
(2011) 04 BOM CK 0036
In the Bombay High Court
Case No : Writ Petition No. 567 of 2009

Shri Ismail Baig and Others

APPELLANT

Vs

Smt. Amina Bi and Others

RESPONDENT

Date of Decision : 01-04-2011

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2011) 1 BomCR 769

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : P.S. Rao, for the Appellant; A. R. Kantak, for Respondent Nos. 1 to 7, 9 and 10, for the Respondent

Judgement

A.P. Lavande, J.—Heard Mr. Rao, learned Counsel for the Petitioners and Mr. Kantak, learned Counsel for Respondent Nos. 1 to 7, 9 and 10. None for the other Respondents, though served.

2. Rule. By consent heard forthwith.

3. By this petition under Article 227 of the Constitution of India, the Petitioners take exception to order dated 31st July, 2009 passed by the Civil Judge, Senior Division Bicholim in Special Civil Suit No. 20/95/A by which the application dated 7th April, 2009 filed by the Petitioners, who are Defendant Nos. 1 to 6 and 10 and 11 (hereinafter referred to as "these Defendants") has been dismissed. The Respondents filed the above suit against the Petitioners and other Defendants seeking declaration that they are the sole and exclusive owners in possession of the suit property bearing survey No. 47, Subdivision Nos. 3,5 and 6 of Bicholim town and that the Defendants have no right whatsoever over the same. The Plaintiffs claimed that the property under Item No. 5 of inventory proceedings known as "Kasim Shah Fakir" was surveyed under survey No. 45 of subdivision No. 12 of Bicholim town. They further contended that another property by name "Colombo Bhatulem" alias "Colombo Botutentil-Xir" alias Muslim Vado. under item No. 6 of the inventory proceedings was surveyed under survey No. 47

subdivision Nos. 3, 5 and 6 of Bicholim town. The relief was sought in respect of the said property.

4. The Defendants filed written statement which was amended in the year 1998. According to the Defendants, property "Kasim Shah Fakir" was surveyed under subdivision Nos. 3, 5 and 6 of survey No. 47 of Bicholim town whereas the property "Colombo Bhatulem" alias "Colombo Botutentil-Xir" alias Muslim Vado. was surveyed under survey No. 45/12. In paragraph 20 of the plaint, the Plaintiffs made the following averment:

The suit property described under item No. 6 is presently surveyed under No. 47 subdivision Nos. 3,5 and 6 of town of Bicholim.

5. In written statement filed by the said Defendants in paragraph 20, the said Defendants stated that contents of paragraph 20 are not disputed. On the basis of the above pleadings, trial was held and it appears that the written arguments have been also filed.

6. It is the case of the Petitioners that since in the written submissions, the Plaintiffs relied upon paragraph No. 20 of the written statement filed by these Defendants and contended that the same was an admission on the part of the said Defendants that the suit property was surveyed under Survey No. 47 subdivision Nos. 3, 5 and 6 of Bicholim town, the said Defendants filed an application dated 7th April, 2009 seeking amendment to delete the word "not" in paragraph 20 of the written statement.

7. By the impugned order, the trial Court has dismissed the application mainly on the ground that although extensive amendment was carried out in the year 1998, no amendment was sought in respect of paragraph 20 of the written statement. By the proposed amendment, these Defendants were withdrawing the admission in favour of the Plaintiffs and the Defendants were guilty of gross delay and laches and serious prejudice would be caused to the Plaintiffs in as much as they will have no opportunity to lead evidence since they had closed their case. Learned Judge further held that if the amendment is allowed, the Defendants would get right to lead evidence on the basis of the amendment.

8. Mr. Rao, learned Counsel appearing for the Petitioners submitted that in paragraph Nos. 11, 12 and 14 of the written statement, Petitioners / Defendants have specifically contended that property "Kasim Shah Fakir" is surveyed under Survey No. 47 under subdivision Nos. 3, 5 and 6 and denied the claim of the Plaintiffs set up in the plaint that property "Colombo Bhatulem" alias "Colombo Botutentil-Xir" alias Muslim Vado" is surveyed under said survey number. Mr. Rao, therefore, submitted that it is evident that it was a typographical mistake in paragraph No. 20 and, therefore, the trial Court ought to have permitted amendment of the written statement by permitting to delete the word "not" from the said paragraph. Learned Counsel further submitted that having regard to the pleadings in paragraph Nos. 11,12 and 14 which clearly lay foundation for a dispute regarding the survey numbers of two properties, the statement made in

paragraph No. 20 of the written statement cannot be termed as an admission in as much as the written statement has to be read as a whole and not piecemeal. According to learned Counsel, the pleadings in paragraph 20 of the written statement cannot be taken out of the context and in isolation thereby treating it as an admission when factually in paragraph Nos. 11, 12 and 14 of the written statement, these Defendants have specifically controverted the case set up by the Plaintiffs and more particularly having regard to the fact that in the entire trial, the trial has taken place on the basis of the dispute raised by the parties. Mr. Rao further submitted that the reasons given by the trial Court for not allowing the amendment are unsustainable in law and serious prejudice would be caused to these Defendants in as much as from the impugned order it is clear that the statement in paragraph 20 of the written statement has been taken as an admission by the learned Judge when in fact the Defendants had disputed the case set up by the Plaintiffs in so far as survey numbers of the two properties are concerned. He further submitted that the Defendants do not wish to lead any further evidence in the matter in the event the amendment is allowed. In support of his submissions, Mr. Rao relied upon the judgment of the Apex Court in the case of *Sushilkumar Jain v. Manoj Kumar and Anr.* (2009)14 SCC 38.

