

(2015) 08 BOM CK 0238
In the Bombay High Court
Case No : Writ Petition No. 259 of 2015

Rajaram Naik

APPELLANT

Vs

The State of Goa and Others

RESPONDENT

Date of Decision : 31-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 6 Rule 17

Citation : (2015) 5 ABR 773 : (2016) 1 ALLMR 5 : (2016) 2 BomCR 378 :
(2016) 1 MhLj 770

Hon'ble Judges : C.V. Bhadang, J

Bench : Single Bench

Advocate : Vilas P. Thali, for the Appellant; A. Prabhudessai, Additional Government Advocate, Advocates for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J—Rule. Rule made returnable forthwith. Mr. Prabhudessai waives service for respondents no.1 and Mr. P. Lotlikar waives service for respondent no.3. Heard finally with consent.

2. By this petition, the petitioner (original defendant no.3) is challenging the order dated 21/1/2015 passed by the learned District Judge below application at Exhibit 87/D in Civil Suit No. 3/2008. By the impugned order, the application (Exhibit 87/D) filed by the third respondent (original plaintiff), for amendment of the plaint has been allowed.

3. The brief facts are that the third respondent has instituted civil suit no.3/2008 for permanent injunction in which the State of Goa is the defendant no.1, while the Director of Mines and Geology, Government of Goa is the second defendant. The petitioner happens to be the third defendant in the suit.

4. As per the plaint allegations the case made out is that the third respondent which is a Private Ltd. Company was having a Diploma of Concession bearing No. 51 of 22 September 1958 for mining situated at villages Gavanem and Ambelim

of Sattari Taluka admeasuring 100 hectares. By virtue of the Goa, Daman and Diu Mining Concession (Abolition and Declaration of the Mining Leases) Act 1987, the concession in favour of the third respondent was deemed to be a lease. The third respondent had applied on 14/11/1988 to the Government of Goa for renewal of the said mining lease, which application was rejected by the order dated 20/10/1989.

5. Sometime in the month of October 2007, the representative of the third respondent noticed that the petitioner was carrying out illegal excavation in the said property. Further according to the third respondent it was reliably learnt that the petitioner had acquired surface rights in respect of survey no.7 and a total quantity amounting to 10,000 tonnes of iron ore of low grade was excavated by the petitioner from survey no.7. In such circumstances, the suit came to be filed for permanent injunction, restraining the petitioner or anybody on his behalf from carrying on any mining activity or extracting any ore, in the property surveyed under no.7 of village Ambelim and restraining them from otherwise interfering with the same or from removing, transporting the ore illegally extracted by them from the survey no.7. A mandatory injunction was also sought against the first and second respondents for taking action against the petitioner.

6. It is undisputed that the third respondent had earlier filed an application for amendment in October 2010, which was allowed on 8/12/2010 and some amendments were carried out. It is further undisputed that in the civil suit, at present, the evidence of the plaintiff is being recorded.

7. In these circumstances, an application at Exhibit 87/D came to be filed on behalf of the third respondent seeking addition of paras 10(3), 11(B), 14(B) and the prayer clause (bb) in the plaint. It was contended that the amendment is necessitated on account of some subsequent developments and was necessary for deciding the real controversy in dispute.

8. The application was opposed on behalf of the petitioner mainly on the ground that the amendment sought would introduce a claim which is barred by time and that it is a belated attempt to amend the plaint, which would be in breach of the proviso to Rule 17 of Order 6 of C.P.C. It is also contended that the amendment is not relevant in so far as the controversy in the suit is concerned.

