

(2016) 07 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No. 4924 of 2015.

**Nilkanth s/o Pandurang Wath Age 56 years, Occupation : Cultivator -
Petitioner @HASH Amarkanth s/o Pandurang Wath, (Dead) Through
Legal Heirs (i) and (ii) (i) Kaushalyabai wd/o Amarkanth Wath, Aged 50
years, Occupation : Household, R/o Subhash Ward, Dewha**

Date of Decision : 22-07-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1, Section 6A
Constitution of India, 1950 — Article 226

Citation : (2017) 169 AIC 717 : (2017) 1 ALLMR 819 : (2016) 6 MhLJ 46

Hon'ble Judges : A.S. Chandurkar, J.

Bench : Single Bench

**Advocate : Shri V.B. Gawali, Advocate, for the Petitioner; Shri A.K. Neware,
Advocate, for the Respondents**

Final Decision : Disposed Off

Judgement

A.S. Chandurkar, J.(Oral) - Rule. Heard finally with consent of learned counsel for the parties.

The challenge in the present writ petition is to the order dated 04/07/2015 passed by the trial Court below Exhibit-179 granting permission to the defendant No.1(ii) to file his written statement on record.

2. The petitioners are the original plaintiffs who had filed Spl. C.S. No.38/1995 for partition and separate possession of the suit property. In the plaint it was their case that they had legal right to the property in question. In the suit Amarkanth s/o Pandurang Wath was shown as defendant No.1 while Pandurang Wath was arrayed as defendant No.2. During pendency of the suit, the defendant No.1 expired on 19/09/2014 after which his widow and son were brought on record as defendant Nos.1(i) and (ii). The defendant No.1(ii) filed an application below Exhibit-179 seeking permission to file his written statement on record. It was stated that after service of the notice, the case was fixed on 23/04/2015 for filing the written statement. It was then adjourned to 29/04/2015. There was

some confusion with regard to the adjourned date and hence the written statement could not be filed on said date. It was further stated that the written statement was prepared on 30/04/2015 and was sought to be placed on record on 04/07/2015. This application was opposed by the plaintiffs. The trial Court by the impugned order allowed the said application.

3. Shri V.B. Gawali, the learned counsel for the petitioners submitted that the impugned order passed by the trial Court was without assigning any reasons. He submitted that the written statement sought to be filed by the defendant No.1(ii) had raised the pleas which were beyond the pleas raised in the written statement that was initially filed by the defendant No.1. He submitted that the defendant No.1(ii) having been impleaded as the legal heir of the defendant No.1, he could not be permitted to take an independent plea which was not taken in the original written statement. He then submitted that the said legal representative had also sought to file his counter-claim in his independent capacity. Thus according to him, the impugned order permitting the written statement to be filed was liable to be set aside. He placed reliance on the judgments of Honourable Supreme Court in 1989(1) SCC 147 Annupam Pruthi v. Rajen Bal, (1999) 3 SCC 109 Gajraj v. Sudha and ors. and judgment of learned Single Judge in 2008(3) M.h.L.J. 297 Manguesh Rajaram Wagle v. Suresh D. Naik.

4. Shri A. K. Neware, the learned counsel for the respondents supported the impugned order. According to him, the stand taken by the defendant No.1(ii) was based on the Will executed by Pandurang dated 26/05/1994. As per the said Will, the legal heirs of Amarkanth had become the owners of the suit property. He then submitted that the trial Court rightly allowed the application moved by the legal heirs for filing the written statement after finding that there was some confusion with regard to the date on which the written statement was to be filed.

5. I have heard the respective counsel for the parties at length. The defendant No.1 had filed his written statement on record on 22/04/1996. It is not in dispute that the defendant No.1(ii) has been brought on record in the capacity of legal heir of the original defendant No.1. The impleadment of the defendant No.1(ii) is under provisions of Order 22, Rule 4 of Code of Civil Procedure, 1908 (for short, the Code). As per provisions of Order 22, Rule 4 (2) of the Code, the defence appropriate to the character of defendant No.1(ii) as legal representative of deceased defendant No.1 was permissible to be taken. The impleadment being as legal heir of the deceased defendant No.1, the legal representative would merely step into the shoes of said defendant. A plea contrary to the one taken by the deceased defendant as well as a plea personal to the legal representative could not be permitted to be taken by him by virtue of such impleadment. This position is clear from the ratio of the decisions relied upon by the learned counsel for the petitioner.

In that background if the written statement proposed to be filed on record is seen, the same indicates that a plea based on the Will dated 26/05/1994 executed by said Pandurang has been taken. As the defendant No.1(ii) was on

record in the capacity as the legal representative of defendant No.1, it was open for him only to take that plea that was available to the deceased defendant. It would not be open for the legal representative to take a diverse plea from the one taken by defendant No.1.

6. The position afore stated would however not apply in so far as the counter-claim is concerned. A counter-claim has the same effect as a cross suit. If the legal representative can bring an independent action for seeking relief, the same can also be sought by filing a counter-claim.

The counter-claim being based on the Will dated 26/05/1994 and it being open for the said legal representative to assert his right in his independent capacity, the same can be permitted to be filed on record.

7. Though it is true that the impugned order does not indicate any reasons for granting the permission to file the written statement, considering the averments made in the application below Exhibit-179, I do not find that by allowing the said application the trial Court committed any jurisdictional error.

In view of aforesaid, though the order granting permission to the defendant No.1(ii) to file written statement is maintained, the same is subject to the following clarification :

(i) The written statement filed by the defendant No.1(ii) is permitted to be taken on record only in the capacity of the defendant No.1(ii) being the legal representative of defendant No.1 and in the light of the stand taken by the defendant No.1 in his written statement dated 22/04/1996. All diverse and independent pleas taken in the written statement of defendant No.1(ii) shall not be permitted to be taken.

(ii) It would however be open for the defendant No.1(ii) to agitate his counter-claim in his independent capacity in accordance with law. Rule is disposed of in aforesaid terms with no order as to costs.