

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 951 OF 2018**

Mr. Filomeno Vincente Gregorio
Tomaturgo Rodrigues & Another Petitioners
Versus
Union of India & 6 Others Respondents

Shri S.M. Volvoikar, Advocate for the Petitioners.

Shri Mahesh Amonkar, Special Standing Counsel for the
Respondent No. 1.

Ms. Priyanka Kamat, Additional Government Advocate for the
Respondent Nos. 2 to 6.

Shri Valmiki Menezes, Advocate for the Respondent No. 7.

CORAM : C.V. BHADANG, J.

Reserved on : 13th December, 2018

Pronounced on : 22nd January, 2019

ORDER:

By this petition, the petitioners/original plaintiffs are challenging the order dated 06.08.2018 below Exhibit-72, passed by the learned Trial Court, in Civil Suit No. 48/2013. By the impugned order, the application Exhibit-72, filed by the petitioners for amendment of plaint has been dismissed.

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

The plaintiffs have filed the aforesaid suit against the respondents herein, for declaration that the suit property (which is better known as “Aframento De Prias” of village Uttorda, bearing Survey No. 53/6, which is part of a larger property known as “Fatiota De Praias”) has an area of 5,050 square metres and for correction of the record of rights and the land survey plan (which shows the area of Survey No. 53/6 as 3,625 square metres) and for a declaration that no part of the suit property forms a part of the Arabian Sea and for a direction to the respondent no. 6 to remap and rectify the High Tide Line (HTL). The petitioners are also seeking a declaration that the suit structures standing in the suit property are existing since prior to the date of the enforcement of the Environment Protection Act and as such, are not violative of the Coastal Regulation Zone (CRZ) Notification and for the consequential relief of restraining the respondents or any body on their behalf from demolishing or interfering with the same.

3. The suit is resisted by the respondents on various grounds.

4. At a stage when the plaintiff no. 2 has entered into the witness box, the petitioners filed an application (Exhibit-72)

for amendment of plaint as under:

- A) *Add following contents in para 1 of the plaint:*
- (i) *In third line in between the word/numbers “No.53/6 and of Utorda village” and in last line in between “number 53/4” and “shall herein after” add “53/4 and unsurveyed portion of land admeasuring 1,100”.*
- (ii) *Add following contents as para (1A) and (1B) in between para 1 and 2 of the plaint:*
- “(1A) The plaintiff states that out of the total area of the suit property 5,050 square metres, an area of 3,625 square metres has been surveyed under Survey No. 53/6 and 325 under Survey No. 54/3. Thus, an area of 3,950 square metres out of total area of the suit property (i.e. 5,050 square metres) has been surveyed under Survey No. 53/6 and 54/3 and the remaining area of 1,100 square metres remained unsurveyed although it is within the fenced area and is in actual and physical possession of the plaintiff.”*
- “(1B) The plaintiff states that the suit property is bounded on the North by the property of late Sebastiao Francisco Azarede and by the property of heirs of late Cosme Damiao Dias, South by the property of heirs of late Joao Piedaded Ludovico Dos Santos Pereira, on the East by the remaining plot of the larger property Fatiota Praias and on the West by Sand Dunes/Arabian Sea”.*
- B) *At the end of para 3 of the plaint, the following contents be added.*
- “The said larger property in surveyed under no. 53 sub-divisions 7, 8 and 9 of 53 sub-divisions 3, 6 and 7. The survey no. 53/6 and survey no. 54/3 which are the survey numbers of the suit property were also originally the survey numbers of the said larger property”.*
- C) *Add following contents as sub para to existing para 27 of the plaint:*

“In the said Appeal No. 59/2012, the Hon'ble NGT after holding due inquiry and calling upon the report from the DSLR/ the Inspector of Survey and Land Records, Margao found that the area of the suit plot of land as physically occupied by the plaintiff works out to be 5,050 square metres and that the part of the suit plot of land which presently stands surveyed under Survey No. 53/4 is forming an integral part of plot IV as described in the said deed of sale dated 21.12.2005 of the suit plot of land. Prior to making this decision the Hon'ble NGT called upon the Inspector of Survey and Land Records, Margao (ISLR) to submit his report as to the extent of area of plot no. IV of the suit plot of land and structures existing therein. The ISLR thus submitted its report vide its letter dated 08.03.2013 wherein inter alia ISLR categorically shown the plot of land surveyed under Survey No. 54/3 of village Utorda entirely forms an integral apart and parcel of the said plot no. IV of the suit property. Thus taking into account the said report of the ISLR, the Hon'ble NGT held that the said plot IV of the suit property entirely belonging to this plaintiff and not that it does not form any part of the Government land. With this decision, the Hon'ble NGT disposed of the said Appeal No. 59/2012 by its order dated 06.03.2013 which shall be produced as and when required”.