9. The Learned District Judge came to the conclusion that the amendment was based on the same cause of action, namely the right flowing in favour of the plaintiff under the Diploma of Concession bearing no.51/1958. In so far as the question of the amendment being barred by limitation is concerned, the learned District Judge found that this cannot be adjudicated at the stage of allowing the amendment, as it is a mixed question of law and facts, which has to be assessed in evidence. It was also found that the petitioner would be at liberty to raise the point of limitation at an appropriate time. The learned District Judge also found that the amendment was necessitated on account of subsequent developments and, as such, the proviso to Rule 17 of Order 6 would not be available to the

petitioner to oppose the amendment. It was found that the amendment would be necessary for deciding the real controversy between the parties. It was also found that the proposed pleadings are necessary and relevant for deciding the suit and no prejudice of whatsoever would be caused to the petitioner. In the face of such finding the application came to be allowed. Feeling aggrieved the petitioner is before this Court.

10. I have heard Mr. Thali, the learned counsel appearing for the petitioner, Mr. Prabhudessai, the learned Additional Government Advocate appearing for respondent no.1 and Mr. Lotlikar, the learned Senior Counsel appearing for the third respondent and With the assistance of the learned counsel for the parties, I have perused the record.

11. At the outset, it is submitted by Mr. Thali, the learned counsel appearing for the petitioner that the amendment except, as proposed in paras 14(B) and the prayer clause (bb) is not opposed. In other words, Shri Thali has confined his challenge only to the amendment, as proposed in para 14(B) and prayer clause (bb). It is submitted that by addition of para 14(B) and the consequent prayer clause (bb), for the first time, a claim in the nature of compensation/damages to the tune of Rs. 4 crores is sought to be introduced, which would be otherwise time barred. It is submitted that thus the amendment could not have been allowed. It is next submitted that the third respondent did not propose the said amendment when the plaint came to be amended for the first time in December 2010. It is submitted that the learned District Judge has not adverted to the provisions of Rule 17 Order 6 of CPC, while allowing the amendment. Lastly it is submitted that the amendment is not relevant in so far as the controversy is concerned.

12. The learned counsel for the petitioner has placed reliance on the following decisions in support of his submissions:

(i) K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, AIR 1995 SC 1768 : (1996) 2 BC 152 : (1996) 1 CTC 178 : (1995) 3 SCALE 69 : (1995) 3 SCC 17 Supp : (1995) 3 SCR 960 .

(ii) Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others, AIR 2007 SC 806 : (2007) 1 JT 579 : (2006) 13 SCALE 525 : (2006) 10 SCR 477 Supp .

(iii) Shiv Gopal Sah @ Shiv Gopal Sahu Vs. Sita Ram Saraugi and Others, AIR 2007 SC 1478 : (2007) 147 PLR 78 : (2007) 5 SCALE 198 : (2007) 5 SCR 568 .

He therefore submitted that the petition be allowed and the amendment to the extent of allowing introduction of para 14 (B) and prayer clause (bb) be set aside.

13. On the contrary, it is submitted by Mr. Lotlikar, the learned Senior Counsel for the third respondent, that once the petitioner is not opposing the amendments which are necessitated on account of subsequent developments, as proposed in para 10 (3) and 11 (B), the amendment as per para 14 (B) could not have been

opposed. It is submitted that the same is consequential in nature.

It is submitted that the allegation that the petitioner had engaged in illegal mining and extraction of iron ore, is already there and only the quantification of the damage is made by addition of paras 14(B) and prayer clause (bb). The learned Senior Counsel would submit that by an order dated 5/6/2008, the Trial Court while dismissing the application for temporary injunction had restrained the petitioner from carrying out any mining activity or extracting any ore or transporting any ore from survey no.7 of village Ambelim, without obtaining the required licence/permission of the competent authority. It is submitted that the third respondent had challenged the rejection of the application for temporary injunction in Appeal From order No. 76/2008. This Court while dismissing the said appeal had set aside the restraint placed on the petitioner (defendant no.3). It is submitted that the third respondent had filed a Civil application(review) no. 9/2010, which was allowed by this Court on 18/1/2011 and that part of the order which had removed the restrain placed on the petitioner was recalled and the said restraint was restored. It is submitted that in the meantime, the petitioner managed to remove the iron ore which was already extracted. The learned Senior Counsel submitted that although the application for amendment does not set out the details, the amendment is necessitated on account of the fact that the ore which was already extracted was removed after filing of the suit. He, therefore, submits that the amendment is necessitated on account of subsequent developments on the filing of the suit. The learned Senior Counsel has placed reliance on the decision of the Hon"ble Supreme Court in the case of Pankaja and Another Vs. Yellappa (D) by Lrs. and Others, AIR 2004 SC 4102 : (2004) 98 CLT 612 : (2004) 4 CTC 231 : (2004) 6 JT 259 : (2004) 6 SCALE 459 : (2004) 6 SCC 415 : (2004) AIRSCW 4522 : (2004) 5 Supreme 772 .

