



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

WRIT PETITION NO.6554 OF 2020

Savita Dhondiram Patil
Age: 45 years, Occu. Agriculture & Doctor
R/o. A-2, 3/4, Mayur Park,
HUDCO, Aurangabad

... Petitioner
(Orig. Defendant)

Versus

- 1] Azizabi w/o Mirza Isam Baig
Since deceased through L.Rs.
- 1A] Akhtar Bagum W/o. Sk. Hasan Jahagirdar
Age: 59 years, Occu. Household,
R/o. Chamanpura,
Gangapur, Dist. Aurangabad.
- 1B] Afsar Begum w/o Sk. Yaseen
Age: 49 years, Occu. Household,
R/o. Sakharam Pant Nagar,
Gangapur, Tq. Gangapur,
District - Aurangabad.
- 2] Anwar Baig s/o Mirza Isam Baig
Since deceased through L.Rs.
- 2A] Farzana Begum W/o. Anwar Baig
Age: 48 years, Occu. Household
R/o. Sakharam Pant Nagar,
Gangapur, Tq. Gangapur.
District-Aurangabad
- 2B] Mirza Akbar Baig S/o Mirza Anwar Baig
Age 28 years, Occu. Business,
R/o. Jahagir Colony, Harsul,
Aurangabad
- 2C] Mirza Azhar S/o Mirza Anwar Baig
Age: 26 years, Occu. Business,
R/o. Sakharam Pant Nagar,
Gangapur, To. Gangapur,
District Aurangabad.
- 2D] Shrin D/o Mirza Anwar Baig
Age 24 years, Occu. Household,
R/o. Sakharam Pant Nagar,
Gangapur, Tq. Gangapur,
District - Aurangabad.

- 2E] Farhana D/o Mirza Anwar Baig
Age: 20 years, Occu. Education,
R/o. Sakharam Pant Nagar,
Gangapur, Tq. Gangapur,
District Aurangabad.
- 2F] Najima W/o Mirza Anwar Baig
Age: 42 years, Occu. Household,
R/o. Sakharam Pant Nagar,
Gangapur, Tq. Gangapur,
District Aurangabad.
- 2G] Mirza Tayyab s/o. Mirza Anwar Baig
Age: 14 years, Occu. Nil,
Through her natural guardian Respondent No.2F
- 2H] Fatima D/o Anwar Baig
Age: 12 years, Occu. Nil
Through her natural guardian Respondent No.2F
- 3] Ismail Baig S/o Mirza Isam Baig
Age: 35 years, Occu. Labourer
R/o. Near Chaus STD, Katkatgate,
Nehru Nagar, Aurangabad.
- 4] Nazir Baig S/o Mirza Isam Baig
Age: 25 years, Occu. Labourer,
R/o. Sakharam Pant Nagar,
Gangapur, District Aurangabad. ..Orig. Plaintiffs
- 5] Nazir Baig S/o Aziz Baig
Age: Major, Occu. Business,
- 6] Riyaz Baig s/o. Aziz Baig
Age: Major, Occu. Business,
- 7] Faruque Baig S/o. Aziz Baig
Age: Major, Occu. Agriculture,
Respondent Nos.5 to 7
R/o. Khirdi, Taluka Khultabad,
District-Aurangabad.
- 8] Ejaz Baig S/o. Iqbal Baig
Age: Major, Occu. Agriculture,
- 9] Nasib Baig S/o. Iqbal Baig
Age: Major, Occu. Business,
- 10] Rauf Baig S/o. Iqbal Baig
Age: Minor, Under the guardianship of
his real mother Tasleembi W/o. Iqbal Baig
- 11] Tasleembi W/o. Iqbal Baig

Age: Major, Occu. Household

Respondent Nos. 8 to 11

R/o. Khirdi,

Taluka Khultabad,

District – Aurangabad

..Orig. Def. Nos.1 to 7

- 12] Kachru Punjaji
Age: Major, Occu. Agriculture
R/o. Khirdi,
Taluka Khultabad, District Aurangabad.

- 13] Dhondiram Asaram Patil
Since deceased through L. Rs.

