

(2011) 12 BOM CK 0006
In the Bombay High Court
Case No : Civil W. P. No. 9553 of 2010

Mohammad Chand Nadaf and others	Vs	APPELLANT
Appasaheb Amin Nadaf and others		RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Citation : (2012) 2 ALLMR 460 : (2012) 2 MhLj 863

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : S.S. Patwardhan along with Ajay Magdum, for the Appellant;

Final Decision : Allowed

Judgement

R.M. Savant, J.—At the outset, the learned counsel appearing for the petitioner seeks leave to replace-Exhibit C i.e. written statement filed on behalf of defendant Nos. 3 and 4 by the correct written statement filed on behalf of the said respondents. Leave granted. Amendment to be carried out forthwith. In the above petition, a fresh notice was issued on 22nd February, 2011 indicating that this Court proposed to dispose of the above petition at the admission stage. In spite of service of notice, none appears for the respondents, In view of the limited issue that is involved in this petition, this Court deems it fit to hear the petition finally at the admission stage. Hence, Rule, made returnable forthwith and heard.

2. The above petition takes exception to the order dated 5th October, 2010 passed by the learned Civil Judge, Junior Division, Jath by which order the application filed by the defendant Nos. 3 and 4 for amendment of the written statement came to be rejected.

3. Shorn of unnecessary details, a few facts can be stated thus :

i. The respondents herein, who are the original plaintiffs, had filed Regular Civil Suit No. 304 of 1987 in the Court of the Civil Judge, Junior Division, Jath for a

decree of perpetual injunction and for possession which relief was prayed in the alternative, against the defendants. In the context of the issue which arises for consideration in the present petition, it would be relevant to note the issues that were framed in the said suit, which read thus :

- 1) Does the plaintiff prove his title over the suit property ?
- 2) Does the plaintiff prove that the defendants encroached 38-Aar area of the suit land ?
- 3) Is the plaintiff entitled for the possession of encroached portion of 38-Aar?
- 4) Does the plaintiff prove the obstruction and interference in his peaceful possession over the suit property by the defendants ?

ii. It was the case of the plaintiff that he is the owner of land bearing Block No. 222 admeasuring 6 Hectare 54 Aar, situated at Karajanagi, Taluka Jath which he had purchased under a registered sale deed and which he was cultivating through his relative Jangali Bapu Nadaf on hire basis. It was his case that in his absence, the defendants started encroaching over the portion of the suit land and also obstructing his possession and therefore he was constrained to file the said suit for perpetual injunction and for removal of the encroachment. The defendant Nos. 2 and 3 have filed written statement and contended that one Appasaheb Naik was the original owner of the suit land (Block No. 222) and land-Block No. 220 and that the defendant Nos. 1 to 3 purchased the land bearing No. 220 under a registered sale deed, 7-8 years prior to the said suit. The said land Block 220 is on southern side of the suit land. It was their case that the said Appasahab Naik fixed a boundary by putting boundary stones and in terms of the said boundary, they are in enjoyment of their land.

iii. The said suit came to be decreed by judgment and order dated 22nd September, 2001. Aggrieved by the said decree, the defendant Nos. Nos. 4 and 5 filed Regular Civil Appeal No. 317 of 2001 which came to be allowed and the matter came to be remanded back for trial afresh after the appointment of the Court commissioner for measurement. After remand of the said suit, the petitioners filed an application for amendment of the written statement. In terms of the said amendment, the petitioners sought deletion of the reference to the defendant No. 3 and from the point of view of the present petition, they sought amendment to the following effect:

That the defendant No. 1 was cultivating the land bearing Gut No. 220 and 222 belonging to Appasaheb Miraso Naik and when they asserted their right as tenants, the owner sold the land to the defendant No. 1.

The said amendment application was opposed on the ground that a new defence of tenancy was sought to be incorporated in the written statement which was not a part of the written statement as originally filed. The trial Court considered the said amendment application and by the impugned order, has rejected the same, the sum and substance of the reasoning of the trial Court is that the defendants

who are the proponents of the said amendment application were trying to introduce a new case of tenancy which was not there in the written statement as originally filed.

4. Heard Mr. Patwardhan, the learned counsel for the petitioners. The principal contention of Mr. Patwardhan is that the trial Court has proceeded on a wrong premise that by the said amendment, the defendants were trying to introduce a new case of tenancy when in fact, what was sought to be introduced by way of the amendment was, as to how the said defendant No. 1 had derived title to the property. The learned counsel would contend that in view of the trial Court having proceeded on a wrong premise, the amendment sought which was only clarificatory in nature, has been rejected.

5. In the instant case, it is pertinent to note that the grievance of the plaintiff is as regards alleged encroachment carried out by the defendants on the plot of land bearing Gut No. 222. The defendants are in possession of Gut No. 220 which is the adjacent land. The plaintiff has filed the suit for perpetual injunction and for possession of the encroached portion against the defendants. Reading of the proposed amendment ex-facie discloses that the defendants filed the said amendment application only to incorporate an averment as to how the defendant No. 1 derived his title and in that context they had stated that when the defendant No. 1 asserted his tenancy right that the original owner Appasaheb Miraso Naik, sold the property to him. By the said amendment, they were not seeking to introduce a new case of tenancy and the same would also not arise as the reliefs sought in the suit is of removal of the alleged encroachment of the defendants. The trial Court, in my view, has proceeded on a wrong premise that by the amendment, a new case of tenancy was sought to be introduced. In my view, the amendment does not change the defence of the defendants in the said suit nor the issue of tenancy would arise. In that view of the matter, the trial Court has, in rejecting the said application, failed to exercise the jurisdiction vested in it. The impugned order, therefore, would have to be quashed and set aside and is accordingly quashed and set aside. Resultantly, the Application Exh. 177 would be required to be allowed. Defendants to carry out the amendment in the written statement and the trial Court to take on record the amended written statement that would be filed by the concerned defendants. The trial Court, thereafter, to proceed with the suit in accordance with law. Rule is accordingly made absolute in the aforesaid terms with the parties to bear their respective costs.