

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 994 OF 2018**

Valente Maxy Pereira & 3 Others Petitioners

Versus

Presentaco Filomena Pereira @
Presentaco Filomena Fernandes &
5 Others Respondents

Mr. Gaurish Agni with Mr. Tanmai Gawas, Advocates for the
Petitioners.

Ms. Analiz Maria Menezes, Advocate for Respondent Nos. 1, 2,
4 and 5.

Mr. Ashwin D. Bhobe with Ms. A. Fernandes, Advocate for
Respondent No. 6.

CORAM :- C. V. BHADANG, J.

RESERVED ON :- 17th October, 2019

PRONOUNCED ON :- 18th October, 2019

ORDER:

By this Petition, the petitioners (original plaintiff nos. 2 to 5), are challenging order dated 30.08.2018, below Exhibit-101, passed by the learned Senior Civil Judge at Margao in Special Civil Suit No. 1/2012. By the impugned order, application (Exhibit-101), seeking amendment of the plaint, has been dismissed.

2. The brief facts are that the petitioners have filed the aforesaid suit against the respondents/defendants, for

declaration as well as mandatory and prohibitory injunction. The property surveyed under P.T. sheet no. 239, chalta no. 50, 51, 52, 54 and 55 of Margao City alongwith a house standing thereon, is subject matter of dispute.

3. The case made out in the plaint is that the suit property originally belonged to one Francisco Pereira and his wife Maria Pereira. Francisco Pereira expired on 17.11.1943, while Maria Pereira expired on 05.08.1949. Francisco Pereira and Maria Pereira are the ancestors of the plaintiffs and the defendant nos. 1 to 5. The respondent no. 6 (defendant no. 6), is the Developer. It is the material case that the plaintiffs have $1/4^{\text{th}}$ undivided share in the suit property and that by a letter dated 26.07.1973, the predecessor in title of defendant nos. 1 to 5 i.e. late Mr. Carmo Pereira, admitted that the predecessor in title of the plaintiffs, are entitled to $1/3^{\text{rd}}$ share (which according to the petitioners ought to have been $1/4^{\text{th}}$ share) in the residential house, which is part of the suit property.

4. It appears that an inquiry was conducted before the City Survey Officer, Margao into the claim of Jose Pereira and others, in which, by an order dated 25.11.1993, the possession of Jose Pereira, Cyril Pereira, Maria Pereira, Julia Fernandes,

Pressentacao Fernandes and Carmo Pereira over the suit property, was confirmed. Be that as it may, the aforesaid suit came to be filed on the ground that the development agreement executed by defendant nos. 1 to 5 in favour of defendant no. 6, without the consent of the plaintiffs, is illegal and unauthorized. It is in these circumstances that the petitioners are claiming a declaration that the agreement for sale or development and the Power of Attorney executed by the defendant nos. 1 to 5 in favour of defendant no. 6, which are without the consent of the petitioners, are null and void and non est in law. The petitioners are also seeking a mandatory injunction for demolition of the building constructed in the suit property, without the consent of the petitioners and further restraining the respondents, from creating any third party interest in the suit property.

5. It is a matter of record that the trial has commenced, in which, the petitioners have examined their witness (PW-1). It is at this stage, that the petitioners have filed application for amendment of the plaint (Exhibit-101), seeking to add para 29a and 29b alongwith prayer clauses (ea), (eb), (ec) and (ed). In short, the petitioners are seeking to challenge the order dated 25.11.1993, passed in the inquiry

proceedings before the City Survey Officer, Margao, confirming the possession of the defendant nos. 1 to 5 over the entire property. It is contended that by virtue of a gift deed produced in the inquiry proceedings, the inquiry officer should not have confirmed the possession and in any case, could have confirmed the possession in respect of only 3/4th share and not the entire suit property and the order in the inquiry proceedings is passed without notice to the petitioners. The petitioners are also seeking to challenge the sale deed dated 19.08.2010 and 30.11.2011, entered into by the defendant no. 6 in favour of third parties. The plaintiffs also want to incorporate a prayer for restoration of the suit property to the plaintiffs.

6. The application was opposed on behalf of the respondents *inter alia* on the ground that the proposed amendment is misconceived and not tenable. It is contended that the trial has already commenced and that there are no averments made in the plaint to show compliance with the requirements of the proviso to Order VI, Rule 17 of the Code of Civil Procedure (CPC, for short). It was contended that by virtue of the proposed amendment, the petitioners are trying to introduce a new claim, which is barred by limitation. It is

contended that the valuable right, which has been created in favour of the third party, would be defeated, if the amendment is allowed.

7. The learned Trial Court has dismissed the application. Hence, this Petition.

8. I have heard Mr. Agni, the learned Counsel for the petitioners, Ms. Menezes, the learned Counsel for the respondent nos. 1, 2, 4 and 5 and Mr. Bhobe, the learned Counsel for the respondent no. 6. Perused record.

9. It is submitted by Mr. Agni, the learned Counsel for the petitioners that the proposed amendment is necessary for deciding the real controversy in the matter. It is submitted that the amendment does not introduce any new case or a new cause of action and the amendment sought is only by way of amplification of the existing pleadings. It is submitted that the amendment to the prayer clause is only consequential in nature to the proposed amendment. The learned Counsel has taken me through the plaint in order to submit that already pleadings are made, so as to question the order dated 25.11.1993, passed by the City Survey Officer, Margao. It is submitted that all

along it has been the case of the petitioners that they have 1/4th undivided share in the suit property and the execution of the development agreement by the defendant nos. 1 to 5 in favour of the defendant no. 6, without the consent of the petitioners, is null and void. It is submitted that the Trial Court has also come to the conclusion that the relief of possession cannot be said to be barred by limitation under Article 110 of the Limitation Act. It is submitted that in as much as the petitioners have not introduced any new case by virtue of the proposed amendment, the proviso to Order VI, Rule 17 of CPC, cannot come in the way.

