

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1030 OF 2018**

Gregory Basil Fernandes Petitioner
Versus
Angelina Correia & 5 Others Respondents

Mr. Sandesh D. Padiyar, Advocate for the Petitioner.
Mr. Vishwadh Sardessai, Advocate for the Respondent No. 1.

CORAM : C.V. BHADANG, J.**DATE : 2nd February, 2019****ORAL ORDER:**

The challenge in this petition, at the instance of the petitioner/original plaintiff, is to the order dated 17.07.2018, passed by the learned Trial Court below application (Exhibit D-20). By the impugned order, the learned Trial Court has dismissed the application (Exhibit D-20), for amendment of plaint.

2. The brief facts are that the petitioner has filed Regular Civil Suit No. 84/2017/F, against the respondents for demolition and prohibitory and mandatory injunction. The petitioner is claiming to be the owner of the suit house and is seeking a direction to the defendant no. 1 to demolish the additional construction/renovation of the house and to restore the suit house to its original condition, apart from other reliefs.

3. It appears that in para 24 of the plaint, the petitioner claimed that the cause of action for filing the suit, arose in December 2013, when he noticed that the defendant no. 1, without any right or authority carried out illegal construction in the suit house. The suit itself was filed on 28.02.2017.

4. The defendant no. 1 filed her written statement and *inter alia* raised a contention about the suit being barred by limitation. It is at this stage, that the petitioner filed an application (Exhibit D-20) for amendment of the plaint.

5. It is contented by the petitioner that the defendant no. 1 had filed Regular Civil Suit No. 283/2013, against one Mr. Victor Fernandes, in which, the defendant no. 1 claimed to be the owner of the suit house. The petitioner had sought intervention in the said suit, which application was dismissed on 16.03.2015. It is thus sought to be contended that the cause of action arose on 16.03.2015.

6. There is an apparent error in the application for amendment, in which, the petitioner had sought substitution of para 24 (as mentioned in para 5 of the amendment application)

in place of original para 24, whereas in fact, according to the petitioner, he intends to substitute that, in addition to para 6 of the application.

7. Mr. Sardesai, in all fairness did not dispute that this would be an inadvertent mistake in drafting the application.

8. There is one error on the part of the learned Trial Court also. The opening para of order dated 17.07.2019 states that application (Exhibit D-20) is filed by the defendant no. 1 for amendment of the written statement, when in fact, the Trial Court was dealing with the application of the plaintiff for amendment. Be that as it may, the learned Trial Court found that by virtue of the proposed amendment, the petitioner cannot be permitted to take away the right accrued to a party, namely the defendant no. 1. It is this order, which is subject matter of challenge in this petition.

9. I have heard Mr. Padiyar, the learned Counsel for the petitioner and Mr. Sardesai, the learned Counsel for the respondent no. 1. With the assistance of the learned Counsel for the parties, I have gone through the record.

10. Mr. Padiyar, the learned Counsel for the petitioner submitted that the averments about the rejection of the intervention application in Regular Civil Suit No. 283/2013 is already there in the present suit. It is thus submitted that except claiming that cause of action accrued on the date when the said application was dismissed, there is no other change that the petitioner is trying to effect. It is submitted that the cause of action accrued on the date of the rejection of the intervention application.

The learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court in the case of **Pankaja & Another Vs. Yellappa (dead) & Others (2004) 6 SCC 415**, in order to submit that in such a case, the Trial Court can frame an issue as to limitation.

11. On the contrary, Mr. Sardesai, the learned Counsel for the respondent no. 1 has supported the impugned order. It is submitted that the petitioner is trying to set up a new cause of action, as claimed in para 24 of the plaint, which cannot be allowed. Reliance is placed on the decision of the Supreme Court in the case of **M/s Ganesh Trading Co. Vs. Moji Ram (1978) 2 SCC 91** and particularly, para 5 thereof.

12. I have considered the circumstances and the submissions made. It is now well settled that cause of action is a bundle of facts, on the basis of which, the plaintiff gets a right to initiate a suit and seek relief against the defendant. In the present case, except claiming that cause of action accrued on the date of the rejection of the intervention application, there is no other averment, which is sought to be introduced.

13. The Hon'ble Supreme Court in the case of **M/s Ganesh Trading Co.** (supra) held thus, in para 5 of the judgment:

“It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If

any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional Court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings.”

(Emphasis supplied)

It can thus be seen that as held by the Supreme Court that the defective pleadings are generally curable, if the cause of action sought to be brought out was not *ab initio* completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action

where there was none. In the present case, the very basis of claiming mandatory and prohibitory injunction is not changed. The only claim made is that the cause of action accrued on the date of the rejection of the application for intervention. It is neither necessary nor appropriate to go into the merits of the amendment as held in the case of **Pankaja** (supra). It would be open to the Trial Court to frame appropriate issue and to decide whether, the cause of action indeed, can be said to have accrued on the date on which the application for intervention was rejected or from the date as originally pleaded.

14. Considering the overall circumstances and further having regard to the fact that the amendment is sought at the stage prior to the commencement of trial, the application for amendment is allowed, subject to costs of Rs.5,000/-.

15. In the result the following order is passed:

ORDER

- (i) The petition is allowed.
- (ii) The impugned order is hereby set aside.
- (iii) The application (Exhibit D-20) is allowed as prayed, subject to costs of Rs.5,000/- being paid, within two weeks from today.
- (iv) Needless to mention that respondent no. 1 who is said to be the only contesting respondent would be entitled to file

additional written statement or carry out consequential amendment to the written statement in accordance with law.

C. V. BHADANG, J.

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