

(2012) 04 BOM CK 0064
In the Bombay High Court
Case No : Writ Petition No. 253 of 2012

Mrs. Jaiwanti D. Ghadi and Others

APPELLANT

Vs

Mr. Manohar B. Ghadi and Others

RESPONDENT

Date of Decision : 13-04-2012

Acts Referred:

Citation : (2012) 04 BOM CK 0064

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

Bench : Single Bench

Advocate : A.D. Bhobe, for the Appellant; Melwin Viegas, Advocate for respondent nos. 1 to 9, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri A.D. Bhobe, learned Counsel appearing for the petitioners and Shri Melwin Viegas, learned Counsel appearing for the respondent nos. 1 to 9. Rule. Heard forthwith by consent of the learned Counsels.

2. Shri M. Viegas, learned Counsel waives service on behalf of respondent nos. 1 to 9.

3. The above petition challenges the order passed by the learned Civil Judge Junior Division, Pernem, dated 12.01.2012 whereby an application for amendment of the written statement filed by the petitioners came to be rejected.

4. The respondents filed a suit stating inter-alia that according to the respondents there is an access provided through the suit property to go to the burial ground and seeking different reliefs. In the written statement filed by the petitioners it is their case inter-alia that the respondents themselves had carried out some activities and as such the width of the alleged access had reduced. The petitioners also filed an additional written statement in view of the amendment carried out by the respondents to the plaint and on perusal of the additional written statement specifically at paragraphs 8, 10 and 11 the petitioners have denied the existence of such access. Thereafter, the petitioners filed an application for amendment of the written statement inter-alia clarifying the fact

that according to the petitioners the portion of the property claimed by the respondents as having an access is in their possession and further deleted some of the sentences in the earlier written statement. The respondents disputed the claim put forward by the petitioners and pointed out that by the proposed amendment, the petitioners are raising the fact about the claim of access which was not pleaded in the earlier written statement and further that the petitioners are also disputing the existence of the access which according to the respondents otherwise was not disputed in the earlier written statement. The learned Civil Judge Junior Division, Pernem, by the impugned order dated 12.01.2012 dismissed the application filed by the petitioners for amendment of the written statement. While disposing of the said application, the learned Judge came to the conclusion that, on the basis of the judgments referred to therein, by the proposed amendment the petitioners wanted to nullify/withdraw specific admissions in the earlier written statement. Being aggrieved by the said order, the petitioners have preferred the above petition.

5. Shri Bhobe, learned Counsel appearing for the petitioners has assailed the impugned order on the ground that the learned Judge whilst passing the impugned order has not at all specified what admission is sought to be nullified by the petitioners by the proposed amendment. The learned Counsel further pointed out that the application for amendment came to be filed by the petitioners much before the issues in the suit have been framed and according to him, there is no admission which is sought to be withdrawn by the petitioners by the proposed amendment. The learned Counsel further pointed out that the existence of the access has been disputed by the petitioners in the additional written statement and as such, the conclusion of the learned Judge to the effect that the petitioners are seeking to withdraw the admission does not arise at all. The learned Counsel further points out that merely incorporating the fact that the petitioners are in possession of the disputed portion does not in any way change the nature of the defence nor does it prejudice the case put forward by the respondents. The learned Counsel further pointed out that the petitioners have filed a counter claim and in any event no prejudice shall occasion to the respondents in case the proposed amendment is granted as according to him, the respondents would always be at liberty to file an additional written statement to the counter claim as the proposed amendment would also be part of the counter claim. The learned Counsel has taken me through the impugned order as well as the pleadings of the parties and pointed out that there is no admission which is withdrawn by the petitioners by the proposed amendment. The learned Counsel as such submits that the impugned order deserves to be quashed and set aside.

