

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

WRIT PETITION NO.12545 OF 2022

Shashikant Dhondiram Kalaskar

Age : 59 yrs, Occu : Agri,

R/o. Sonai, Tal. Newasa, Dist. Ahmednagar

.. Petitioner

Versus

1. Asha Vasant Jadhav

Age : 53 years, Occu : Agri,

R/o. Manori, Tal. Rahuri, Dist. Ahmednagar

2. Saraswatibai Dhondiram Kalaskar

Age : 75 yrs, Occu : Nil

3. Manik Dhondiram Kalaskar

Age : 56 yrs, Occu : Business,

Respondent Nos.2 & 3

R/o. Sonai, Tal. Newasa, Dist. Ahmednagar

.. Respondents

...

Advocate for Petitioner : Mr. Zafar M. Pathan

...

CORAM : SANDEEP V. MARNE, J.

DATE : 12-12-2022

ORAL JUDGMENT :

. By this petition, petitioner (Orig. defendant no.2) has challenged the order dated 17.08.2022 passed by Jt. Civil Judge Junior Division, Newasa below Exh.18 in Regular Civil Suit No.969 of 2017 allowing application filed by plaintiff (respondent no.1 herein) for amendment of the plaint.

2. The suit is filed by plaintiff seeking partition of the suit property and other related reliefs. In the plaint, the averments were made to the effect that plaintiff is in possession of the suit property. Defendant no.2 filed written-statement denying the contentions of plaintiff about possession and claimed that defendant no.2 is in possession of the suit property. Before commencement of the trial, the application for amendment was moved to delete all the averments relating to plaintiff's possession of the suit property. Prayer relating to *mesne* profit during pendency of the suit was also sought to be added. By order dated 17.08.2022, the amendment has been allowed. Petitioner, who is defendant no.2 in the suit, is aggrieved by the order allowing amendment and has challenged the same in the present petition.

3. Mr. Pathan, the learned counsel for petitioner submits that the averments which are sought to be deleted by way of amendment constituted important admissions in favour of defendant no.2 and that therefore plaintiff cannot be permitted to withdraw such admissions. He further submits that the said averments amount to admissions in the light of Section 58 of the Indian Evidence Act and by deleting such averments, not only prejudice would be caused to defendant no.2 but the nature of the suit is also sought to be

altered. Mr. Pathan further submits that plaintiff initially contended that she is in possession of the suit property and after realizing the lacuna in those contentions, she now wants to withdraw those averments thereby prejudicing the defence of defendant no.2.

4. In support of his contentions, Mr. Pathan relies upon the judgment of the Apex Court in **Ram Niranjana Kajaria vs. Sheo Prakash Kajaria & Ors.**, 2015 (6) ALL MR 416 as well as the judgment of this Court in **Deubai Tukaram Pakhare and Others vs. Muktabai Tukaram Pakhare and others**, 2000 (1) Mh.L.J. 511.

5. I have heard the learned counsel for petitioner and have perused the records of the case. The suit has been filed by plaintiff seeking partition and possession of 1/4th share in the suit property. In her claim, plaintiff claimed that she not only has undivided share in the suit property, but such share was handed over to her for her enjoyment and she has been possessing the same. She also claimed cultivating crops in the suit property.

6. Defendant no.2 filed written-statement specifically denying the contentions raised by plaintiff about possession and on the contrary made specific averments in para - 23 that he is in

possession the entire suit property. The trial in the suit is yet to commence. At that stage, plaintiff filed application dated 15.11.2018 for amendment of the plaint whereby she sought to delete various averments made by her in plaint claiming possession of the suit property. She also desired to add prayer for claiming *mesne* profit from the defendants during pendency of the suit.