- 14] Rukhmanbai Dhondiram Patil
Since deceased through L. Rs.

- 14A] Dnyaneshwar S/o. Dhondiram Patil
Age: Major, Occu. Agriculture
R/o. Plot No.A-2, Mayur Park,
Aurangabad.

- 15] Sunita Dhondiram Patil
Age: Major, Occu. Household,
R/o. Plot No.A-2, Mayur Park,
Aurangabad

...Respondents
(Orig. Defendant Nos.9 to 11)

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Mr. S.P. Shah, Advocate for Petitioner

Mr. Shaikh Tarek Mobin, Advocate for Respondent Nos.1A, 1B, 2A to 2H, 3 & 4

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CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 17th JANUARY, 2025
PRONOUNCED ON : 29th JANUARY, 2025

ORDER :

1. The order dated 22/06/2020, passed by Civil Judge, Junior Division, Khultabad, below Exhibit-95 in Regular Civil Suit No.116/2009, is impugned in the present writ petition. The petitioner had filed application at Exhibit-95 seeking amendment in the written statement under Order 6 Rule 17 of the Civil Procedure Code.

2. Petitioner is daughter of original defendant No.12 and daughter of defendant No.9 namely Dhondiram Asaram Patil, whereas respondent Nos.1 to 4 are original plaintiffs. Respondent Nos. 5 to 11 are defendant Nos.1 to 7 and respondent Nos.12 to 15 are original defendant Nos.9 to 11 in Regular Civil Suit No.116/2009. Defendant No.12 Dhondiram Patil, was pursuing litigation on behalf of respondent Nos.9 to 12 till his death.

3. Facts in the nutshell giving rise to the litigation are as under:

One Vazir Baig was original owner of suit property Gut No.293 (Old Survey No.98), admeasuring 22 Acres situated at village Khirdi, Taluka Khultabad, District Aurangabad. He died in the year 1941 leaving behind two sons Aziz and Isam. Plaintiffs are the legal heirs of Isam Baig whereas defendant Nos.1 to 7 are legal heirs of Aziz Baig in R.C.S. No.116/2009. After the death of Vazir Baig name of Aziz Baig was entered as exclusive owner in respect of Gut No.293. Aziz Baig started disposing the properties standing in his name by way of executing sale deeds from the year 1972. On 19/05/1972 he sold 3 Acres of land out of Gut No.293 to defendant No.9 by registered sale deed No.1360. In the year 1983 petitioner/ defendant No.12 purchased 3 Acres 25 Gunthas land out of Gut No.293 from Aziz Baig by registered sale deed. The suit property was sold by Aziz Baig in parts from 1972 to 1983. During the life time of Isam Baig, he did not take any objection to the sale deed

executed by Aziz Baig. It is claimed by defendant No.12 that, on the contrary Isam Baig has categorically admitted the exclusive ownership of his brother Aziz Baig in the written statement filed in R.C.S. No.173/1967 instituted by Hafizabee i.e. married daughter of Vazir Baig, for partition and separate possession. R.C.S. No.173/1967 was decreed and on the basis of decree she has also sold 4 Acres and 19 Gunthas land out of Gut No.293 to defendant No.10 by registered sale deed.

4. Isam Baig died in the year 1997. When plaintiffs i.e. legal heirs of deceased Isam Baig filed suit for partition and injunction on 09/03/2007, petitioner along with other defendants had already purchased suit property almost 30 to 40 years ago, and the suit is in collusion with legal heirs of Aziz Baig. Learned advocate for petitioner submits that during the lifetime of Isam Baig he has not raised any objection as regards the sale of suit property. The suit has been filed with an intention to harass the petitioner and other defendants. After service of summons defendant No.12 i.e. present petitioner appeared along with defendant Nos.9 to 11 and filed their common written statement. Issues came to be framed on 19/09/2014, affidavit of examination-in-chief on behalf of plaintiff has been filed on 17/06/2016. It is contended by petitioner that in the meanwhile during pendency of proceedings, father of petitioner defendant No.9 namely Dhondiram Patil died in the year 2015. He was pursuing litigation on behalf of respondent Nos.9 to 12.