On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **Surender Kumar Sharma Vs. Makhan Singh (2009) 10 SCC 626** and **Mount Mary Enterprises Vs. Jivratna Medi Treat Private Limited (2015) 4 SCC 182**, in order to submit that the amendment cannot be refused merely because it is belated. It is submitted that any such amendment, which is necessary for deciding the real controversy in the matter, is required to be allowed.

10. The learned Counsel for the respondent nos. 1, 2, 4 and 5 has supported the impugned order. It is submitted that

the proposed amendment introduces a new case and new reliefs and that too, after the commencement of the trial, which has been rightly refused. It is submitted that the petitioners had obtained the copy of the inquiry report on 22.08.2011 i.e. much prior to the filing of the suit and therefore, there is no reason forthcoming as to why the challenge to the inquiry report was not included in the suit. It is submitted that there is third party interest created and now the petitioners cannot be allowed to amend the suit.

11. Mr. Bhobe, the learned Counsel for the respondent no. 6 has pointed out that the passing of the order by the inquiry officer on 25.11.1993 was brought to the notice of the petitioners in the written statement filed by the respondents and there is no reason forthcoming in the application to show as to why the proposed amendment could not have been brought earlier and particularly, prior to the commencement of the trial.

The learned Counsel has placed reliance on the decision of this Court in the case of **Cesaria Barretto Vs. Administrator of Comunidades** (Writ Petition No. 1033/2017 decided on 12.04.2018), in order to submit that where the amendment is brought after the commencement of

the trial, the fact that inspite of due diligence, the party could not have raised the matter earlier, is a jurisdictional fact. It is submitted that in absence thereof, the amendment cannot be allowed and has rightly been refused.

12. I have considered the circumstances and the submissions made. Insofar as the amendment seeking to challenge the order passed on 25.11.1993 is concerned, the learned Trial Court has held that it is not relevant, which would mean that the said amendment is not necessary for deciding the real controversy in the matter. As regards the two transactions entered into by the respondents, the Trial Court has held that there are no details of the transactions and the persons with whom the transactions are entered into, are not parties to the suit and therefore, the amendment "is irrelevant". The learned Trial Court has further found that the amendment sought after the commencement of trial is hit by the proviso to Order VI, Rule 17 of CPC, as the petitioners have not shown due diligence.

13. In my considered view, no case for interference is made out. The first and foremost requirement for allowing the amendment is that the amendment is necessary for deciding

the real controversy in the matter. The material case of the petitioners in the plaint is based on their alleged 1/4th undivided share in the suit property and the development agreement that has been entered into by the respondent no. 6 with the respondent nos. 1 to 5, being entered into without their consent. Insofar as the order passed in the inquiry proceedings is concerned, even according to the petitioners, all that the order confirms is the possession of the respondent nos. 1 to 5 over the suit property and not title. It is also contended on behalf of the petitioners that the City Survey Officer cannot decide the title. Thus, no fault can be found with the finding of the learned Trial Court that the proposed amendment is not necessary for deciding the real controversy in the matter. Even insofar as the transactions entered into by the respondent no. 6 is concerned, they comprise of one sale deed dated 19.08.2010 and agreement for sale deed dated 30.11.2011, both of which are prior to the filing of the suit. The learned Trial Court is right in finding that neither the details of the transactions nor the persons with whom these transactions have been entered into, have been set out nor their impleadment is sought.

14. As noticed earlier, the entire basis of the petitioner's case is on their claim that they have 1/4th undivided share in

the suit property and without their consent, the development agreement could not have been executed in favour of respondent no. 6. For deciding the said issue, the challenge to the sale deed and the agreement for sale as aforesaid, is not necessary. Thus, on either counts, I find that the Trial Court is right in holding that the amendment is not relevant. Even insofar as the second requirement about the compliance with the proviso to Order VI, Rule 17 of CPC, the amendment has rightly been refused. The application is silent as to why, the petitioners could not have brought the amendment prior to the commencement of the trial. There is not even an averment to that effect, much less proof. The contention that the proposed amendment is by way of amplification of the existing pleadings, to my mind cannot be accepted. With the assistance of the learned Counsel for the parties, I have gone through the plaint and there is no specific challenge raised to the order passed in the inquiry proceedings, which according to the petitioners is now sought to be amplified. Thus, the proposed amendment, in my considered view, has to fail on either counts of it being not necessary for deciding the real controversy in the matter and secondly, for want of compliance with the proviso to Order VI, Rule 17 of CPC.

15. The reliance placed on behalf of the petitioners on the decision of the Supreme Court in the case of **Surender Kumar Sharma** (supra) and **Mount Mary Enterprises** (supra) is misplaced.

In the case of **Surender Kumar Sharma** (supra), the Supreme Court has held that the amendment is not liable to be rejected, merely on the ground of delay, if the Court finds that the same is necessary for deciding the real controversy between the parties. In that case, a suit was filed for eviction of the tenant including on the ground of arrears of rent and on facts, it was found that even after the amendment, the suit would remain a suit for eviction. Further, in the said case, it does not appear that the amendment was sought for after the commencement of the trial, requiring the compliance with the proviso to Order VI, Rule 17 of CPC.

16. In the case of **Mount Mary Enterprises** (supra), the only amendment sought was to correct the valuation of the suit in keeping with the market value of the suit property, which price was admitted by the defendant in the written statement. Thus, all that was required was the correction of the valuation of the suit property. Even in the said case, it does

not appear that the amendment was sought after the commencement of the trial.

17. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to require interference. The Petition is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.

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