14. He submitted that the learned District Judge has rightly come to the conclusion that the amendment was necessary for deciding the real controversy in dispute and as such, has rightly been allowed.

15. Mr. Prabhudessai, the learned Additional Government Advocate for the respondents no.1 and 2 had nothing much to say in the matter, as the dispute is essentially between the private parties.

16. I have considered the rival circumstances and the submissions made. The only point which arises for determination is as to whether the impugned order allowing the amendment to the extent of introduction of para 14(B) and prayer clause (bb) needs to be set aside. My answer is in the negative for the following reasons:

17. It is now well settled that all such amendments which are necessary for deciding the real controversy in dispute have to be allowed. Such amendments can be allowed at any stage of the proceedings, albeit subject to the embargo placed in proviso to Rule 17 of Order 6 of C.P.C.

In the present case, as indicated above, the suit is basically filed on the

allegation that the petitioner is engaged in illegal mining and extraction of iron ore from property survey no.7 of village Ambelim and the relief claimed in the suit is permanent injunction against the petitioner from carrying out any such mining activity or extracting the iron ore, or from removing or transporting the same. The amendment sought to be introduced by para 14(B) and prayer clause (bb) reads as under:

"14 (B) The Plaintiff states that by carrying out illegal mining in the property bearing Survey no.7, which falls within the mining concession/deemed lease granted to the plaintiff, the Defendant no.3 has caused loss to the Plaintiff.

No person other than the Plaintiff, could legally carry out any mining activity in any other property, including survey no.7, falling within mining concession / demand mining lease, bearing No. 51/58.

The value of the Ore illegally extracted by the Defendant No. 3, prior to institution of the Suit and thereafter, would be to the tune of 4 (Four) Crores of Rupees. The Defendant No. 3 is liable to compensate the Plaintiff in the form of Four Crores of Rupees, for the loss which he has caused to the Plaintiff.

The Plaintiff is entitled to recover the said amount from the Defendant No. 3."

Prayer "(bb) For a Decree, directing the Defendant No. 3 to pay to the Plaintiff an amount of Rs. 4(Four) Crores, as and by way of damages, for the loss caused, by illegal mining and removal of Ore, and illegal sale, transfer or appropriation of the same with interest @ 12% per annum, from the date of filing of the Suit, till final payment."

18. It can thus be seen that the claim as sought to be introduced by para 14(B) is substantially in tune with the allegation in the plaint particularly those on which the relief is based. The third respondent has claimed that the value of iron ore illegally extracted would be to the tune of 4 crores and the petitioner (defendant no.3) would be liable to compensate the same. By introduction of prayer clause (bb), the third respondent is seeking a decree for Rs. 4 crores, by way of damages. It is thus clear that the proposed amendment, does not derogate from the case made out in the plaint and to a certain extent even the amendment as proposed in para 14(B) would relate to subsequent developments, namely, the allegation about the removal of iron ore which was already extracted. In that view of the matter, no exception can be taken to the finding recorded by the learned District Judge that the proposed amendment would be necessary to decide the real controversy between the parties in the suit. The learned District Judge as noticed earlier has also found that the amendment would be necessary in order to avoid multiplicity, which is the very object of Rule 2 Order 2 of C.P.C.

