

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1064 OF 2019.

FR. ANTONIO LOUIS FRANCIS PAUL
D'SOUZA @ FR. TONY D'SOUZA, THR.
HIS POA, SHRADDHA NIKHIL KAMAT,, ... Petitioner

Versus

MANEESHA SUBHASH NARVEKAR
AND 8 ORS., ... Respondents.

Shri Shivan Desai, Advocate for the petitioner.
Shri S. S. Kantak, Senior Advocate with Shri P. Talaulikar, Advocate for
the respondent nos.1 and 2.
Shri A. Gosavi, Advocate for the respondent no.3.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 4th March 2020

ORAL ORDER

Facts:

The petitioner is the sole plaintiff in Regular Civil Suit No. 12/2013/E, before the Civil Judge, Senior Division, Mapusa. He has filed that suit against nine defendants. He has sought a declaration.

2. As the pleadings reveal, the defendants 3 to 9 sold a piece of their property to the defendants 1 and 2, through a registered deed. The plaintiff claims that the property belongs to him and that the defendants 3 to 9 have nothing to do with it. He alleges that those defendants created title through another person having a similar name

as that of the plaintiff's predecessor. But those namesakes¹ are different and unconnected. So, in that context, the plaintiff wanted the Civil Court to declare that the sale deed the defendants 3 to 9 executed in favour of the first defendant, who is the second defendant's wife, is void. He has also sought a consequential injunction.

3. As excepted, the defendants filed their written statements and denied the plaintiff's claim. Then the trial Court framed the following issues:

1. Has the plaintiff proved that he is the absolute owner and possessor of the suit property?
2. Has the plaintiff proved that the Sale Deed, dated 22.08.2008, is void?
3. Has the plaintiff proved that the defendants must be restrained from interfering with the suit property?
4. Has the plaintiff proved that the suit is not barred by limitation?
5. Have the defendants 3 to 9 proved that they were enjoying the suit property for more than 30 years continuously and openly and, thus, they should be considered as owners in possession of the suit property?

4. And then the matter went for trial. The trial concluded. The counsel for the respective parties advanced their arguments. Thereafter the trial Court adjourned the matter. It was to enable the parties to file their written arguments. On the date of next adjournment, the parties did file their written arguments. But, besides the written arguments, the

¹ A namesake is actually one who is intentionally named after another, usually, an ancestor. It does not refer to non-intentional, coincidental name sharing or identity as well. A name-fellow is a disused word. So for want of a better word, let us use 'namesake'.

plaintiff filed another application for amendment of the pleadings.

Draft amendment reads thus:

At the end paragraph No: 4 of the plaint after words “the Plaintiff above named.” add following “That said Mr. Patrick Michael D Souza alias Mr. Patrocinio de Souza alias Mr. Patrick D'Souza alias Mr. Patrick M. D'Souza alias Mr. Patric D'Souza alias Mr. Patrocinio D'Souza had expired on 14/3/1980 and the said fact is recorded in the inventory proceedings bearing No: 337/2011/F and therefore, assuming and without admitting that the Judgment and Decree dated 30/6/2007, passed in Regular Civil Suit No: 209/2006/C refers to Mr. Patrick Michael D Souza alias Mr. Patrocinio de Souza alias Mr. Patrick D'Souza alias Mr. Patrick M. D'Souza alias Mr. Patric D'Souza alias Mr. Patrocinio D'Souza, the same is passed against a person who was dead at the time of filing the said above suit and/or passing Judgment and Decree in the said suit proceedings.

After prayer clause (B) add prayer clause (BB):

(BB) In alternative to relief prayed at prayer clause (B) grant relief of recovery of possession to the plaintiff herein and direct the Defendant No: 1 and/or 2 to handover and delivery vacant possession of the suit property to the plaintiff.

5. Through its order, dated 6.11.2019, the trial Court rejected the plaintiff's pleas for amendment. Aggrieved, he has filed this Writ Petition.

