IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1085 OF 2018

M/s Costa Pinto & Associates, a duly registered firm under the Indian Partnership Act, with registered office at 8, 2nd floor, Durga Apts., Luis de Miranda Road, Margao, represented in this petition by its Managing Partner Joseph Alfred D'Costa, son of late Minguel A. Costa, aged about 57 years, married, businessman, resident of Pajifond, Margao, Goa 403 601.
…. Petitioner

Versus

M/s Prestige Holiday Resorts LLP, a limited liability partnership with registered office at Haathi Mahal, Mobor, Cavelossim, Salcete, Goa 403 731, represented by its partner Mr. Datta Patil with office at Haathi Mahal, Mobor, Cavelossim. …. Respondent

Mr. S.S. Kantak, Senior Advocate with Mr. Pavithran A.V. and Ms. Aleesha Reis Dos Falcao, Advocates for the Petitioner.

Mr. A.F. Diniz with Mr. A. D'Souza, Advocates for the Respondent.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 11th February, 2019

PRONOUNCED ON: 4th March, 2019

JUDGMENT:

1. Rule made returnable forthwith. The learned Counsel for the respondent, waives service. Heard finally by consent of parties.

2. By this petition, the petitioner/plaintiff is challenging the order dated 22.10.2018, passed by the learned Commercial Court in Special Civil Suit (Commercial) No. 24/2017 (old Special Civil Suit No. 168/2000). By the impugned order, the learned Trial Court has partly allowed an application for amendment (Exhibit-124) for amendment of plaint filed by the petitioner. The petitioner is aggrieved by the rejection of the part of the proposed amendment.

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

The petitioner has filed the aforesaid suit, against the respondent *inter alia* for injunction and other reliefs. In particular the petitioner is seeking mandatory injunction directing the respondent no.1 (defendant no.1) M/s. Prestige Holiday Resorts Private Limited to demolish the six apartments of Block J(A) and alternatively to hand over the possession of the said six apartments, to the petitioner on the petitioner paying the bare cost of construction of the 6 apartments. There are certain consequential reliefs sought in the suit.

4. The case made out in the plaint is that the petitioner as per the agreement dated 07.08.1993, had agreed to purchase and develop a property bearing survey no.398/1 of Benaulim, Salcete, Goa, belonging to the owners Mario Roberto Mesquita and his wife Marta Estibeiro. Pursuant to the said Agreement, the petitioner designed a housing scheme named “The Royal Palms” on the said land and made construction after obtaining the necessary licenses/permissions.

5. It is the material case that the first respondent approached the petitioner for purchase of apartments/villas in order to enable the first respondent to market them in timeshare schemes. The parties over a period of time, entered into in all 19 agreements by which the petitioner had agreed to sell to the first respondent about 165 apartments, five villas, besides other built up areas, which are set out in Schedule-A to the plaint.

6. As per the aforesaid agreement, the petitioner completed and handed over five villas and 49 apartments to the first respondent as set out in Schedule-B to the plaint. After the possession of the aforesaid apartments and villas was handed over to the first respondent, the petitioner as confirming party and the owners of the suit property namely Mario Mesquita and Marta Estibeiro as vendors, executed a Deed of Sale in favour of the first respondent on 19.09.1995 thereby transferring in favour of the first respondent the undivided share of the property corresponding to the areas of the apartments which were handed over by the petitioner to the first respondent. Subsequently, some other apartments/villas were also handed over to the first respondent. It is further contended that by another Sale Deed of the even date along with a Deed of Rectification dated 15.09.2000, the owners of the suit property transferred in favour of the petitioner the remaining land out of survey no.398/1 excluding the portion transferred in favour of the first respondent.

7. Further according to the petitioner, by an agreement dated 19.06.1995, the petitioner had agreed to sell to the first respondent 12 studio units each having an area of about 50 square metres on the first and second floor of Blocks S-26 and S-27. In short, the material case is that the ground floor of Block S-27 in the 'I' Block and the ground floor of J(A), J(B) and J(C) i.e. Block S-28 to S-35 were not agreed to be sold to the first respondent. The cause of action to the suit according to the petitioner arose in July 2000 when the petitioner noticed that the first respondent in contravention of the agreement dated 19.07.1998, had constructed 6 apartments of the J(A) Block, that were cancelled vide clause 1.4 and 3.6 of the agreement dated 19.07.1998. It was in these circumstances, that the petitioner had sought demolition of the 6 apartments of Block J(A) and for some other reliefs insofar as the ground floor spaces in Block J(B) and J(C) are concerned. It may be mentioned that Block J which comprises of Blocks J(A), J(B) and J(C) are together referred to as the "Mundcar Block".

