

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

WRIT PETITION NO.9722 OF 2019

NARAYAN LAXMAN MISHRE THROUGH LRS DHONDIRAM
NARAYAN MISHRE
VERSUS
JANABAI PRAKASH DAUND AND OTHERS

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Mr. S. R. Deshpande, Advocate for the Petitioners.
Mr. A. D. Kasliwal, Advocate for Respondent No.1.

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**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 27th JANUARY, 2023.**

PER COURT:-

1. By this petition, petitioners challenges the order dated 26.04.2019 passed below Exhibit-16 in Regular Civil Appeal No.245/2013, whereby the respondents' application for amendment to the written say below Exhibit-18 came to be allowed.

2. The facts of the case are as under:

RCS No.437/2000 was filed by the petitioners seeking a declaration that the registered sale deed dated 07.12.1999 executed by the petitioners in favour of respondent no.3 and the subsequent sale deed dated 21.01.2000 executed by respondent no.3 in favour of respondent no.1 be declared null and void and not binding on the plaintiffs. In this suit an application for interim injunction came to be filed by the petitioners to which respondent nos.1 and 2 filed their say and subsequently applied to the Trial Court for treating the say to the interim application as written statement. On 28.08.2013 the suit was partly decreed.

The review application was filed by the petitioners seeking review of the decree, which came to be allowed by order dated 23.07.2018 and after review order the suit was decreed granting all the reliefs sought in the RCS No.437/2000. Respondent nos.1 and 2 preferred an appeal against the judgment and decree of the Trial Court being RCA No.245/2013. On 07.12.2018 an application for amendment was sought by respondent nos.1 and 2, firstly to add paragraph no.7 to the say below Exhibit-18, which was to be treated as written statement, secondly to correct the word 'possession' occurring in last two lines of paragraph no.6 of Exhibit-18 to the word 'mutation' considering the context in which the said word occurred and thirdly, to permit the verification of the say filed below Exhibit-18 to meet the requirements of order i.e. Order VI Rule 15 of the Code of Civil Procedure.

3. Heard the learned counsel appearing for the parties.

4. Learned counsel for the petitioners submits that the amendments which are proposed seeks to withdraw the admission which was given in favour of the petitioners. To buttress his submissions he has invited the attention of this Court to the judgment and decree dated 28.08.2013 and in particular the finding of the Trial Court in respect of the Issue No.8, which relates to the possession of the suit property by the plaintiffs. He would further submit that as far as the verification which has been sought, the same does not fall within the purview of the Order VI Rule 17 of the Code of Civil Procedure in as much as the same pertains to the amendment of the pleadings and pleadings have been defined under Order VI Rule 1 to mean either plaint or written statement. He would, therefore, urge that the impugned

order allowing the amendment permits the withdrawal of the admission and hence, ought to be quashed and set aside. He would further urge that by the proposed amendment, respondent nos.1 and 2 are trying to fill in the lacunas, as the Trial Court has held the issue of possession in favour of the petitioners in view of the implied admissions given in the written statement below Exhibit-18. He would further submit that it is not their case that the proposed amendments are by way of subsequent development or that the same were not within the knowledge, which is a criteria considering the proviso to Order VI Rule 17 of the Code of Civil Procedure. The learned counsel for the petitioners relies upon the following decisions:

1. ***Damu Maruti Dadhe and Another Vs. Limba Maruti Dadhe and Others, reported in 2011 (5) Mh.L.J. 738.***
2. ***Mooljee Lukhmidas Vs. S. M. Kapadia, reported in 2006 (6) LJSOFT 143.***
3. ***Jayashree Subhash Kalbande and Another Vs. Bhaurao Nagorao Derkar and Others, reported in 2014 (4) Mh.L.J. 168.***
4. ***Raj Kumar Bhatia Vs. Subhash Chander Bhatia, reported in (2018) 2 Supreme Court Cases 87.***

