

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1970 OF 2018

Khwajasaheb Muktumahussain Bhalдар

...Petitioner

Versus

Babu Abbas Desai

...Respondent

...

Ms. Anusha Pravin Amin, for Petitioner.

Mr. Mandar Limaye, for Respondent.

...

CORAM: SANDEEP V. MARNE, J.

DATE : JULY 27, 2023.

P.C.:

By this petition, Petitioner challenges order dated September 01, 2017 passed by the Jt. Civil Judge, Junior Division, Miraj rejecting Petitioner-Plaintiff's application for amendment of the plaint.

2. Petitioner-Plaintiff has filed Regular Civil Suit No.104 of 2015 *inter alia* seeking declaration that the Heirship Certificate procured by Defendants in Miscellaneous Civil Application No.35 of 2014 is illegal. The Petitioner-Plaintiff has also sought injunction not to act of the Heirship Certificate.

3. In paragraph No.5 of the plaint, Petitioner-Plaintiff contended that Abbas Pashasaab Desai was employed in Railways and that he did not marry and did not have any children. That Defendant's mother-Jaitunbi had

married Mohammed Hanif Desai, resident of Kundargi Taluka-Gokak and the couple had two sons Babu (Defendant) and Maula and two daughters Sahebabi and Ayesha. That after death of her husband, Jaitunbi left her house at Kundargi, Taluka-Gokak and settled down at Miraj. That at Miraj she started residing with Abaas Pashasaab Desai without marrying him. That Abaas Pashasaab Desai had merely provided support to Jaitunbi, without marrying her.

4. In the amendment application, Petitioner-Plaintiff has sought to add pleadings to the following effect. That Defendant's mother-Jaitunbi had married with Mohammedhanif Gajbarsaab Desai and out of the said wedlock, she had only two daughters-Sahebabi and Ayesha. That after death of Jaitunbi's first husband Mohammedhanif Desai, she arrived at Miraj and started residing with Aabbas Mohammed Desai. That out of her association with Aabbas Mohammed Desai, Jaitunbi gave birth to two sons Babu (Defendant) and Maula. That Jaitunbi had never married Abaas Pashasaab Desai. That Abaas 'Mohammed' Desai and Abaas 'Pashasaab' Desai are two distinct persons without any relation with each other. That Abaas Pashasaab Desai was not a Railway employee but used to work in the Miraj Railway Canteen as Sweeper. That Abaas Mohammed Desai was the Railway employee. Defendant's mother-Jaitunbi obtained all terminal benefits as widow of Abaas Mohammed Desai. Petitioner-Plaintiff has taken disadvantage of similarity in the name of Abaas Mohammed Desai and Abaas Pashasaab Desai and has got the name of Abaas Mohammed Desai corrected as Aabbas Pashasaab Desai in the Register of Births and Deaths maintained by Sangali-Miraj and Kupwad City Municipal Corporation.

5. The Trial Court has rejected the application for amendment on the ground that the pleadings sought to be added contradict original pleadings in the plaint.

6. After going through the original pleadings in the plaint and the amendment sought to be introduced, it is clear that the Petitioner-Plaintiff now wants to withdraw the admission given in the plaint that Defendant's mother-Jaitunbi used to reside with Aabbas Pashasaab Desai. He now also wants to resile from his earlier stand that Jaitunbi had begotten four children out of wedlock from Mohammed Hanif Desai. He now wants to state that Jaitunbi has begotten only two daughters out of wedlock with Mohammed Hanif Desai and that two sons were born out of her association with Aabbas Mohddad Desai.

7. In my view, having taken a specific stand in the plaint that Defendant's mother-Jaitunbi used to reside with Aabbas Pashasaab Desai, Petitioner-Plaintiff cannot now be permitted to raise contradictory pleadings that Jaitunbi started residing with altogether different person Aabbas Mohammed Desai at Sangali. By way of amendment, contradictory and inconsistent pleadings are sought to be added.

8. Mr. Limaye, the learned counsel appearing for Respondent would rely upon judgment of the Apex Court in **Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria**, (2015) 6 All MR 416, in which it is held in paragraph 23 and 24 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**, (1974) 1 SCC 242.

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 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 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**, [2008 ALLSCR 1678] (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. In the present case, one of the aims for seeking amendment is apparently to withdraw an admission that Defendant’s mother Jaitunbi used to reside with Aabbas Pashasaab Desai. The amendment therefore cannot be permitted.

10. Ms. Anusha Amin, the learned counsel appearing for the Petitioner would seek to rely upon the judgment of the Apex Court in **Ganesh Prasad Vs. Rajeshwar Prasad & Ors**, 2023 SCC OnLine SC 256, particularly paragraph No.37 and 38 which reads thus -

“37. Thus, the Plaintiffs and Defendant are entitled to amend the plaint, written statement or file an additional written statement. It is, however, subject to an exception that by the proposed amendment, an opposite party should not be subject to injustice and that any admission made in favour of the other party is not but wrong. All amendments of the pleadings should be allowed liberally which are necessary for determination of the real controversies in the suit provided that proposed amendment does not alter or substitute a new cause of action on the basis of which the original *lis* was raised or defence taken.

38. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings.”

11. In my view reliance of the Petitioner on the judgment in **Ganesh Prasad** (supra), far from assisting his case, actually militates against him. The Apex Court itself has held in the judgment that admissions made in favour of party cannot be permitted to be withdrawn by introducing an amendment.

12. In the result I do not find any error in the impugned order passed by the Trial Court. Even otherwise, the amendment sought to be introduced seems inconsequential. The Petitioner-Plaintiff has taken a stand that Defendant's mother-Jaitunbi did not ever marry Abaas Pashasaab Desai and that therefore Petitioner-Plaintiff cannot seek any share in the property of Abaas Pashasaab Desai. Petitioner-Plaintiff will have to prove this assertion. Petitioner-Plaintiff has been consistent in his stand that Aabbas Pashasaab Desai remained unmarried till his death and that Defendant is not born out of

the wedlock between Aabbas Pashasaab Desai and Jaitunbi. This stand take by the Petitioner-Plaintiff will have to prove by producing evidence. The issue whether Aabbas was working in Railway administration and who else (apart from Abbas) is the father of Jaitunbi's children would accordingly become irrelevant.

13. Writ Petition, being devoid of merits, is dismissed without any order as to costs.

(SANDEEP V. MARNE, J.)

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