8. The respondents have resisted the suit. For the limited purpose of deciding the present petition, it is not necessary to set out the same in details.

9. On 01.10.2018, the petitioner filed an application (Exhibit-124) for amendment of the plaint, seeking amendment as set out in paras 1 to 73 of the Schedule, annexed to the application. Notwithstanding the extensive amendment, the ground on which it is sought is short. It is contended that the amendment is necessitated on account of subsequent events arising out of the reply dated 05.02.2018, filed by the respondent in Special Civil Suit No. 24/2017 to the interrogatories, wherein the respondent has admitted that between 01.07.1997 and 13.12.2000, the respondent was non-existent. As such, the agreement dated 19.07.1998 which is one of the central documents on which the suit is based is a nullity *ab initio* as it was executed by a non-existent party i.e. by M/s. Prestige Holiday Resorts Private Limited. In short, according to the petitioner, during the period from 01.07.1997 to 13.12.2000, the first respondent was a public limited company and, as such, the three agreements of Sale Deed dated 19.06.1995, 04.11.1995 and 22.09.1996 which were purportedly novated by the agreement dated 19.07.1998 would be *ab initio* void. It is contended that the proposed amendment does not change the nature of the suit or the cause of action and it is necessary for deciding the real controversy in the suit and for arriving at a just and proper decision. It is contended that it would not cause any prejudice to the respondent, as they will get an opportunity to meet the case of the petitioner.

10. The respondents have resisted the application on the ground that it is frivolous and vexatious in nature. It was contended that this is the fourth application for amendment, by which the petitioner is seeking to delete certain paragraphs which at one point of time, the petitioner himself had sought incorporation of the same and which was allowed by the Court on 04.08.2017. It is contended that the proposed amendment seeking deletion of these paragraphs is reflected in paragraphs 26, 30, 31, 40, 41 and 42 of the Schedule which is baseless and is a dialectory tactic. It was contended that the suit was filed in the year 2000 and no restitution was sought till the year 2017. It is contended that the change of status of the respondent to a public company limited by operation of law does not have any impact on the legality in the agreements entered into by the parties.

11. By the impugned order, the learned Trial Court has partly allowed the application by permitting the amendment as sought vide paras 4, 6 (except the last sub-para), paras 7, 8, 10, 11, 12, 13, 15, 16, 24, the first two sub-paras, para 27, 28, 29, 33, 35, 45 and 47 of the Schedule and only the correction in the nomenclature of the blocks as has been sought for in paras 33 and 35 of the Schedule. The rest of the amendment is disallowed. Hence, this petition.

12. It is submitted by Mr. Kantak, the learned Senior Counsel for the petitioner that the Trial Court has not considered whether the proposed amendment, was necessary for deciding the real controversy in the matter, which is the first and foremost requirement, while dealing with an application for amendment. It is submitted that the Trial Court is in error in dismissing the application, on the ground of delay and on the ground that if allowed, the claim would be barred by limitation, on the date on which the amendment is sought.

It is submitted that the Trial Court, is also in error, in holding that the proposed amendment is frivolous and vexatious. It is submitted that the amendment is necessitated on account of the fact that, has come on record by virtue of reply filed by the respondent in Special Civil Suit No. 24/2017 on 05.02.2018 to the interrogatories, wherein the respondent has admitted that between 01.07.1997 and 13.12.2000, the respondent was not in existence, rendering the definitive agreement as nullity.

13. On behalf of the petitioners, reliance is placed on the decision of the Supreme Court in the case of **Estralla Rubber Vs. Dass Estate (P) Ltd. (2001) 8 SCC 97, Sampath Kumar Vs. Ayyakannu & Another (2002) 7 SCC 559, Andhra Bank Vs. ABN Amro Bank N.V. & Others (2007) 6 SCC 167, Surender Kumar Sharma Vs. Makhan Singh (2009) 10 SCC 626**.