6. On the other hand, Shri Melwin Viegas, learned Counsel appearing for the respondent nos. 1 to 9 has supported the impugned order. The learned Counsel has pointed out that the respondents have filed a suit claiming the right of access through the suit property as according to the respondents, such access leads to a burial ground. The learned Counsel further pointed out that besides the claim to

such access, there are other different reliefs sought by the respondents in the plaint. The learned Counsel has taken me through the original written statement filed by the petitioners at page 57 and pointed out that there is a specific averment therein to the effect that by this encroachment (5.0 X 25.0 square meters)the plaintiff no. 1 closed the open space of land of suit property (103/2) touching the village road (west side) to its hilly part (east side) as can be observed in the sketch produced and thus made eastern hilly part of the suit property inaccessible to its co-owners and others from the village road and made that hilly part a land-locked property part of suit property (east part). Thus, he blocked and/or narrowed the alleged access to the alleged burial ground mentioned in the plaint. The learned Counsel as such submits that the existence of the said access has been admitted by the petitioners and as such by the proposed amendment the petitioners are withdrawing the said admission.

7. Shri Viegas, learned Counsel appearing for the respondent nos. 1 to 9 has also raised a grievance to the effect that the application for temporary injunction filed by the respondents is being delayed on account of such application being filed by the petitioners. The learned Counsel as such submits that there is no case made out by the petitioners for any interference in the impugned order and as such the petition deserves to be rejected.

8. I have carefully considered the submissions of the learned Counsels. I have also perused the plaint and the written statement filed by the respective parties. It is not in dispute that the issues in the suit have not been framed and much before the said stage the application for amendment of the written statement came to be filed by the petitioners. On minute examination of the said paragraphs relied upon by the learned Counsel appearing for the petitioners, I find that the petitioners themselves have styled the disputed access in the said paragraphs as an "alleged access." This itself shows that there is no categorical admission to that effect.

9. Be that as it may, on perusal of the additional written statement specially the paragraphs referred to by the learned Counsel appearing for the petitioners, I find that the petitioners have disputed the existence of such access. Merely because the petitioners are disputing such access does not disentitled the respondents to establish by cogent evidence the existence of such access. The respondents are always at liberty to prove their case. Shri Viegas, learned Counsel appearing for the respondents fairly points out that the respondents are not relying upon any admission on the part of the petitioners to prove their case and that they have enough evidence to prove their case. Apart from that, merely because the petitioners are seeking to incorporate an additional fact that the suit portion of the property is in their possession is also not a factor which can be said to be inconsistent with the original pleadings. The suit filed by the respondents is at the initial stage and as such by allowing the application for amendment, no prejudice will occasion to the respondents as in view of the contention of Shri Bhobe, learned Counsel appearing for the petitioners, the

respondents would always be entitled to file an additional written statement disputing the alleged contentions raised by the petitioners in the proposed amendment. The learned Judge whilst passing the impugned order has not even specified the admission which is sought to be withdrawn/nullified by the petitioners by the proposed amendment. It is well settled that the defendants are always entitled to raise contrary stands in their written statement. In the present case, considering that there is no specific and categorical admission which is sought to be withdrawn by the petitioners by the proposed amendment, I find that the learned Judge has failed to exercise its jurisdiction in accordance with law whilst passing the impugned order and dismissed the application for amendment of the written statement. Considering the facts and circumstances of the case, I find that the application for amendment ought to have been granted subject to payment of costs to the respondents. In view of the above, I pass the following :

ORDER

- (i) The impugned order dated 12.01.2012 is quashed and set aside.
- (ii) The application for amendment of the written statement filed by the petitioners dated 08.11.2011 is allowed subject to the petitioners paying costs of Rs. 2500/- to the respondents herein as condition precedent.
- (iii) The respondents will be at liberty to file an additional written statement to the counter claim.
- (iv) The learned Judge is directed to try and dispose of the application for temporary injunction filed by the respondents as expeditiously as possible.
- (v) Rule is disposed of in above terms.
- (vi) The petition stands disposed of accordingly.