5. Per contra, learned counsel appearing for the respondents submits that as far as the issue of verification is concerned, although the application has been filed under the provisions of Order VI Rule 17, it has to be considered that the say has to be treated as a written statement and inadvertently the verification clause could not be added and as such, it is an irregularity and not an illegality. As far as the proposed amendment in paragraph no.6 of the say below Exhibit-18 is

concerned, he would submit that it is clear that under registered sale deed respondent no.3 has sold the property to respondent nos.1 and 2 and it is clear from the entire tenor of the written statement that what was to be contended is that the mutation was not effected in the name of respondent no.1 due to an objection raised by the petitioners. He would submit that, even if it is assumed that the proposed amendment withdraws the admission, all amendments are to be allowed liberally. The learned counsel for the respondents relies upon the following decisions:

1. ***Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, reported in 1984 (Supp) Supreme Court Cases 594.***
2. ***Sushil Kumar Jain Vs. Manoj Kumar and Another, reported in (2009) 14 Supreme Court Cases 38.***
3. ***Shanti Budhiya Vesta Patel & Ors. Vs. Nirmala Jayprakash Tiwari & Ors., reported in 2010 ALL SCR 1921.***

6. I have considered the rival submissions of the parties.

7. The issue in the present case is whether the proposed amendment amounts to a withdrawal of an admission which has been given in the written statement. For that purpose, it is necessary to reproduce the paragraph nos.5 and 6 of the written statement, which are being reproduced hereinunder:

“5. That, in respect of the para no.6 of the interim application, it is true to say that, the defendant no.2 and 4, has moved an application before the concerned Talathi, sajja at Village Maliwada, Tal. & Dist. Aurangabad on dated 27.04.2000, for making the mutation entry in the name of the defendant no.2 by way of registered sale deed. But, the plaintiff has filed an application for not making the mutation entry in the name of the defendant no.2 only. Therefore, the plaintiff has filed this application alongwith the suit for

declaration and injunction and cancellation of the registered sale deed dated 07.12.1999 and dated 21.1.2000.

6. That, the contents of the para no.7 of the interim application, to para no.9 are the legal one and hence need not reply at this stage. The defendant no.2 and 4 further submits that, the plaintiff has filed this false suit on baseless grounds and to mislead to this Hon'ble Court, by stating that, he is having actual possession over the agriculture land bearing no.3 situated at village Wanjarwada Tal. & Dist. Aurangabad. The plaintiff is not having any *prima facie* case nor the balance of convenience lies in favour of the plaintiff, even on today, the defendant no.1 is having actual and physical possession over the suit land i.e. suit land. That, the defendant no.2 and 4 moreover submit that, on today, there is no possession in favour of them, as there is objection in respect of the mutation entry in favour of the defendant no.2, this fact is also clear that, and all the peoples of the same village, of Wanjarwadi Tal. & Dist. Aurangabad known this real fact. They have not prepared any false and fabricated documents in favour of them and as such the interim application filed by the plaintiff may kindly be rejected with the heavy costs."

8. As far as paragraph no.6 of the written statement is concerned, the averments in paragraph no.6 deal with the aspect of possession over the suit property and the say of respondent no.1 in the said paragraph is limited to the aspect of the possession in as much as it is stated that there is no *prima facie* case in favour of the petitioners, as respondent no.3 is having actual and physical possession over the suit property. It is further stated that, there is no possession in favour of respondent nos.1 and 2, as there is objection in respect of mutation entry in favour of respondent no.1. In my opinion, considering that the said paragraphs dealt with the aspect of the possession of the suit property, it cannot be said that the word possession occurring in the last two lines of the paragraph no.6 was a typographical error and in fact it referred to the mutation. I am fortified in my view

by the averments which are made in paragraph no.5, which are the averments in respect of mutation entry and deals with the objection which had been raised by the petitioners to the mutation entry in the name of respondent no.2. In event the averment was in respect of the mutation of the suit land, the said averments would have found place in paragraph no.5 and not in paragraph no.6 of the written statement.