Submissions:

Petitioner:

6. In the above factual background, Shri Desai, the learned counsel for the petitioner, has submitted at the very outset that the petitioner desires to give up his claim to incorporate the first part of the draft amendment. Instead he would like to focus on the second part, which according to him, is quite essential for the Court to resolve the real controversy in the suit. He also assures the Court that the

petitioner does not intend to lead any evidence on this alternative prayer.

7. That is, the first part of the draft amendment refers to another round of litigation between the respondent and a third party. To that extent, the petitioner wanted to assert that the judgment the defendants 3 to 9 secured against a third party would not bind him. Now that plea stands given up. On the other hand, the second limb of the draft amendment concerns the incorporation of additional or alternative prayer. The petitioner wants the relief of recovery of possession as an additional or alternative prayer.

8. Shri Desai has strenuously contended that the petitioner has all along maintained that he has been in possession of the property. To support this assertion, he has taken me through the rival claims on the property. At any rate, Shri Desai maintains that the plaintiff has been in possession. Nevertheless, any stray act of trespass on the defendants' part, as set out in the suit itself, does not amount to any dispossession. That said, no cause of justice should suffer on technicalities. So the petitioner wanted to be abundantly cautious. In that regard, the petitioner wanted to incorporate the alternative prayer. Shri Desai insists that the amendment is essential in the interest of justice and for the resolution of the real controversy in the issue.

9. To elaborate, Shri Desai has submitted the amendment the petitioner has sought does not alter the nature of the suit, nor does it cause any prejudice to the defendants' interest.

10. Eventually, Shri Desai, the learned counsel, has drawn my attention to the judgment recently rendered by this Court in *Keshav Shambhu Palyekar v. Goa Tourism Development Corporation Ltd*² besides *Paresh Shah v. Bhonsle Dairy*.³ According to Shri Desai, the latter judgment has been identical on all fours. He stresses that even the facts are similar. To conclude, Shri Desai has submitted that the trial Court has gone on to the merits of the matter and virtually rendered a judgment in anticipation of what could have been the final judgment and decree, which is yet to be delivered. Therefore, he urges this Court to set aside the impugned order and allow the amendment, especially, in the interest of justice.

Respondents:

11. Shri Kantak, the learned Senior Counsel for the respondents 1 and 2, has initially drawn my attention to what he termed as the untenability of the petitioner's claim to the property. According to him, the petitioner and his brother already had Inventory Proceedings in 2000. In those proceedings, a particular property was shown in Survey No.54/3. Later suppressing that fact, the petitioner took out second

²WP 1183 of 2018,decided on 20.1.2020. (High Court of Bombay at Goa)

³ WP No.865/2018, decided on 29.11.2017 (High Court of Bombay at Goa)

inventory proceedings in 2011, showing the same property, earlier allotted to his elder brother, as a different property under Survey No.55/7. Thus, the learned Senior Counsel contends that very factual foundation of the petitioner's case is shaky.

12. I am afraid, as rightly pointed out by the petitioner's counsel, it is not in my province to adjudicate on the merits of the matter. Instead, I required the learned Senior Counsel to confine himself to the issue of amendment. Then, the learned Senior Counsel has submitted that the draft amendment would amply reveal that the petitioner wanted to reintroduce an amendment which already stood rejected.

13. To elaborate, the learned Senior Counsel has submitted that, initially, on 16.3.2018, when the matter was listed for final arguments, the petitioner applied for amendment. That amendment was nothing but the first part of the present amendment. On 31.8.2018, the trial Court dismissed that application.

14. Indeed, on perusal, I accept that the earlier amendment and the first part of the present amendment are identical. But now, the petitioner gives up his claim over that part. So the issue of repeated efforts with an identical plea ends.

15. If we confine to the second part of the draft amendment, according to the learned Senior Counsel, it is belated. He points out liberal may be the Court's approach in allowing the amendments, but it

is subject to the principles of prejudice and prior knowledge. To illustrate, the learned Senior Counsel has submitted that in reply to the amendment application, the respondents have taken a plea of limitation. So, if the petitioner is successful, the amendment necessitates an issue on limitation, and that issue on limitation necessitates additional evidence, and that additional evidence necessitates further trial.

