

(2011) 09 BOM CK 0048
In the Bombay High Court
Case No : Writ Petition No. 447 of 2003

Francisco Patrico Rodrigues and Another	APPELLANT
Vs	
Aleixo Cipriano Albuquerque and Others	RESPONDENT

Date of Decision : 19-09-2011

Acts Referred:

Citation : (2012) 1 CivCC 798 : (2012) 1 MhLj 603

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Shivan Dessai, for the Appellant; P. Rao, For respondent Nos. 2, 3, 5 to 10, for the Respondent

Final Decision : Allowed

Judgement

F.M. Reis, J.—The above petition challenges the order dated 30-3-2002 passed by the learned Civil Judge Junior Division, Ponda, in CMA No. 60/2002/C in Regular Civil Suit No. 10/96/C whereby an application for amendment filed by the petitioners dated 27-2-2002 came to be rejected. The petitioners filed the suit against the respondents praying inter alia for a permanent injunction restraining the respondents, their servants, agents, employees, labourers and family members, from erecting M.S. Angles, digging pits and carrying out any work/construction and causing any obstruction or any work of whatsoever nature on the suit access. The petitioners also prayed for a declaration that the suit access shown in the approved plans to the petitioners' house in the property surveyed under No. 32 situated at Vaikhande, Ponda, is their way and that the petitioners have right to use the said access without any obstruction from the respondents and their agents etc. Further, the relief of mandatory injunction was also sought by the petitioners in the suit.

2. The respondents disputed the claim of the petitioners by filing their written statement. During the pendency of the suit, the petitioners filed an application for amendment of the plaint dated 27-2-2002 so as to incorporate some subsequent events whereby the house where the property of the petitioners was

located came to be partitioned between the co-owners. The application filed by the petitioners was opposed by the respondents by filing their reply. The learned Judge by the impugned order, rejected the application filed by the petitioners for amendment of the plaint.

3. Shri S. Dessai, the learned Counsel appearing for the petitioners has assailed the impugned order and pointed out that the facts sought to be incorporated in the plaint were subsequent events which have occurred after the filing of the suit and as such the question of the petitioners having knowledge of the said facts at the time of filing of the suit would not arise. The learned Counsel further pointed out that besides incorporating the subsequent events, there were some averments which were mere clarificatory in nature which were necessary for the adjudication of the matter in controversy. The learned Counsel further pointed out that the cause of action as well as the claim of the petitioners in the suit is not changed nor that the proposed amendment was inconsistent with the original pleadings of the petitioners. The learned Counsel further took me through the impugned order and pointed out that the learned Judge has erroneously come to the conclusion that the proposed amendment was not necessary for the purpose of deciding the dispute and further that such facts were to the knowledge of the petitioners at the time of filing of the suit. The learned Counsel further pointed out that the learned Judge has erroneously exercised its jurisdiction whilst passing the impugned order which resulted in irreparable damage to the case of the petitioners which deserves to be quashed. The learned Counsel has taken me through the proposed amendment and pointed out that paras 8(a) and (b) and 9(a) and (b) are subsequent events whereas the proposed amendment at para 4(a)(i)(ii)(iii)(iv) are clarificatory in nature. The learned Counsel as such pointed out that the impugned order be set aside.

4. On the other hand, Shri P. Rao, learned Counsel appearing for the respondents has supported the impugned order. He pointed out that there is no justification shown by the petitioners in their application for leave to amend the plaint which would entitled them to amend the plaint. The learned Counsel further pointed out that though the proposed amendment is in respect of the facts which have occurred after the filing of the suit nevertheless such facts are irrelevant for the purpose of deciding the dispute. The learned Counsel further pointed out that the proposed amendment is not at all necessary to decide the dispute and as such the learned Judge was justified to exercise its discretion in refusing to grant the leave to the petitioners to amend the plaint. The learned Counsel further pointed out that the petitioners have already availed of an earlier opportunity to amend the plaint which disentitles them to file another application. The learned Counsel as such submitted that the above petition deserves to be rejected.

5. Having heard the learned Counsel appearing for the parties and on perusal of records, I find that there is no dispute raised by the respondents to the effect that the claim of the petitioners in the suit with regard to the access through the property of the respondents is not changed by the proposed amendment. As

such, the subject-matter of the suit continues to be the same. But however as rightly pointed out by Shri S. Dessai, the learned Counsel appearing for the petitioners that most of the proposed amendment is to introduce some subsequent events which are not in dispute. Apart from that, the remaining part of the proposed amendments are merely clarificatory in nature. I have perused the application for leave to amend as well as the draft amendment and I find that in fact part of the proposed pleadings are clarificatory in nature and the remaining portion are to incorporate facts which occurred after the filing of the suit. The findings of the learned Judge in the impugned order to the effect that the said pleadings are not necessary for the purpose of deciding the dispute cannot be accepted. There is no dispute that the proposed amendments are in respect of the house property which belongs to the petitioners. Whether such facts are necessary and material are matters which have to be adjudicated after the parties are permitted to lead evidence in support of their pleadings. The learned Judge was not justified to refuse the application for leave to amend on the ground that such facts were to the knowledge of the petitioners at the time of the filing of the suit. Such findings of the learned Judge cannot be sustained. On perusal of the impugned order, I find that the learned Judge has refused the leave to the petitioners to amend on unjustifiable reason and as such the impugned order cannot be sustained and deserves to be quashed and set aside. But however, the application for leave to amend the plaint is allowed subject to payment of costs which are quantified at Rs. 2000/- payable by the petitioners to the respondents. In view of the above, I pass the following :

ORDER

- (i) The impugned order dated 30-3-2002 is quashed and set aside.
- (ii) The application for leave to amend filed by the petitioners dated 27-2-2002 is allowed subject to payment of costs of Rs. 2000/- to the respondents herein.
- (iii) Rule is made absolute in above terms with no order as to costs.