14. It is submitted that the Trial Court has gone on the merits of the amendment, which is not permissible.

15. Mr. Diniz, the learned Counsel for the respondent has supported the impugned order. It is submitted that, it is by virtue of Section 43(1A) of the Companies Act, 1956 that the status of the respondent had changed, from a private limited company, to a public limited company and this has no bearing or effect on the agreements, entered into by the petitioner and the respondent. It is submitted that such a change of status, by operation of law, cannot have the effect of the respondent being a non entity, as claimed. It is submitted that there is substantial delay in bringing the amendment and it has rightly been found to be vexatious.

16. The learned Counsel, however, has produced a chart setting out the amendment under certain heads, to which the respondent has no objection for being carried out. In respect of rest of the amendment, it is submitted that the relief would be clearly time barred and such that amendment cannot be allowed, as held by the Hon'ble Supreme Court in the case of **Revajeetu Builders and Developers Vs. Narayanaswamy and Sons & Others (2009) 10 SCC 84**. It is submitted that delay in a given case can be one of the grounds to decline the amendment as held in the case of **Shiv Gopal Sah alias Shiv Gopal Sahu Vs. Sita Ram Saraugi & Others (2007) 14 SCC 120**. It is submitted that for a limited purpose, the Court can examine the merits of the amendment, in order to find out whether, it is necessary to decide the real controversy in the matter or whether, the amendment sought is frivolous or vexatious. It is submitted that the suit is filed on the basis of the very same agreement and the petitioner has obtained interim relief, which agreement is now challenged on the ground that the date on which agreement was entered into, the respondent was not in existence, in the eyes of law. It is submitted that the proposed amendment would have the effect of changing the nature of the suit. Reliance is placed on the decision of the Supreme Court, in the case of **Vijendra, Kumar Goel Vs. Kusum Bhuwania (1997) 11 SCC 457** and **T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board (2004) 3 SCC 392**.

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

18. Out of the proposed amendment as set out in paras 1 to 73 of the Schedule annexed to the application for amendment, the learned Trial Court has allowed the amendment as proposed at paras 4, 6 (except the last sub-para), paras 7, 8, 10, 11, 12, 13, 15, 16, 24, the first two sub-paras, para 27, 28, 29, 33, 35, 45 and 47 of the Schedule and only the correction in the nomenclature of the blocks as sought for in paras 33 and 35 of the Schedule.

19. The respondent has expressed no objection for allowing the propose amendment in paragraph nos.1, 2, 3, 5, 6, 9, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27(entire), 28(entire) and 29(entire), 30, 31, 32, 35, 39, 40, 41(except last six lines), 42, 43, 44, 45(entire) of the Schedule to the Amendment Application in its entirety.

Thus, the amendment proposed in the aforesaid paras can be allowed on concession and by consent of parties.

20. Learned Counsel for the respondents has expressed no objection for allowing the amendment in part of paras 37 and 61 and the remaining part is objected, which reads thus:

I	II	III
	Part of the amendment, which is not objected	**Part of the amendment which is objected**
Para 37	The first four bullet points of paragraph 37 which pertain to nomenclature changes (in red) may be allowed. The amended paragraph 37 would thus read as follows: "The Plaintiff submits that the Plaintiff had merely agreed to sell to Defendant No.1 inter alia the upper floors of **Blocks 28 to 33.** Under Clause 1.4 of the agreement dated 19.07.1998 prepared by Defendant No.1, it has been expressly stipulated that the 6 premises of the **Block 34** would not be constructed, and that Prestige Holiday Resorts Pvt. Ltd. would not seek compensation for the loss of its built-up	The deletion (in red) in the following paragraph 37 as sought to be made by the Petitioner/Org. Plaintiff is being objected to by the Respondents/Org. Defendants : ~~"The Plaintiff is therefore entitled to a mandatory injunction directing M/s. Prestige Holiday Resorts Pvt. Ltd. To demolish 6 apartments of the Block J(A) constructed in the Mundkar block. Plaintiff~~

