02.2011.

4. Be that as it may, in the said suit, the defendant nos. 13 to 22 got themselves impleaded, claiming that they are the co-owners of the suit property, having inherited the same from one Shripad Nagarsekar as per the matrizz certificate. Although, the suit was initially filed seeking an order restraining the Municipal Council from granting NOC/permission to persons other than the plaintiffs, from erecting structures/shacks for seasonal business in the suit property, without the consent of the plaintiffs, the plaint was subsequently amended seeking a relief of declaration that the plaintiff, Vishram Katak was the exclusive owner of the suit property, by virtue of prescriptive right and the same is now owned by plaintiff no. 2, under a deed of sale dated 22.02.2011.

5. This Court in Writ Petition No. 232/2016, which arose out of an order of temporary injunction, by an order

dated 21.11.2016 had expedited the suit, to be decided in a time bound manner. After this, when the suit was at the stage of recording evidence of defendant nos. 13 to 22 and when the defendant no. 13 was under cross examination, the plaintiffs filed three successive applications, being Exhibits 234, 238 and 244 for addition of parties as under:

(i) Application Exhibit-234: By this application filed on 08.11.2017, the petitioners sought addition of defendant nos. 23 to 34. It was contended that the defendants nos. 13 to 22 during their evidence produced a deed of succession after the death of their father/father-in-law, late Shripad Nagarsekar, in which, there were some other names appearing alongwith the defendant nos. 13 to 22, as set out in para 9 of the application. These persons were sought to be added as defendant nos. 23 to 32. Insofar as proposed defendant nos. 33 and 34 are concerned, it was contended that the name of one Gopal Savlo Rajadyaksha also known as Gopal Savlo Sinai is appearing in Form No. III in occupants column alongwith some of the defendants in survey no. 13/16. Hence, the petitioners sought addition of Gopal Savlo Rajadyaksha and his wife Pushpa Gopal Rajadyaksha as defendants nos. 33 and 34.

6. (ii) Application Exhibit 238: This application was filed on 06.12.2017 for adding the following persons, as defendant nos. 35 to 37:

- (i) Yeshwant Mortu Sinai Nagarsekar,
- (ii) Suryaji Mortu Sinai Nagarsekar and
- (iii) Narayan Mortu Sinai Nagarsekar.

This was on the ground that the names of these persons are erroneously recorded in the survey records. It was contended that the defendants while opposing the earlier application Exhibit-234 had claimed that there are names of some other persons recorded in Form No. III, who are not parties to the suit.

7. (iii) Application Exhibit 244: This application was filed on 21.02.2018 for addition of defendant nos. 35 to 80. This was on the ground that notices sent to Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar (who were sought to be added vide application Exhibit-238), revealed that all three of them were dead and therefore, addition of the legal representatives of these persons were sought vide application Exhibit-244. The proposed defendant nos. 35 to 47 are said to be the legal representatives of Yeshwant Mortu Sinai Nagarsekar, defendant

nos. 48 to 71 are the legal representatives of Suryaji Mortu Sinai Nagarsekar, while defendants nos. 72 to 80, are the legal representatives of Narayan Mortu Sinai Nagarsekar. It is contended that as the petitioners are seeking declaration of title, the persons, whose names appear in the survey record including the erstwhile Form No. III, are necessary parties.

8. The learned Counsel appearing for the respondent nos. 13 to 22 waived service on behalf of the proposed defendant nos. 23 to 32. Notices were issued to the proposed defendant nos. 33 and 34. The proposed defendant nos. 73 to 80 gave no objection to their impleadment as necessary parties being co-owners alongwith defendant nos. 13 to 22. A perusal of the order would show that some of the proposed defendants were not served. However, the learned Trial Court took up the three applications, for disposal and dismissed the same by separate orders of even date, primarily on the ground of delay. That was challenged by the petitioners before this Court in Writ Petition No. 691/2018, which was partly allowed on 23.07.2018 and the three applications were remitted to the Trial Court to decide the same afresh after examining whether, the proposed parties are necessary or proper parties in the suit.

9. After this, the learned Trial Court heard the parties and by impugned order dated 09.08.2018 has again dismissed the three applications, which is subject matter of challenge in this petition.

10. I have heard Mr. Naik, the learned Counsel for the petitioners, Ms. Pereira, the learned Counsel for the respondent no. 1, Mr. Ramani, the learned Counsel for the respondent nos. 4 and 6 to 9, while Mr. D'Costa, the learned Senior Counsel for the respondent nos. 13 to 22. Perused record.