9. The judgment of the Trial Court giving a finding in respect of the issue no.8 has taken into consideration the aspect of the possession and has come to a definite finding of possession in favour of the petitioners by referring to the written statement of respondent nos.1 and 2 below Exhibit-18 and in particular to the averments of possession made in the paragraph no.6 of the written statement. I, therefore, find considerable force in the submission of the learned counsel for the petitioner that by way of proposed amendment, respondent nos.1 and 2 are seeking to withdraw a vital admission, which has been given in their favour and which is also a finding of the Trial Court. As far as the verification of the pleadings is concerned, the relevant provision can be found in Order VI Rule 15 of the Code of Civil Procedure, which deals with the verification of the pleading that every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. In view of this mandate of the Order VI Rule 15, where every pleading has to be verified in manner provided, it cannot be said that the verification is a mere irregularity and not an illegality in any event in an application under Order VI Rule 17, which deals with the amendment of the pleading, the issue of the

permission for verification of the pleadings could not have been entertained. The last purport of the proposed amendment is the introduction of the proposed paragraph no.7, to show collusion between the petitioner and respondent no.3, which in my opinion, is not necessary to decide the real controversy between the parties in as much as the plaintiff has to prove his case of the registered sale deed being declared null and void and this aspect of collusion can certainly be argued.

10. As far as the reliance of the learned counsel for the respondents on the decision of the Supreme Court in the case of ***Panchdeo Narain Srivastav*** (supra), the Court in the facts of that case had held that, it cannot be said that by amendment an admission of fact cannot be withdrawn and that the learned Trial Court granting the application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary. In the facts of that case, the position was that it was an amendment before the Trial Court and in that view of the matter, the Court had held that even if the High Court was justified in holding that the deletion of the word 'Uterine' has some significance that itself would not provide any justification for rejecting the amendment in exercise of its revisional jurisdiction. In the present case, after the trial of the proceedings in which a definite finding has been arrived at in favour of the petitioners by taking into consideration the admission which has been given in the written say below Exhibit-18, it cannot be said that such an admission can be permitted to be taken away by way of a proposed amendment at the appellate stage. Learned counsel for the respondents relies on the said judgment to advance a proposition that, in exercise of

revisional jurisdiction the High Court ought not to interfere with the order made by the Trial Court. In my opinion, considering that the error of law has occurred by permitting the proposed amendment, interference in exercise of the writ jurisdiction is certainly warranted.

11. The next decision which has been relied upon is in the case of the Apex Court in ***Sushil Kumar Jain*** (supra), wherein in the facts of that case the words ‘under different tenancies’ were sought to be corrected to the words ‘three different portions under one tenancies’, which was permitted as the same was necessary for adjudication of the matters in controversy. In the facts of that case, the Apex Court had considered the averments and had held that neither any admission was made by the appellant in his original written statement nor the appellant had sought to withdraw such admission made by him in his written statement. In my view, in the facts of the present case a vital admission as far as the aspects of the possession is concerned is given in paragraph no.6 of the written say below Exhibit-18 and as such, this decision does not assist the case of the petitioners. As far as reliance of the respondents in the case of ***Shanti Budhiya Vesta Patel & Ors.*** (supra) the same pertains to the merits of the matter and inapplicable to the issue which is being considered as regards the proposed amendment. The reliance upon the decision in the case of ***Raj Kumar Bhatia*** (supra) is also in support of the submissions of the learned counsel that in exercise of its powers under Article 227 of the Constitution of India, this Court ought not to interfere. As already observed, since the Appellate Court in my opinion has committed an error in law, which would prejudice

the petitioners, in my opinion an exercise of writ jurisdiction is warranted.

12. For the reasons above, writ petition is allowed. The impugned order dated 26.04.2019 passed below Exhibit-16 in RCA No.245/2013 is hereby quashed and set aside.

(SHARMILA U. DESHMUKH)
JUDGE