16. The matter has already been dragged on for a considerable number of years, and it cannot, stresses the learned Senior Counsel, have a second lease of life. It is impermissible. To support his contentions, the learned Senior Counsel has relied on *Rajkumar Gurawara v. S. K. Sarwagi and Company Private Limited*⁴.

17. In the end, the learned Senior Counsel has also contended that it is not the petitioner's case that pending the suit, he has lost the possession and that under those changed circumstance, he was compelled to apply for amendment. Under these circumstances, the learned Senior Counsel has urged the Court to dismiss the writ petition

18. Heard Shri Desai, the learned counsel for the petitioner, and Shri S. S. Kantak, the learned Senior Counsel for the respondents 1 & 2.

Discussion:

19. To begin with, I record that the petitioner has given up his claim to incorporate the first part of the draft amendment; instead, he

⁴ 2008(14) SCC 364

has confined his claim to incorporating the alternative or additional prayer concerning the recovery of possession. True, the defendants have pleaded the defence of limitation as well.

20. As much depends on the scope of Order 6 Rule 17 of CPC, it pays to examine that provision. It reads:

17. Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and *all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy* between the parties.

Provided that *no application for amendment shall be allowed after the trial has commenced*, unless the Court comes to the conclusion that *in spite of due diligence*, the party could not have raised the matter before the commencement of trial.

(Italics supplied)

21. Pithily stated, as the Supreme Court did in *Rajesh Kumar Aggarwal v. K. K. Modi*⁵, this rule declares that the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings. But it stresses that such amendment should be necessary for determining the real question in controversy between the parties. The proviso puts a caveat in place. No application for amendment should be allowed after the trial has commenced unless the Court concludes that despite due diligence, the party could not have raised the matter before the trial commenced.

22. In *Paresh Shah*, the petitioner filed a suit for declaration, injunction, and other consequential relief. All along, he has claimed that

⁵ 2006(4) SCC 385

he had been possessing the property. He secured an ad interim injunction, too. When the matter was posted for arguments, the petitioner applied for amendment; he sought the alternative relief of recovery of possession. He has also undertaken not to lead fresh evidence should the amendment be allowed.

23. On the question of due diligence, the petitioner pleaded that he “was given legal advice to seek such an alternate relief.” That legal advice, according to him, was unavailable earlier. The trial Court refused the amendment. The petitioner in that case advanced identical arguments as is done now before me and incidentally by the same counsel, it seems. He expects the same result, naturally. A decisional *déjà vu* for him. But how does it unravel?

The Perils of Precedent:

24. The doctrine of precedent is everyone's dragon. If facts in the putative precedent are identical with or reasonably similar to those in the compared case, the precedent is recognized as legitimate, and it is applied. In such cases, all of us consider it merely, as the Italians say, *un dragonetto* (a small dragon). But if the material facts in the compared case do not run on all fours with the putative precedent, the doctrine becomes *un dragone* or, to give equal time, *una dragonessa* (a full grown, ferocious dragon). Wrestling with such a dragon can be the most

difficult and controversial job in the judging business⁶. What is one man's meat is another man's poison. What is one attorney's material and relevant fact in analogical comparisons is the other attorney's immaterial and irrelevant fact. The judge is required to draw this distinction⁷.

25. Let us see whether *Paresh Shah* is a precedential dragon that can be slayed without our offending the principle of *stare decisis*. In that case, this Court noticed that the petitioner, earlier in 2014, pleaded that one of the respondents “forcibly occupied” the plot and started raising structures. So the petitioner applied under Order 39, Rule 2A, complaining of contempt. But he sought amendment in 2017—three years later. In this context, *Paresh Shah* has observed that the question of due diligence “has to be considered in the facts and circumstances of each case and on a pragmatic view.” Then, it has held that “the petitioner is entitled to say that the application was made when he was legally advised to seek an alternate relief of possession” if the court concludes that “the petitioner is no longer in possession or has lost possession.”