	area from the plaintiff. **<u>In fact, M/s. Prestige Holiday Resorts Pvt. Ltd.</u>** deducted the amounts already paid by it towards the purchase of the 6 premises and thereby cancelled the Agreement of purchase of the said 6 premises **<u>and therefore no compensation could be sought by it.</u>** Hence the 6 premises of **<u>Block 34</u>** has been illegally constructed in total violation of the said Agreement dated 19.07.1998; without the authority, consent and permission of the Plaintiff and in total violation of the proprietary rights of the Plaintiff who admittedly is the exclusive owner of the undivided right/title in the landed property corresponding to the said 6 apartments. The plaintiff is therefore entitled to a mandatory injunction directing M/s. Prestige Holiday Resorts Pvt. Ltd. to demolish 6 apartments of the Block J(A) constructed in the Mundkar block. Plaintiff is further entitled to restitution of all the gains obtained by Defendant No.1 through the use of the said 6 premises from the time of commencement of use by it of the said premises as such or for the period as found appropriate by this Hon'ble Court.”	~~is further entitled to restitution of all the gains obtained by Defendant no.1 through the use of the said 6 premises from the time of commencement of use by it of the said premises as such or for the period as found appropriate by this Hon'ble Court.~~
Para 61	The first three bullet points of paragraph 61 which pertains to nomenclature changes (in red) may be allowed. The amended paragraph 61 would thus read as follows : “the cause of action for filing the above suit arose in July 2000 when the Plaintiff noticed that M/s. Prestige Holiday Resorts Pvt. Ltd. was contravening the said Agreement dated 19.07.1998 by having constructed the 6 apartments of the **<u>Block</u>** **<u>34</u>** that were cancelled vide Clause 1.4 of the Agreement dated 19.07.1998. The cause of action further arose **<u>a week before filing the suit</u>** when the Director of M/s. Prestige Holiday Resorts Pvt. Ltd. informed the Plaintiff that the Plaintiff has no right to the ground floor of ~~Blocks J(B) and J(C)~~ i.e. Blocks 28 to 33. The cause of action is also continuous as the violations continue to be carried out from day to day. The suit is therefore not barred by limitation.”	The following proposed insertion (in red) in last bullet point of paragraph 61 is being objected to by the Respondents/Org. Defendants. “The cause of action is also continuous as the violations continue to be carried out from day to day. **Other causes of action have also been pleaded hereinabove.**

Thus, the part of the amendment as proposed in paras 37 and 61, to which there is no objection can also be allowed.

21. The dispute remains as regards the other paras which are not allowed by the Trial Court and which are also objected to by the respondents.

22. The suit, as originally filed, is for mandatory injunction for demolition of the six apartments of Block J(A) or in the alternative to direct the first respondent to handover the six apartments of Block J(A) to the petitioner on the petitioner paying bare cost of construction of the said apartments to the first respondent and some other consequential reliefs.

23. The suit is based on the agreement dated 19.07.1998 by which the three agreements dated 19.06.1995, 04.11.1995 and 22.11.1996 have been novated. Now by the proposed amendment, a declaration is sought, inter alia, that the agreement dated 19.07.1998 is null and void or not binding on the plaintiff. Notwithstanding the extensive amendment, the ground on which the amendment is sought is very short. The reason for filing the application for amendment, at this stage, is a reply filed by the respondent on 05.02.2018 to the interrogatories in Special Civil Suit No.24/2017, which shows that the status of the respondent was changed from a private limited company to a public limited company from 01.07.1997 to 13.12.2000.

24. The learned Trial Court has found that the amendment is not based on any subsequent event or facts which came to the knowledge of the petitioner, for the first time, on filing of the reply of the respondent to the interrogatories in the year 2018. The learned Trial Court, in this regard, has noticed a letter dated 01.03.1999 addressed by the first respondent to the petitioner and another letter dated 10.03.1999, by which the petitioner had given NOC for grant of construction licence and approval of the revision plans at the request of the Prestige Holiday Resorts Limited (which was the name of the public limited company), in view of their agreement dated 19.07.1998. In the opinion of the learned Trial Court, there was no difference between the Prestige Holiday Resorts Limited, which was an entity and signatory to the said agreement and Prestige Holiday Resorts Pvt. Limited. The learned District Judge has found and to my mind rightly so, that even on the date of the said letter, the respondent was not a private limited company and in any event, the petitioner could have by due diligence known whether, the respondent was a private limited company, as on the date of the execution of the agreement dated 19.07.1998. Thus, it cannot be accepted that the proposed amendment, was based on any subsequent events or facts, coming to the knowledge of the petitioner, for the first time, on the respondent filing a reply to the interrogatories in Special Civil Suit No. 24/2017 on 05.02.2018.