11. It is submitted by Mr. Naik, the learned Counsel for the petitioners that, in as much as the plaint was amended in the year 2015, claiming a declaratory relief of title, all the persons, whose names appear in the survey record, including the erstwhile Form No. III i.e. prior to promulgation, are necessary parties. It is submitted that filing of the first application Exhibit-234 was necessitated on account of the fact that the defendant nos. 13 to 22 produced a deed of succession showing some other heirs of Shripad Nagarsekar, who need to be added as defendant nos. 23 to 32. Insofar as the proposed defendant nos. 33 and 34 are concerned i.e. Gopal Rajadyaksha and Pushpa Rajadyaksha, it is submitted that name of Gopal

Rajadyaksha is appearing in Form No. III of survey no. 36/16 and therefore, both of them are necessary parties.

12. It is submitted that application Exhibit-238 was filed as there were three other names, which were found to be recorded in Form No. III i.e. Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar and the third application Exhibit-244, was the outcome of application Exhibit-238, in which notices sent to all three of them, were returned, reporting that they were dead and therefore, their legal representatives need to be brought on record. It is submitted that they being necessary parties be joined as defendants particularly when the proposed defendant nos. 73 to 80 have given no objection for their impleadment.

On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **Vidur Impex and Traders Private Limited & Others Vs. Tosh Apartments Private Limited & Others (2012) 8 SCC 384** and in the case of **Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay & Others (1992) 2 SCC 524**.

13. On the contrary, the learned Senior Counsel for the main contesting respondent nos. 13 to 22 has submitted that the suit is filed in the year 2010 and the cause of action is shown to have accrued on 13.11.2009 and thus, the impleadment sought at this stage is clearly belated and thus, the proposed amendment has rightly been refused. It is submitted that even the declaratory relief was introduced by virtue of an amendment on 04.06.2015 and thereafter, the present applications are filed in 2017-18. It is submitted that the Trial Court after due consideration of the matter has rightly refused the impleadment, which order does not call for interference. It is submitted that there is an order of injunction operating against these respondents and filing of these applications is an attempt to prolong the suit.

14. Mr. Ramani for the respondent nos. 4 and 6 to 9 has also supported the respondent nos. 13 to 22.

15. I have carefully considered the circumstances and the submissions made.

16. Before proceeding to consider the individual applications, it is necessary to note that the civil suit is filed by

the original plaintiff Vishram Kantak in the year 2010. Indisputably, the suit was filed seeking relief only against the respondent no. 1 (Municipal Council) in which, cause of action has been shown to have accrued in the year 2009. The defendant nos. 4 to 12 and 13 to 22 were added subsequently. Till today, the plaint has been amended by orders dated 14.11.2011, 02.01.2013, 05.02.2015 and 01.09.2015. The relief for declaration is incorporated by amendment in the year 2015. The suit is expedited as per the orders passed by this Court, in which, the evidence on behalf of the defendant nos. 13 to 22 is in progress.

It is further a matter of record that there is Regular Civil Suit No. 82/2010, in which, the petitioners/plaintiffs are also parties and have raised a counterclaim, seeking a similar relief for declaration, as is sought in the present suit. With this background, let us now consider the individual applications for impleadment.

17. Application Exhibit-234: Although, by this application, addition of defendant nos. 23 to 34 is sought, the claim has to be considered in two parts. Firstly, with reference to the defendant nos. 23 to 32 and secondly, with reference to defendant nos. 33 and 34. Insofar as defendant nos. 23 to 32

are concerned, it is contended that defendant nos. 13 to 22, during their evidence have produced a deed of succession, after the death of their father/father-in-law, late Shripad Nagarsekar, in which, there are some more parties alongwith defendant nos. 13 to 22, which are the proposed defendant nos. 23 to 32.

18. The learned Trial Court has refused to permit the said impleadment, on the ground that before the Municipal Council, the only grievance of the petitioners/plaintiffs was that Dr. Arvind Shripad Nagarsekar, Gaurish Kantak, Govind Kantak and Krishnath Kantak were interfering with the ownership rights of the petitioners. The learned Trial Court found that there is no whisper in the suit that any of the remaining heirs of late Ramchandra Nagarsekar were interfering with the property. Secondly, the learned Trial Court has found that in Regular Civil Suit No. 82/2010, where the petitioners have raised a counterclaim, the present defendant nos. 13 to 22 alongwith some other legal heirs are already on record and therefore, the petitioners have an option of proceeding against the remaining legal heirs of Ramchandra Nagarsekar in Regular Civil Suit No. 82/2010. Thus, according to the learned Trial Court, considering the cause of action leading to filing of the present suit and the fact that the proposed parties have not

interfered with the suit property or have done any act detrimental to the interest of the petitioners, they are not necessary parties to decide the suit.

19. On a careful consideration of the submissions made, I find that the deed of succession, on the basis of which the present application is filed was produced by the defendants alongwith their written statement way back in the year 2012 and a copy of the same is said to be served on the petitioners. Besides that PW-1 Shantanand Kantak has also admitted that his father i.e. the original plaintiff no. 1, Vishram Kantak and his brothers had entered into compromise terms. That apart, the proposed respondent nos. 23 to 32 are also not claiming any right in the suit property as per declarations, at page nos. 323, 324 and 325 of the compilation.