D) Add following names in the array of defendants as defendant nos. 7 to 9 in the plaint.

(7) Mrs. Maria Celeste C.I. Pereira alias Barbosa, age 55 years, teacher and his wife.

(8) Mr. Anthony Barbosa, age 65 years, advocate by profession.

(9) Ms. Maravilla Camila C. Pereira, age 56 years (unsound of mind) represented by her guardian and sister Mrs. Maria Celeste C.I. Pereira, the defendant no. 7 abovenamed (appointed) vide order dated 07.10.2011 passed in CMA No. 92/2011 by the District of Sessions Judge, South Goa, Margao.

*All r/o H. No. 411, near City Cafe, Fatorda,
Margao, Salcete, Goa.*

5. The application was resisted by the respondents on the ground that it is filed after the trial has commenced and the petitioners have not shown that inspite of due diligence they could not have brought the amendment before commencement of trial. It is submitted that by the proposed amendment the petitioners are trying to introduce a new case and cause of action. It was contended on behalf of the respondent nos. 2 to 6 that this would require a fresh notice under Section 80 of the Code of Civil Procedure (CPC, for short). It is contended that there is inordinate delay in bringing the amendment as the suit is filed in the year 2013 and the application for amendment is filed in July 2018 that too, after commencement of trial. It is contended that by the proposed amendment the petitioners are trying to change the nature of the suit property by inclusion of Survey No. 54/3 even without making the owners thereof as party to the suit.

6. The learned Trial court by the impugned order has dismissed the application. The Trial Court has found that the petitioners have not shown due diligence in filing the application, in as much as, the same is filed after

commencement of trial. The learned Trial Court has found that the petitioners have already made out a case that the suit property admeasures 5,050 square metres and Survey No. 53/6 has been erroneously shown to be admeasuring 3,625 square metres. The Trial Court has found that the specific case made out is that the remaining area has been erroneously shown as the sea bed of Arabian Sea. That now a new case is tried to be introduced. That there is no cause of action pleaded as against the defendants, who are proposed to be added and the suit as against the proposed defendants is barred by limitation.

7. I have heard Shri Volvoikar, the learned Counsel for the petitioners and Shri Amonkar, the learned Special Standing Counsel for the respondent no 1. I have also heard Ms. Priyanka Kamat, the learned Additional Government Advocate for the respondent nos. 2 to 6 and Shri Menezes, the learned Counsel for the respondent no. 7. Perused record.

8. It is submitted by the learned Counsel for the petitioners that the amendment is based on subsequent event of one Agnelo Noronha, seeking demarcation of a part of the property bearing Survey No. 54/3. It is submitted that inspite of an objection from the petitioners, the respondent no. 5, by an

order dated 14.03.2018 has directed demarcation of Survey No. 54/3. It is submitted that thus, the requirement of the proviso to Order VI, Rule 17 of the CPC is satisfied. It is submitted that the essential case that the suit property (which is part of a larger property known as Fatiota De Praias) admeasures 5,050 and has been erroneously shown to be admeasuring 3,625 square metres has been made out in the plaint and thus, the proposed amendment is only clarificatory in nature to show the exact location of the suit property. It is thus submitted that the proposed amendment neither changes the nature of the suit nor introduces any new cause of action. It is submitted that the proposed amendment is necessary for deciding the real controversy in the suit and has to be allowed. On behalf of the petitioners reliance is placed on the decision of the Supreme Court in the case of **Sajjan Kumar Vs. Ram Kishan, (2005)13 SCC 89.**

9. On the contrary, the learned Counsel for the respondent no. 1 and respondent nos. 2 to 6 have supported the impugned order. It is submitted that the proposed amendment changes the nature of the suit property and the suit and introduces a new cause of action, as has been rightly held by the learned Trial Court. On the basis of the two sale deeds i.e.

dated 20.12.2005 and 21.12.2005, it is contended that the petitioners were aware about the land purchased. It is contended that the only case made out in the plaint is that a part of land has been erroneously shown as the sea bed of Arabia Sea, which is now sought to be changed and enlarged which is not permissible.

10. Shri Menezes, the learned Counsel for the respondent no. 7 has also supported the impugned order. It is submitted that the amendment at this stage, has rightly been refused. The learned Counsel has placed reliance on the decision of the Supreme Court in the case of **Vidyabai & others Vs. Padmalatha & Another, (2009) 2 SCC 409**, in order to submit that the petitioners ought to demonstrate the compliance with the proviso to Order VI, Rule 17 of CPC when the amendment is brought after the commencement of trial, which is not forthcoming in this case.

