

Wakodikar

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10666 OF 2014**

Shri. Sandesh Dattaray Waingankar Petitioner.

V/s.

Shri. Atmaram Laxman Waingankar and others. Respondents.

Mr. Tejpal S.Ingale, Advocate for the Petitioner.

Mr. Prosper D'souza, Advocate for Respondent No.1.

CORAM : M. S. SONAK, J.

DATED : 30th APRIL, 2019.

ORAL JUDGMENT :

1. Heard Mr.Ingale for the petitioner and Mr.Prospers D'souza for respondent Nos.1 and 2.
2. Rule. Rule is made returnable forthwith with the consent of and at the request of Learned Counsel for the parties.
3. Challenge in this petition is to the order dated 13/09/2014 by which the Learned Trial Judge has rejected petitioner's application for amendment of written statement.
4. Mr.Ingale, the Learned Counsel for the petitioner, submits that the petitioner seeks to withdraw no admission. The amendment is only clarifactory in nature and was necessitated on account of

respondents/plaintiffs amending the plaint vide order dated 02/05/2013. He submits that trial is yet to commence in the suit and therefore, the petitioner's application seeking leave to amend the written statement is required to be liberally construed.

5. Mr. Prosper D'souza, Learned Counsel for the respondent submits that the petitioner to withdraw admissions solemnly made to the original written statement. He points out that the survey was carried out in the presence of the petitioner and the survey was never objected by the petitioner. He points out that there is delay of over 10 years in seeking amendment. The purpose of which is to withdraw admission and in any case to create confusion. He, therefore, submits that the impugned order was correctly mentioned and warrants no interference.

6. Record indicates that the respondent/original plaintiffs were granted leave to amend their plaint vide order dated 02/05/2013. This amendment was to place on record to the suit property which was earlier surveyed as No.77/1 and 77/3 is now been merged and allotted survey No.77/1.

7. The petitioner/original defendant had initially admitted that, the respondents were the owners of property bearing survey No.77/1 and 77/3. By the proposed amendment, it is not as if the petitioners are withdrawing from this position. All that, the petitioners wish to place on record is that the property which was earlier surveyed under No.77/3 was in fact, property bearing survey No.77/4 and vice versa. At this stage, it is neither appropriate nor necessary to go into the issue as to whether this contention of the petitioner is correct or not. At this stage, the Court is not expected to go into the merits of the rival

contentions. The merits can be gone into, once amendment is allowed and the parties go to trial. However, the amendment of this nature ought not to have been refused on the ground that some admissions are not to be withdrawn. At the highest, this is case of explaining admission and not the case of withdrawal of the admission.

8. Besides, the present case, the trial is yet to commence. The Court have to be liberal in dealing with the application seeking amendment to written statement particularly, when such applications are taken out before the commencement of the trial. The mere fact that leave to amend is to be granted does not mean that this Court has accepted the veracity or the merits of the averments which are proposed to be added by means of amendment. Thus, there will be no prejudice to the respondent/original plaintiffs. Leave to amend is granted. The respondent will have full opportunity to demolish the case which the petitioners seeks to place on record by means of amendment. No doubt, some prejudice in terms of delay will occasion to the respondent Nos.1 and 2. However, his prejudice can always be compensated by the award of costs.

9. Accordingly, the impugned order dated 13/09/2014 is hereby set aside.

10. The petitioners are granted leave to amend the written statement, as proposed by them, subject to payment of costs of Rs.5,000/- within a period of six weeks from today. The costs to be either directly paid to the respondent Nos.1 and 2 or to be deposited to the Trial Court, from where, the respondent Nos.1 and 2 can withdraw

the same unconditionally. The amendment to be carried out within two weeks from the date of deposits of payment of costs.

11. Copy of the amended written statement to be furnished to the original plaintiffs or the Advocate for the original plaintiffs.

12. It is once again made clear that all the rights and contentions of both the parties on the merits are expressly kept open. Merely because leave to amend is granted, it should not be construed as acceptance of the veracity or the merits of the amended conveyance. Mr. Prosper D'souza, on behalf of the respondent No.1 makes it clear that the respondent No.1 do not admit the veracity any of the amended pleadings or the plans/maps which are sought to be produced by this application. It is noted. As observed earlier, all these of the matters accordingly will have to be gone into at the stage of trial.

13. This Court, records its gratitude towards the Learned Advocate Mr. Prosper D'souza who appeared in the matter under the legal aid scheme.

14. All concerned to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)