25. In the case of **Revajeetu Builders and Developers** (supra), the Hon'ble Supreme Court, after taking survey of several decisions, holding the field, has laid down the following factors to be taken into consideration, while dealing with the application for amendment, in para 63 of the judgment, which are as under:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case ?

(2) Whether the application for amendment is bona fide or mala fide ?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case ? and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

It can thus be seen that one of the factors to be taken into consideration is, whether, the application for amendment is bonafide or malafide. Thus, although the Court cannot go into the merits of the amendment, at that stage, a limited examination for the purpose of finding out whether, the amendment is bonafide or malafide, can always be made. The amendment is solely based on the fact that as on the date of the execution of the agreement dated 19.07.1998, the respondent was not a private limited company, but was a public limited company. Thus, according to the petitioner, the entity, with which, the petitioner entered into agreement was non-existent, as on the date of the agreement. The amendment will have to be examined for the limited purpose to find out whether, it is bonafide in nature.

26. Section 43(1A) of the Companies Act, reads thus:

> "Where the average annual turnover of a private limited company, whether in existence at the commencement of the Companies (Amendment) Act, 1974 or incorporated thereafter, is not, during the relevant period less than such amount as may be provided, the private company shall, irrespective of its paid-up share capital, become, on and from the expiry of a period of three months from the last day of the relevant period

> during which the private company had the said average annual turnover, a public company by virtue of this sub-section:
>
> Provided that even after the private company has so become a public company, its articles of association may include provisions relating to the matters specified in clause (iii) of sub-section (1) of Section 3 and the number of its members may be, or may at any time be reduced, below seven.”

It can thus be seen that by virtue of the operation of law, namely, Section 43(1A) of the Companies Act, the status of the respondent, for a limited period had changed to a public limited company and this by itself, cannot afford a valid ground for allowing the proposed amendment.

27. There are certain other factors, such as, delay which is also relevant for the purpose. Although, delay by itself in every case, may not be sufficient to deny amendment, it can assume significance in a given case.

28. In the case of **Surender Kumar Sharma** (supra), the Hon'ble Supreme Court has held that the amendment cannot be refused merely on the ground of delay, if the Court finds that by allowing the amendment the real controversy between the parties can be resolved and where the other party can be adequately compensated by costs or otherwise. It can thus be seen that the question would depend upon the facts and circumstances of each case.

29. In the case of **Surender Kumar Sharma** (supra), there was a suit for eviction, on the ground of arrears of rent, wherein on facts, it was found that the proposed amendment was not changing the nature and the character of the suit and was thus allowed.

30. In the case of **Andhra Bank** (supra), there was a plea for amendment of the written statement by introduction of additional ground of defence, which on facts was found to be permissible, notwithstanding the delay in bringing the amendment.

31. In the present case, I find that looking to the nature of the suit, as it stands and the relief claimed, the proposed amendment would not be necessary for deciding the real controversy in the matter and, on the contrary, it would change the nature of the suit altogether, in as much as the suit as originally filed is based on agreement dated 19.07.1998 which itself is now sought to be challenged, as being null and void.

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

(i) The petition is partly allowed.

(ii) The impugned order is hereby modified.

(iii) In addition to the amendment as allowed by the Trial Court, the amendment as set out in paragraph nos.1, 2, 3, 5, 6, 9, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27(entire), 28(entire) 29(entire), 30, 31, 32, 35, 39, 40, 41(except last six lines), 42, 43, 44, 45(entire) of the Schedule to the Amendment Application in its entirety, is allowed.

(iv) The proposed amendment in part of paras 37 and 61 as set out in column II of para 20, is also allowed.

(v) The rest of the amendment is disallowed.

(vi) Rule is made absolute in the aforesaid terms with no order as to costs.

33. At this stage, Mr. Pavithran, the learned Counsel for the petitioner seeks extension of the interim relief as the petitioner intends to approach the Hon'ble Supreme Court.

34. Mr. Diniz, the learned Counsel for the respondent opposes the prayer.

35. Having heard the learned Counsel for the parties and in order to afford a fair opportunity to the petitioner, it is ordered that the ad-interim relief, already operating, shall continue for a period of three weeks from today.

C. V. BHADANG, J.

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