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

12. The application (Exhibit-72) filed by the petitioners is both for amendment of plaint and for addition of parties,

although, Order I, Rule 10 of CPC has not been specifically mentioned in the application. However, that may not be decisive, as mere non mentioning or even wrong mentioning of a provision is not material. The claim of the petitioners is essentially for amendment of plaint and for addition of parties. As per Order VI, Rule 17 of CPC, the Court shall allow all such amendments, which are necessary for deciding the real controversy in the matter. Thus, a finding that the amendment is necessary for deciding the real controversy in the suit is the first jurisdictional fact before any such amendment can be allowed. After the introduction of the proviso to Order VI, Rule 17 of CPC in the year 2002, there is a second jurisdictional fact introduced, before such amendment could be allowed, when the amendment is brought after the commencement of trial. The Hon'ble Supreme Court in the case of **Kailash Vs. Nankhu, (2005) 4 SCC 480** has *inter alia* held that the proviso is directory and not mandatory in nature. In a later decision, in the case of **R.N. Jadi & Brothers and Others Vs. Subhashchandra, (2007) 6 SCC 420**, the Supreme Court had an occasion to consider its decision in the case of **Kailash** (supra), where it is held that **Kailash** (supra) is not authority to allow an application for amendment in a routine manner. This is what is held in para 14 of the judgment:-

"It is true that procedure is the handmaid of justice. The Court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash Vs. Nankhu, (2005) 4 SCC 480, which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the Court, in an appropriate case, to exercise a jurisdiction to take out the rigor of that provision or to mitigate genuine hardship. It was in that context that in Kailash (supra), it was stated that the extension of time beyond 90 days was not automatic and that the Court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time limit fixed by the Code and the power inhering in the Court in terms of Section 148 of the Code. Kailash (supra) is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner."

13. There cannot be any manner of dispute that, in this case the trial has commenced as the plaintiff no. 2 has entered

the witness box when the application for amendment was filed. Thus, the petitioners were obliged to show that inspite of due diligence they could not have “raised” the matter earlier that is before commencement of trial. The application (Exhibit-72) tries to meet this requirement, saying that the amendment is based on a subsequent event, which in my considered view, cannot be accepted. The claim by Mr. Agnelo Noronha and the receipt of a notice dated 27.12.2017 from the respondent no. 5 for demarcation of the land Survey No. 54/3, cannot be said to be developments so as to prompt the petitioners to seek the amendment. This is because in the plaint the property Survey No. 54/3 was not even the subject matter of suit. The case essentially made in the plaint is that the land Survey No. 53/6 better known as Aframento De Prias is admeasuring 5,050 square metres, however, it is erroneously shown as 3,625 square metres in the survey record. It is contended that the remaining property is wrongly shown as the sea bed of Arabian Sea. It is in that view of the matter that the petitioners have sought a direction to the respondent no. 3 for re-determination of the HTL. By the proposed amendment, it is now sought to be contended that the suit property apart from 3,635 square metres of Survey No. 53/6 comprises of 325 square metres of land of Survey No. 54/3 (wrongly mentioned as Survey No. 53/4

in para A of the proposed amendment) and 1,100 square metres of unsurveyed land. This clearly changes the whole nature and complexion of the suit claim. That apart, the petitioners were also obliged to show that inspite of due diligence, they could not have brought the amendment prior to the commencement of the trial, which they have failed to show. The record, in fact, is to the contrary. The sale deeds namely dated 20.12.2005 in respect of the property Survey No. 53/6 and the one dated 21.12.2005 in respect of the unsurveyed land are much prior to the filing of the suit. The order of National Green Tribunal (NGT) in Appeal No. 59/2012, which is sought to be referred to in para C of the proposed amendment is dated 06.03.2013. Thus, the learned Trial Court is justified in holding that the case made out does not in any manner indicate that the petitioners inspite of due diligence could not bring the amendment earlier. Thus, the amendment in my considered view, has been rightly rejected. The claim for addition of parties is based on the substantive amendment. Thus, the same also cannot be allowed.

14. The reliance on behalf of the petitioners on the case of **Sajjan Kumar** (supra) to my mind is misplaced. That was a dispute involving a claim for eviction of a tenant by a landlord, in which, the description of the property was sought to be

amended, on the ground that the description as given in the rent note was itself incorrect. It does not appear from the facts of the said case that there was any dispute as to the identity of the property. It was merely a case of mis-description. Furthermore, the order of the Trial Court in that case rejecting amendment is dated 29.04.2002, which would indicate that the suit was filed prior to the introduction of the proviso to Order VI, Rule 17 of CPC. Thus, the said proviso was not applicable in the said case (see **Pradeep Singhvi & Another Vs. Heero Dhankani & Others, (2004) 13 SCC 432**). Thus, the case of **Sajjan Kumar** (supra) in my humble view, cannot come to the aid of the petitioners.

15. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to require interference in the exercise of supervisory jurisdiction of this Court. The petition is without any merit and is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.