

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 88 OF 2022

1 Xavier Agostinho Dias
aged about, 62 years,
married, businessman

2 Thereza Ozinia Dias
aged about 64 years,
married, housewife,
Both residents of House No.477,
Orel, Assolna, Salcete Goa.

... Petitioners

Versus

1 The State of Goa,
through its Chief Secretary
Government of Goa
Secretariat, Porvorim,
Bardez Goa.

2 The Chief Engineer
Public Works Department
Roads and Bridges
Government of Goa,
Panaji Goa.

3 The Executive Engineer,
Works Division VI
Public Works Department,
Fatorda, Margao Goa.

4 The Assistant Engineer
Sub Division – I,
Works Division – VI
Public Works Department,
Fatorda, Margao Goa.

... Respondents

Mr Sudin Usgaonkar, Senior Advocate with Ms. Tanisha Mashelkar, Advocate for the Petitioners.

Mr Geetesh Shetye, Additional Government Advocate for the Respondents.

CORAM: M. S. SONAK, J.

DATED : 20th APRIL 2023

ORAL JUDGMENT

1. Heard Mr S. Usgaonkar, learned Senior Advocate who appears along with Ms T. Mashelkar, learned counsel for the Petitioners and Mr G. Shetye, learned Additional Government Advocate for the Respondents.
2. Rule. The rule is made returnable immediately at the request and with the consent of the learned counsel for the parties.
3. This petition challenges the orders dated 28.02.2022 on Exhibit D-113 (application for amendment of the plaint) and Exhibit D-114 (application for production of additional documents). The trial Court has dismissed both applications.
4. The Petitioners are the original plaintiffs, and the Respondents are the original defendants in Civil Suit No.31/2013. When the evidence was concluded and the matter was posted for judgment, the Petitioners sought leave to amend the plaint and produce certain additional documents. These applications came to be rejected by the

trial Court mainly because the Petitioners failed to make out a case that, despite due diligence, they could not have produced such documents or sought leave to amend the plaint based thereon before the commencement of trial.

5. Mr Usgaonkar submits that even the impugned orders acknowledge that the documents now sought to be produced are vital because they contain facts that constitute the cause of action. He presents that the documents are correspondence with the Government and, in that sense, public documents. He submits that such documents are necessary for determining the real question in controversy between the parties. The amendment was only for pleadings to these documents. He, therefore, submits that the trial Court erred in rejecting the application for the production of additional documents and granting leave to amend the plaint. Mr Usgaonkar submits that prejudice, if any, could always have to be compensated with costs. He relies on *Abdul Rehman and another Vs Mohd. Ruldu and others*¹ to support his contentions.

6. Mr G. Shetye learned Additional Government Advocate submits that seeking leave to amend or produce additional documents does not make out any case of due diligence. He presents that if these documents were so vital, it is inconceivable that they were not produced earlier. He submits that there is a contradiction in the Petitioners' stance because the application states that these documents

¹ (2012) 11 SCC 341

were discovered only in 2022 when one of the Petitioners stayed at Assolna after he tested positive for Covid. Mr Shetye, therefore, submits that there is no jurisdictional error in the impugned orders. He relies on *Snehdeep Auto Centre and others Vs Ravindra Ganpatrao Bharitkar and others*² and *Vidyabai and others Vs Padmalatha and another*³ in support of his contentions.

7. The rival contentions now fall for my determination.

8. The Petitioners/plaintiffs have instituted this suit seeking relief of declaration and permanent injunction in respect of the suit property described in the plaint. This suit is instituted against the Government, PWD, etc. because the Petitioners apprehended that the Respondents would forcibly take over the Petitioners' property for road widening.

9. The documents that the Petitioners seek to produce are basically letters written by the Petitioners to the Executive Engineer, PWD and some letters *inter se* between the Assistant Engineer, PWD and Sarpanch of Village Panchayat of Assolna or the Deputy Collector in charge of demolition squad. All these documents are on pages 53 to 57 of the paper book in this petition. These documents are also described in para 7 of the Petitioners' application, Exhibit D-114.

2 (2012) 6 Mah LJ 348

3 (2009) 2 SCC 409

10. The application for amendment of the plaint concerns these additional documents that the Petitioners now seek to produce on record.
11. The trial Court, in paragraphs 17, 18, and 19, has observed as follows:-

"17. The proposed amendment has the basis in the documents of the year 2011, 2012 and 2013. These documents are in the form of letters, some of which are addressed by the plaintiffs and some another correspondence are addressed by the defendants to the Village Panchayat or the Deputy Collector.