9. Per contra, Mr. Kantak, learned Counsel appearing for Respondent Nos. 1 to 7, 9 and 10 supported the impugned order and submitted that the reasons given by the trial Court cannot be faulted. He further submitted that serious prejudice would be caused to the Plaintiff in the event proposed amendment is allowed at the fag end of the trial. Even written arguments have been submitted before the trial Court. Learned Counsel further submitted that in the event amendment is allowed, the Plaintiffs would be prejudiced since the on behalf of the Petitioners statement has been made that they do not want to lead any evidence and as such, the Plaintiffs would be deprived of an opportunity of cross-examining these Defendants. In view of amendment of paragraph 20 of the written statement, Mr. Kantak further submitted that by the proposed amendment the Defendants are seeking to withdraw the admission which they are not entitled to do in law. In support of his submissions, Mr. Kantak relied upon the judgment in the case of *Armando Santano Pereira and Anr. v. Jude John D'Souza and Ors.* 2009(3) BCR 147.

10. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

11. Learned Trial Court has dismissed the application for amendment on the ground that by the proposed amendment, the Defendants are seeking to withdraw the admission made in the written statement, which was extensively amended in the year 1998. The learned trial Court further held that the Defendants were guilty of laches and serious prejudice will be caused to the Plaintiffs if the proposed amendment is allowed at the fag end of the trial when evidence has been led by both the sides.

12. In so far as the first ground on which the learned trial Court has refused the

amendment is concerned, I find it difficult to accept the reason given by the trial Court. In paragraph Nos. 11, 12 and 14 of the written statement filed by these Defendants, they categorically denied that property Colombo Batulem (the suit property) was surveyed under survey No. 47 subdivision Nos. 3, 5 and 6, but was surveyed under survey No. 45/12 and the property "Kasim Shah Fakir" was surveyed under subdivision Nos. 3,5 and 6 of survey No. 47 and not survey No. 45/12 as contended by the Plaintiffs. The entire trial was conducted on the basis of these pleadings of the respective parties. This being the position, I find it difficult to accept the finding of the learned trial Court that the statement made in paragraph 20 of the written statement amounted to admission of the case set up by the Plaintiffs and that by the proposed amendment, these Defendants were trying to withdraw the admission. No doubt, it is settled law that the Defendant is not entitled to withdraw an admission made in the written statement as has been held by the learned Single Judge of this Court in the case of Armando Santano Pereira (supra), but the ratio of the said judgment is not attracted in the present case since it is also well settled that the pleadings have to be read as a whole and, therefore, the learned trial Court has erred in exercising jurisdiction in holding that there was an admission by these Defendants. In the absence of pleadings in the written statement at paragraph Nos. 11, 12 and 14 by these Defendants, the trial Court would have been justified in holding that there was an admission. No doubt, these Defendants amended the written statement extensively in the year 1998 and, therefore, there is substantial delay in seeking amendment. But, this fact by itself would not be sufficient to reject the application for amendment since it is well settled that mere delay by itself would not be a ground to reject the application for amendment sought by the Defendants. In so far as the prejudice caused to the Plaintiffs is concerned, the same can be taken care of by permitting the Plaintiffs to lead evidence in case the proposed amendment is allowed. In so far the statement made by Mr. Rao that the Defendants do not want to lead any evidence in case the proposed amendment is allowed is concerned, the same is accepted since it is for the parties to decide whether they want to lead evidence or not and it is for the learned trial Court to draw appropriate inferences from the conduct of the parties. No party can be compelled to lead evidence in support of his / her pleadings. However, prejudice which is likely to be caused to the Plaintiffs in the event the proposed amendment is allowed can be taken care of by permitting the Plaintiffs to lead evidence if they so desire.

13. The prejudice which would be caused to the Plaintiffs by delay in filing the application for amendment, can be taken care of by awarding appropriate costs in favour of the Plaintiffs.

14. In view of the above discussion, I am of the considered opinion that the learned trial Court has not exercised jurisdiction in accordance with the well settled principles governing the grant/ refusal of an application for amendment of written statement filed by the Defendant. The learned trial Court ought to have allowed the application for amendment sought for by these Defendants.

Therefore, the impugned order is liable to be quashed and set aside.

15. In view of the above, the impugned order dated 31st July, 2009 passed by the learned trial Court in Special Civil Suit No. 20/1995 is quashed and set aside. The application for proposed amendment sought by these Defendants is allowed subject to these Defendants paying costs of Rs. 2,500/- to the Plaintiffs.

16. These Defendants shall deposit the costs in the trial court within a period of two weeks, before carrying out the amendment. Liberty to the Plaintiffs to withdraw the costs after they are deposited. The amendment shall be carried out within a period of two weeks from today. The Plaintiffs are permitted to lead any further evidence in view of the proposed amendment, if they so desire.

17. Rule is made absolute in aforesaid terms.