7. On careful perusal of the nature of the suit, pleadings in the plaint and the written-statement, I am of the view that plaintiff initially made assertions to the effect that she is in possession of the suit property. However based on such assertions relating to possession, no specific prayer was sought. In fact, prayer clause 'A' of the unamended plaint contains a prayer for possession of 1/4th share in the suit property. Thus there was contradiction in the averments in the plaint claiming possession and prayer clause 'A' demanding possession. By way of amendment, plaintiff sought deletion of all the averments wherein she had claimed possession of the suit property. It now appears that plaintiff wants to indirectly admit that the possession of the suit property is with the defendants. In fact, it has been an assertion of defendant no.2 in his written-statement that he is in possession of the suit property. In such a situation, it cannot be contended that there was any admission in the plaint favouring

defendant no.2 which is now sought to be taken away by amending the plaint. In fact, I must say that on account of the averments made in the plaint regarding possession by plaintiff and denial on that averment by defendant no.2, there would have been a trial on the issue as to who is in possession. Now, the job is simplified by plaintiff by deleting the averments claiming possession and by indirectly admitting that the defendants are in possession of the suit property. Therefore, I am of the view that this is not a case where any admission was made in favour of the defendant no.2 which is sought to be withdrawn by plaintiff.

8. Mr. Pathan has relied upon judgment of the Apex Court in **Ram Niranjana Kajaria** (*supra*) in which it is held as under:

“23. Delay in itself may not be crucial on an application for amendment in a written statement, be it for introduction of a new fact or for explanation or clarification of an admission or for taking an alternate position. It is seen that the issues have been framed in the case before us, only in 2009. The nature and character of the amendment and the other circumstances as in the instant case which we have referred to above, are relevant while considering the delay and its consequence on the application for amendment. But a party cannot be permitted to wholly withdraw the admission in the pleadings, as held by this Court in **Nagindas Ramdas v. Dalpatram Ichharam alias Brijram and others**[6]. To quote Paragraph-27:

“27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be

presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.”

(Emphasis supplied)

24. We agree with the position in **Nagindas Ramdas** (supra) and as endorsed in **Gautam Sarup** (supra) that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. To that extent, the proposition of law that even an admission can be withdrawn, as held in **Panchdeo Narain Srivastava** (supra), does not reflect the correct legal position and it is overruled.”

9. Similarly in **Deubai Tukaram Pakhare** (supra) this Court has held as under:

“they are withdrawing the admission which they have already given when they filed the earlier objection and any proposed amendment and/or any amendment which takes away the admission in favour of the adverse party shall not be ordinarily allowed unless the explanation as to under what circumstances, the admissions are given is offered. It is well settled rule that the admissions given in same proceedings are binding as against the parties and cannot be withdrawn and explained.”

10. There can be no debate with regard to the proposition that a vital admission made in pleadings cannot subsequently be

permitted to be withdrawn so as to cause prejudice to the other party. However, in the present case there was no admission in favour of defendant no.2 / petitioner in the plaint. Deletion of averments relating to possession by way of amendment can, by no stretch of imagination, be termed as withdrawal of any admission in favour of defendant no.2. Therefore, the judgments relied upon by Mr. Pathan have no application to the peculiar facts and circumstances of the present case.

11. I may profitably refer to the recent decision of the Apex Court in **Life Insurance Corporation of India vs. Sanjeev Builders Private Ltd & Anr**, 2022 LiveLaw (SC) 729 in which the Apex Court has summarized the principles relating to amendment of pleadings in para - 70 which reads thus:

“70. Our final conclusions may be summed up thus:

(i) Order II, Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to

the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) **Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach.** The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See *Vijay Gupta v. Gagninder Kr. Gandhi & Ors.*, 2022 SCC OnLine Del 1897)”

12. Applying the above principles to the present case, there was neither any admission in the plaint in favour of defendants nor any of the defences available to them is sought to be taken away. The Trial in the suit is yet to commence. Therefore the liberal approach adopted by the trial court in allowing the amendment does not warrant interference by this court in exercise of writ jurisdiction.

13. The writ petition is devoid of merits and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)