19. In so far as the proposed amendment seeking to introduce a claim which is barred by time, the learned District Judge has found and to my mind rightly so that, this would be a mixed question of law and facts and it can be appropriately

gone into at the trial. Needless to mention that the petitioner would be at liberty to raise appropriate contention in this regard.

20. In the case of Pankaja and others, (supra), the appellants/plaintiffs had filed a suit for permanent injunction and for possession etc. It was claimed that during the pendency of the suit, the respondent in violation of the order of the Court had further encroached in the suit property to the extent of 15" x 15" and on that account the appellant had sought amendment seeking possession of the encroached area. The amendment was allowed by the Trial Court. In the context, the Hon"ble Apex Court has held thus in para 14 of the judgment:

14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case."

21. It can thus be seen that the question whether the amendment would really serve the cause of justice and would avoid further litigation is one of fact to be decided in the facts and circumstances of each case.

22. As noticed earlier, according to the third respondent, the proposed amendment is only by way of quantification of the damages in respect of the iron ore removed prior to and subsequent to the filing of the suit. If that be so, it cannot be accepted that the amendment could fail, at the threshold, on the ground that it is barred by time.

23. In so far as the proviso to Rule 17 of Order 6 of the Code of Civil Procedure is concerned, the same reads as under:

"17. Amendment of Pleadings.-the Court may at any stage at 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."

24. Thus, the normal rule would be that the Court may at any stage of the proceeding may allow either party to alter or amend his pleadings, when such amendments may be necessary for the purpose of determining the real question

in controversy between the parties. Thus the proviso can come into play only, when the Court comes to the conclusion that the party has not approached the Court with due diligence. The proviso would not come in the way of grant of amendment when the Court finds that inspite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso in fact aims at balancing the conflicting considerations for expeditious disposal of the suit on one hand and a genuine need of a party to effect amendments.

25. Coming back to the present case, the proposed amendment as noticed earlier is only an amplification of the pleadings already on record in which there are some subsequent developments and the quantification of the damages. As noticed earlier, it is claimed that the iron ore which was already extracted was removed in the interregnum when the restraint placed on the petitioner was removed by this Court, while dismissing the Appeal From order and was restored when the review application came to be allowed. If that be so, it cannot be said that the third respondent had acted without due diligence.

26. In so far as the contention that the amendment is not relevant for the controversy, it is trite that the merits of the amendment cannot be gone into at this stage. As noticed earlier, the District Judge has found, and to my mind rightly so, that the amendment would be necessary for deciding the real controversy in dispute.

27. In the case of K. Raheja Constructions Ltd. and anr., supra, the plaint was sought to be amended for introduction of a relief of specific performance on the ground that it was subsequently discovered that the Charity Commissioner had granted permission for sale of the trust property and therefore the petitioners/ plaintiffs were entitled to a decree of specific performance. The Hon"ble Apex Court found that the grant of permission by the Charity Commissioner for alienation, was not a condition precedent for filing suit for specific performance and the decree of specific performance is always subject to grant of such permission. On facts, it was found that the petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief of specific performance in the original suit itself. It would be thus clear that the case is distinguishable on facts.

28. In the case of Shiv Gopal Sah, supra, the Hon"ble Apex Court found on facts that there was towering delay without any explanation of the same. The Hon"ble Apex Court found that this "negligent complacency" on the part of the appellants would not permit them to amend the plaint, more particularly, when the claim has, apparently, become barred by time.

29. In Ajendraprasadji, supra, the Hon"ble Apex Court has traced the history before which the proviso to Rule 17 of Order 6 was reintroduced in the present form. The decision of the Apex Court in Ajendraprasadji, basically turns upon the question as to when the trial could be said to be commenced. On facts it was found therein that the amendment sought to be introduced was totally

inconsistent.

30. In the result, no case for interference is made out. The petition is accordingly dismissed.

31. Rule is discharged with no order as to costs.

32. It is needless to mention that the contentions on merits are expressly kept open.