*18. Suit was filed on 18.05.2013 on the cause of action that arose in May 2013. These documents therefore were very fresh in the mind of the plaintiff at the time of filing the suit and at the time when the cause of action arose. **The bare perusal of the contents of these documents would indicate that these documents contains bundle of facts which constitutes the cause of action for the instant suit.** Being so, no prudent man would tend to forget these documents at the time of filing of the suit. Even if the documents are not available a prudent man will make every efforts to trace these documents. The plaintiff said, he traced it when he came to reside house at Assolna in the year 2022. Meaning thereby prior to that he made no efforts to trace these documents.*

19. The due diligence has not defined in the Code. As per the dictionary meaning due diligence means such diligence as a prudent man would exercise in the conduct of his own affairs. The conduct of plaintiff in not putting efforts to trace these document prior to 2022 shows lack of due diligence that could be attributed to the prudent man."

12. Thus, even the trial Court admits that from a bare perusal of the contents of the documents which are now sought to be produced, it is clear that these documents contain a bundle of facts which constitutes the cause of action for the instant suit. Thus, the trial Court agrees that these documents and consequential amendments based on these documents are necessary for determining the real question in controversy between the parties. In *Abdul Rehman* (supra), the Hon'ble Supreme Court has held that the object of Order VI Rule 17 of CPC is that the Courts should try the merits of the case that comes before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The Court explained that the primary purpose of allowing the amendment is to minimize the litigation.

13. *Snehdeep Auto Centre* (supra) and *Vidyabai* (supra) relied upon by Mr Shetye hold that when leave to amend is applied after the commencement or conclusion of the trial, the Applicant has to satisfy the Court that despite his due diligence amendment could not be filed earlier, or documents could not be produced earlier.

14. In the present case, the Petitioners have explained how they entrusted the matter to their Advocate by giving him all the necessary case papers when the suit was instituted. Additionally, the Petitioners have explained how they shifted their residence from Assolna to Camurlim. Additionally, they have presented how they had taken all

the documents to Camurlim. Further, the Petitioners have explained that Petitioner No.1 tested positive for Covid on 06.01.2022 and was quarantined in his earlier house at Assolna. During quarantine, he found the file of documents in the earlier place, including the documents that the Petitioners now seek to produce on record.

15. The explanation offered by the Petitioners does not smack of any malafides. The explanation sounds probable. The explanation suggests that despite due diligence, the Petitioners might have had no immediate access to these documents. No sooner were these documents discovered, leave was sought to amend the plaint and produce these documents on record. As noted by the learned trial Judge, the documents contain a bundle of facts necessary to prove the cause of action. As such, the documents are necessary for determining the real question in controversy between the parties.

16. Some prejudice is bound to occasion the Respondents. However, such prejudice can be compensable by payment of costs. Accordingly, Mr Usgaonkar, based on the instructions from the Petitioner, who is present in the Court, offered to pay costs of ₹25,000/- to the Respondents/State. Such costs would sufficiently compensate the Government.

17. In the impugned order rejecting the application for amendment, the trial Court observed in para 22 that the plaintiffs wish to change the cause of action by the proposed amendment. There is no basis for this observation. The cause of action remains the same.

The documents are necessary to prove the cause of action initially pleaded. The amendment is needed because otherwise, the Respondents would contend that no amount of evidence which is not backed by pleadings can ever be looked into.

18. Therefore, though this is a case of an amendment after the trial has concluded, the Petitioners/plaintiffs have made out a case that, despite due diligence, it was impossible to file an amendment application earlier or produce documents earlier. The proviso does not require a party to prove that it was impossible for the party to have filed such an application earlier. Thus, the proviso to Order VI Rule 17 of the CPC is substantially complied with in the facts of the present case.

19. For all the above reasons, the impugned orders dated 28.02.2022 are set aside. Accordingly, the Petitioners' application at Exhibits D-113 and D-114 are allowed subject to the Petitioners' paying costs ₹25,000/- to the Respondents.

20. The costs must be deposited before the trial Court within four weeks from today. If the costs are deposited within four weeks, the Respondents can withdraw the same. However, if the costs are not deposited within four weeks, this petition shall be deemed dismissed with costs of ₹10,000/-.

21. It is clarified that this Court has not gone into the merits of the matter. Therefore, any observations in this judgment and order or, for

that matter, in the impugned orders should not be considered for deciding the case on merits.

22. The rule is made absolute in the above terms. Accordingly, the interim order is vacated.

23. The Civil Application does not survive the disposal of the Writ Petition, and the same is also disposed of accordingly.

24. All concerned are to act on the authenticated copy of this order.

M. S. SONAK, J.