

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

WRIT PETITION NO. 14324 OF 2017

Smt. Riyazunnisa Begum Mohd. Jaffar
age 50 years occupation household
R/o Flat No. 1, Samir Complex, Ravindra Nagar,
Ahabab colony, Aurangabad. **...Petitioner**

VERSUS

1. Abdul Qadar Sk. Ameer
age 60 years occupation business
R/o near Fatema Girls High School,
next to Majid Kirana Store, Nagsen colony,
Aurangabad
2. Kaisar Khan Badruddin Khan,
age 67 years occupation Corporator
R/o near Suleman Masjid, Jinsi, Aurangabad
Taluka and District Aurangabad. **...Respondents**

*Mr Ajeet D. Kasliwal, Advocate for petitioner.
Mr D.P. Palodkar, Advocate for respondent No. 1
Mr S.U. Adwant, Advocate for respondent No.2*

CORAM : SUNIL P. DESHMUKH, J.

DATE : 21st August, 2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned advocates for appearing parties finally with consent.
2. Petitioner is before this court aggrieved by order dated 28th September, 2017 allowing application Exhibit - 27 of original

defendant No.2 in regular civil suit bearing No. 769 of 2001 filed by present petitioner-plaintiff against present respondents. The suit has been for recovery of possession, declaration and perpetual injunction. The suit has been decreed, against which present respondent No.2-defendant No.2, has preferred regular civil appeal bearing No. 40 of 2009 and the same is pending adjudication before the appellate court. During pendency of the appeal, appellant-defendant No.2 had moved an application Exhibit - 23 pursuant to Order XLI, Rule 27 of the Civil Procedure Code for additional evidence. Defendant No.2 himself had filed *pursis* Exhibit - 31 requesting the court to hear Exhibit 23 alongwith appeal.

3. It appears that defendant No.2 has also filed an application Exhibit - 27 seeking amendment to written statement. An application Exhibit - 30 had been moved by plaintiff requesting the court to hear applications for additional evidence and amendment to written statement alongwith appeal.

4. According to learned counsel for petitioner-plaintiff, upon said application Exhibit - 30 and in view of *pursis* Exhibit - 31, the two applications had been decided by the court to be heard at the time of final hearing of appeal. Order to aforesaid effect, according to learned counsel, had been passed on 17th January, 2015.

5. Learned counsel for petitioner makes a grievance that irrespective aforesaid position, learned Adhoc District Judge went on to pass order allowing application- Exhibit - 27 for amendment to written statement. According to him, in prevailing position, the order is not proper and tenable. He submits that over and above aforesaid, the appellate court did not take into account submissions advanced on behalf of petitioner as well as contents of 'say' filed resisting application for amendment to written statement. He further submits that all the amendments sought may not have any basis in earlier written statement and yet it has been observed that those are clarificatory in nature. He submits that perusal of order would show that it falls short of reflection of application of mind to the case pleaded on behalf of plaintiff. In the circumstances, he purports to object to order of amendment to written statement.

6. On the other hand, learned counsel Mr Adwant appearing for respondent herein-defendant No.2 submits that it is difficult to conceive the position as to how application for amendment to written statement would be considered alongwith appeal. He submits that unless written statement is allowed to be amended, application for additional evidence would not be meaningful. In short, he purports to submit that it is a situation

like egg first or hen first. According to him, may be there are some orders passed earlier, yet, there is no irregularity in rendering a decision on application for amendment to written statement and the same ought not be questioned on that count. He submits that so far as merits of the matter are concerned, defendant No.2 has absolutely a fine case and sufficient foundation has been laid in the written statement filed and amendments sought are only of clarificatory and incidental in nature and no prejudice would at all be caused to plaintiff by the same. He submits that for the sake of objection, objection to impugned order is being taken. In fact, the same is not conducive to expeditious prosecution of the litigation at the behest of plaintiff in its later stages, which is pending in appeal. He, therefore, urges not to meddle with order impugned on technical grounds.

7. Learned counsel Mr Palodkar appearing for respondent-defendant No.1 has no particular instructions in the matter.

8. Having heard learned counsel for parties as aforesaid, perusal of order dated 28th September, 2017 although refers to granting opportunity of hearing to counsel for plaintiff and defendant No.2, yet, it does not exactly reflect upon submissions advanced on behalf of parties, besides laconic observations with regard to nature of amendment to written statement being sought.

Order impugned on Exhibit - 27 for amendment to written statement falls short of reflection of mind to the case pleaded.

9. In the circumstances, keeping all the points open for the parties to be contested, it would be expedient to relegate the parties to the appellate court for hearing afresh on application Exhibit - 27.

10. Impugned order is, thus, set aside. Application Exhibit - 27 is restored to the file of the appellate court to be heard expeditiously, preferably within a period of four weeks from the date of receipt of writ of order of this Court.

11. Rule made absolute accordingly making it further clear that all the points are kept open for the parties.

**(SUNIL P. DESHMUKH)
JUDGE.**

Madkar