

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7265 OF 2015

DWARKABAI BABURAO CHAUDHARI AND ANOTHER
VERSUS
SHAHADU VITTHAL MAHAJAN AND OTHERS

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Advocate for Petitioners : Mr. Bhokarikar Madhav M
AGP for Respondents 4-7 : Mr. S P Tiwari
Advocate for Respondent no.1 : Mr L S Mahajan

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CORAM : V.K. JADHAV, J.

Dated: March 21, 2018

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PER COURT :-

1. Heard finally with consent at admission stage.
2. The petitioners/original defendants 1 and 4 have challenged the order passed below exh.70 in R.C.S. No.85/2005 by the Jt. Civil Judge Jr. Division, Chopda. Respondent no.1/original plaintiff has instituted the suit bearing R.C.S. No.85/2005 for declaration, decree of perpetual injunction and also a decree of mandatory injunction in respect of the suit property. Petitioner no.1/original defendant has strongly resisted the suit by filing written statement at exh.24. During the pendency

of the suit, the petitioner/original defendant no.1 has filed an application exh.70 seeking amendment in the written statement. By the impugned order, as stated above, trial court has rejected the said application. Hence, this writ petition.

3. Learned counsel for the petitioners submits that, by an application Exh.70 the petitioners are seeking deletion of certain portion of the paragraph no.8 of the original written statement and also seeking amendment in the written statement by giving reference to the earlier record of the rights and registered sale deed which is necessary for the just disposal of the suit. Learned counsel submits that, by deletion of portion of paragraph no.8 of the original written statement does not have effect of displacing the plaintiff from admission made in his favour by defendant. In fact, the petitioners have not given any admission in paragraph no.8 and petitioners want to delete the said portion of paragraph no.8 as unwanted and uncalled for considering the issues involved in the suit. Learned counsel submits

that, the petitioners have not introduced any new defence and no serious prejudice is likely to be caused to the plaintiffs. Learned counsel submits that, the petitioners being a defendant can raise multiple and even alternate defences in answer to the suit. However, the trial court has rejected the application mainly on the ground that the trial has been commenced and that, deletion of certain portion of paragraph no.8 would amount to wipe out the admissions given by the defendants in their written statement.

4. Learned counsel for the petitioners in order to substantiate his contentions placed his reliance on following judgments/cases :-

1. Sushil Kumar Jain v. Manoj Kumar and Anr, reported in AIR 2009 Supreme Court 2544;
2. Sumesh Singh v. Phoolan Devi and Ors., reported in 2009 AIR SCW 4331 and;
3. M/s. Estralla Rubber v. Dass Estate (Pvt.) Ltd., reported in 2001 AIR SCW 3544.

5. Learned counsel for respondent no.1/original plaintiff submits that, the proposed amendment is

unwanted and uncalled for. Respondent/plaintiff has referred the documents in the plaint itself to substantiate his case and the petitioner/original defendant no.1 has filed the application exh.70 seeking proposed amendment on the ground that the record has been discovered at the belated stage. Learned counsel submits that, suit is of the year 2005 and the trial court has framed the issues in the year 2007. Trial is already commenced and now the suit is posted for cross-examination of the plaintiff's witness by the petitioners/defendants. Learned counsel submits that the trial court has rightly rejected the application exh.70. No interference is required.

6. On careful perusal of the contents of the application exh.70, it appears that, the proposed amendment is in respect of certain old record. However, if, any record in the form of entries in the revenue record and in the form of the sale deed, the same would be the part of the evidence and it is the cardinal principle of law that evidence is not required to be

pleaded. So far as deletion of certain portion of paragraph no.8 of the original written statement and further introducing certain facts by referring old record is concerned, it is also a part of the record that petitioner no.2 has also resisted the suit by filing written statement in which he has raised almost all the contentions sought to be raised by way of proposed amendment.

7. This is Regular Civil Suit instituted way back in the year 2005. On 21.6.2007 below Exh.31 trial court has framed the issues and also framed additional issues on 12.7.2007. Respondent/plaintiff has filed his affidavit-of-evidence before the trial court and the matter is pending since the petitioner's have filed the application exh. 70 seeking amendment in the written statement way back in the year 2011 and after rejection of the same, filed present writ petition which is pending since 2015. Consequently, there is no progress in the suit.

8. In case **Sushil Kumar Jain vs. Manoj Kumar and another, reported in AIR 2009 Supreme Court 2544**

the Supreme Court has considered that, even if certain admissions are given in the written statement, such admissions can be explained by amendment in the written statement and even by substituting or altering the defence. However, in para no.16 of the judgment the Supreme Court has allowed the said amendment for the reason that the amendment in written statement before the issues were framed, documents were filed and the evidence was adduced. The Supreme Court has held that the bar under the proviso does not apply.

9. In the instant case, the trial has been commenced way back in the year 2007 and even respondent/plaintiff has filed his affidavit of evidence.

In other two cases relied upon by learned counsel for the petitioner in the facts of the said cases, it is observed by the Supreme Court that mere denial of the plaint's averment does not amount to categorical admissions and as such amendment in the written

statement can be allowed. However, in the instant case, after denying the averments made in the plaint, the petitioners/defendants have put forth their own case and in the said paragraph no.8 of the written statement, certain deletion is sought by way of proposed amendment, which amounts to wipe-out the admissions given in the written statement. The same is not permissible, especially when the trial of the suit has been commenced way back in the year, 2007. So far as the proposed amendment of insertion of certain new paragraphs in the written statement is concerned, I have already discussed that the evidence is not required to be pleaded. The respondent/plaintiff has already given reference to certain documents in the plaint and petitioner no.1 has again referred those documents by way of proposed amendment. Further more, petitioner No.2 herein has already filed his written statement wherein he has given reference to all those documents for which the amendment is sought by petitioner no.1 by filing application exh.70.

10. In view of above, I do not find any fault in the

impugned order passed by the trial court. No interference is required. Hence, I proceed to pass the following order.

O R D E R

- I) The writ petition is dismissed.

- II) In the circumstances there shall be no order as to costs.

(**V.K. JADHAV, J.**)

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