26. As rightly contended by the respondents 1 and 2, the petitioner in *Paresh Shah* did assert possession and even secured interim

⁶ Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?* Pepperdine Law Review, Vol.17, Issue 3, Article 2, p.605, found at: <http://digitalcommons.pepperdine.edu/plr>, accessed on 4th March 2020

⁷ Id, p.621

injunction. Later, he has complained of trespass or dispossession, for he was unsure of the nuance. So he sought the alternative relief. Here, no such event or eventuality arises.

27. Oft-quoted is the Lord Halsbury's assertion in *Quinn v. Leatham*⁸, that that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all. And this proposition finds accepted on numerous occasions by the Supreme Court. One such case is *Bhavnagar University v. Palittana Sugar Mills Pvt. Ltd.*⁹: "It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

28. I reckon precedents are as much factual as they are legal, and in any case material facts are those that have legal consequences. In *Paresh Shah* the petitioner's assertion of previous possession and later

⁸ 1901 AC 495

⁹ (2003) 2 SCC 111

dispossession are material and make all the difference to the case outcome. That accepted, we need not examine the rationale of the “legal advice” in the middle of a suit to a party who has all along been represented by a counsel. _

29. In *Keshav Shambhu Palyekar*, this Court has held that the question of correctness of the survey number and the legitimacy of possession are matters of merit. It must be based on the documentary and oral evidence. An amendment, on the other hand, cannot be rejected prejudging what could be termed as the falsity of a plea or its inherent weakness. True, there could be no quarrel about this proposition.

30. In *Rajesh Kumar Aggarwal*, the Supreme Court has held that while considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment at the stage of allowing the prayer for amendment. On fact, *Rajesh Kumar Aggarwal* has held that since the cause of action for the amendment arose during the pendency of the suit, the proposed amendment ought to have been granted. According to it, with the amendment, the basic structure of the suit has not changed, save the relief sought.

In *Rajkumar Gurawara*, the plaintiff filed the suit for declaration of his exclusive right to do mining operation in the suit property. But, after impleading the second defendant, after closing the evidence, and during the arguments, the plaintiff applied for amendment. He wanted to amend the prayer, with an additional relief of possession and damages. Accepting that pre-trial amendments must be liberally viewed, the Supreme Court has, however, held that after the commencement of trial, particularly after the completion of evidence, the question of prejudice to the opposite party may arise. In such an event, the court must satisfy itself of the conditions prescribed in the proviso.

On facts, *Rajkumar Gurawara* has held that the plaintiff had the knowledge about the third party's possession, but he did not implead him. Instead, he proceeded with the trial. Only during the stage of arguments, the plaintiff came up with an application for an amendment. In this context, *Rajkumar Gurawara* has stressed that "the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation." According to *Rajkumar Gurawara*, the plaintiff not only failed to satisfy the conditions

prescribed in proviso to Order VI Rule 17 but even on merits has failed to justify the amendment.

Gratuitous Diversions:

19. That said, I concur with the petitioner's counsel that the trial Court has travelled far and almost decided the case hypothetically, though the issue before it concerns only an amendment. True, at times, what is sought to be introduced through the amendment may be frivolous and meritless. But the merit of amendment is different from the merit of the contents the amendment brings in. It suffices if the applicant satisfies the criteria laid down in Order 7, Rule 11 CPC for securing the amendment. Courts cannot prejudge the merit of the plea or prayer sought to be introduced. That is for trial. True, here, the petitioner has failed to satisfy the proviso to Order 7, Rule 11 CPC. Seeking the relief of recovery of possession when the matter was posted for arguments, without establishing the element of due diligence, cannot be sustained. His assurance to the trial Court that he would not lead any evidence is no solace. The respondent might want to if the amendment were allowed.

20. Here, as the record reveals, the trial Court has virtually discussed the entire case and pointed out the alleged infirmities and supposed short comings in the petitioner's case, I am afraid such an approach will cause prejudice to the petitioner.

21. I, therefore, hold that all the observations made in the impugned order touching the merits of the case stand erased.

Result:

Under these circumstances, I find no ground to interfere with the judgment under challenge. I accordingly dismiss the writ petition.

DAMA SESHADRI NAIDU, J.

vn*