20. Coming to the proposed defendant nos. 33 and 34, it is contended that the name of Gopal Rajadyaksha is appearing in Form No. III in occupants column alongwith some of the defendants in survey no. 36/16 and therefore, the addition of Gopal Rajadyaksha alongwith his wife Pushpa Rajadyaksha is sought as defendant nos. 33 and 34. In this regard, the learned Trial Court has noted that the deed of settlement dated

13.04.2012, wherein Gopal Rajadyaksha has stated that he is not the owner of the land survey no. 36/16 and his land bears survey no. 36/17. The petitioners were aware of this deed of settlement, which is produced in Regular Civil Suit No. 82/2010, in which the petitioners have raised a counterclaim. For this reason, the learned Trial Court has refused the impleadment of proposed defendant nos. 33 and 34. At this stage, in view of the deed of settlement dated 13.04.2012 executed by Gopal Rajadyaksha, in my considered view, no exception can be taken to the finding recorded by the learned Trial Court in this regard.

21. Application Exhibits 238 and 244: The application Exhibit-238, in fact, would not survive, in as much as, proposed defendant nos. 35, 36 and 37, namely, Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar are all reported to be dead. However, the subsequent application Exhibit-244 is based on application Exhibit-238, in as much as by the application Exhibit-244, amendment of proposed defendant nos. 35 to 80 is sought, who are the legal heirs of Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar.

22. The learned Trial Court has found that the original plaintiff no. 1 Vishram Kantak and his brother had entered into compromise terms dated 14.06.1996, on the basis of which, LRC Appeal No. 141/89 arising out of D.C. No. 435 was disposed of on 08.07.1996 by the learned Deputy Collector, Quepem. The learned Trial Court has found that the plaintiffs were well aware that Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar were no longer surviving and their successors vide consent terms had agreed that they would not have any claim in property in Cancona Taluka as against the plaintiffs. In that event, the original plaintiffs were well aware of death of Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar and thus, could not have sought their impleadment at the stage when the suit is fixed for the evidence of the defendant nos. 13 to 22.

23. The principles governing addition/striking of parties are too well settled to be restated. The plaintiff being the *dominus litus*, is entitled to decide as to who is to be arrayed as party defendant/s to the suit. This is however, subject to the overriding power of the Court under Order I, Rule 10(2) of CPC, to add or strike off parties, which the Court may do so at any

stage either upon or without the request of the parties. If the plaintiffs, as in the present case, come with a prayer for impleadment, the Court is required to decide whether, the parties are necessary or proper parties and if necessary, the Court would permit such addition/impleadment. If they are found to be proper parties, the Court in its discretion can direct such impleadment, depending upon the facts and circumstances of each case. The necessary parties are those in whose absence no effective decree can be passed by the Court. A proper party on the other hand, is the one who though not necessary parties, whose presence, would enable the Court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. (see the decision of the Supreme Court in the case of **Mumbai International Airport (P) Ltd. Vs. Regency Convention Centre and Hotels (P) Ltd. 2010 (7) SCC 417**).

24. Coming back to the present case, the learned Trial Court has found that insofar as the legal representatives of Gopal Rajadhyaksh, Yeshwant Mortu Sinai Nagarsekar, Suryaji Mortu Sinai Nagarsekar and Narayan Mortu Sinai Nagarsekar are concerned, they are not necessary parties on account of the

deed of settlement dated 13.04.2012 (executed by late Gopal Rajadyaksha) and the compromise terms dated 14.06.1996 and judgment dated 08.07.1996 in LRC Appeal No. 141/89. Insofar as defendant nos. 23 to 32 are concerned, they have executed declaration that they have no interest in the matter. In that view of the matter, no case for interference is made out in the impugned order.

25. In the case of **Vidur Impex and Traders Private Limited** (supra), addition of parties were sought in a suit for specific performance of agreement for sale. The question was whether, transferee pendente lite, could be impleaded as party defendant.

In the case of **Ramesh Hirachand Kundanmal** (supra), the suit was filed by a dealer in possession of service station under an agreement with lessee thereof, challenging the notice issued by Municipal Corporation for demolition of certain structures raised by him on the premises as being unauthorized. It was held that the lessee is not a necessary or proper party and addition of lessee would enlarge the controversy in the suit. It was thus held that the Court cannot direct the plaintiff (dealer) to add the lessee as defendant in the suit.

The principles apart, both these cases clearly turned on their own facts. The question whether, the proposed party is a necessary or a proper party, would depend upon facts and circumstances of each case.

26. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to require interference, under the supervisory jurisdiction of this Court. The petition is dismissed, with no order as to costs.

C.V. BHADANG, J.

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