5. Learned advocate for petitioner submits that after death of defendant No.9 petitioner was not aware about the litigation pending between the parties, so also, she did not have any legal knowledge about the Court proceedings. Unfortunately during the said period she was also not guided properly by the advocate engaged by her in the trial Court. Therefore, she appointed one Shri Tandale, to advocate her cause, but due to demise of Mr. Tandale in the year 2018 she was constrained to change her advocate. Accordingly, she appointed Mr. Uttam Jadhav as her advocate. Though she had handed over the documents relating to the suit to earlier advocate, no proper steps were taken by him. On 23/08/2019 she again changed her advocate and during the discussion with new advocate she realised that it is necessary to amend the written statement on the basis of stand taken by father of plaintiffs in R.C.S. No.173/1967. Accordingly application below Exhibit-95 was filed on 18/09/2019 on behalf of defendant No.12 seeking amendment in the written statement, to place on record the copy of written statement filed by Isam Baig in R.C.S. No.173/1967. According to him, in the written statement Isam Baig had taken a stand that Aziz Baig was exclusive owner of said property. In the application it was specifically contended that, if the application is allowed the amendment sought does not change the nature of suit of plaintiff, however, if it is not allowed it would cause irreparable loss to petitioner.

6. Plaintiffs resisted the said application by filing their say, on the ground that there is delay in filing the written statement. Trial Court after taking into consideration the application and the say filed by respondents has rejected the application below Exhibit-95 vide order dated 22/06/2020, which is impugned in the present writ petition.

7. Trial Court while rejecting the application observed that the proposed amendment is not material for the proper and effective adjudication of present suit. The application has been filed after commencement of trial and defendant No.12 has neither explained delay nor given any reason stating as to what prevented her from filing the application for proposed amendment during the intervening period. Thus, the application for proposed amendment was rejected by holding that it does not appear to be bonafide, legitimate, honest and necessary for conclusion of the suit. However, if the amendment is granted it would cause hardship and prejudice to the plaintiff.

8. According to learned advocate for petitioner it needs to be appreciated that while filing application petitioner has properly explained the delay caused in filing the application. It is a specific contention of applicant that though the written statement was filed on 19/11/2007, it is only during the pendency of civil suit defendant No.12 came to know about earlier suit bearing R.C.S. No.173/1967 filed by Hafizabee against Aziz Baig and Isam Baig for partition and

separate possession in respect of suit property. On getting the knowledge she has immediately filed for certified copy of judgment and decree passed in the said suit along with copy of written statement filed by Aziz Baig and Isam baig. It is stated that at the time of filing of written statement in the present suit, the copy of written statement filed in R.C.S. No.173/1967 was not in the possession of defendants. Therefore, pleadings to that effect could not be incorporated to the written statement. The proposed amendment would help to resolve the real controversy. Since the petitioner was not in possession of the written statement filed by predecessor in the title of plaintiff i.e. Isam Baig, she could not incorporate it in the written statement.

9. According to learned advocate for petitioner he has sufficiently demonstrated in the application itself that defendant No.12 was not aware about the contents of written statement filed by Isam Baig in R.C.S. 173/1967, therefore, the same could not be incorporated in the pleadings. It is only after getting knowledge of the same in October, 2017, she has applied for certified copy and after receiving it, she has filed present application.

10. Learned advocate has drawn my attention to the copy of written statement filed by Isam Baig in R.C.S. No.173/1967. In said written statement, stand of Isam Baig was all along that defendant No.1 is the exclusive owner and occupier of the properties. It was his stand that Survey Nos.61 and 98 are not

Matrooks or ancestral properties, they are exclusively owned and possessed by defendant No.1 independently.

11. The learned advocate Mr. Shah submits that, in view of stand that was taken by Isam Baig through whom plaintiffs are claiming to be the owners, seeking declaration of partition and separate possession of the suit properties, the amendment is necessary. Learned advocate for petitioner contends that her father Dhondiram Patil defendant No.12 was taking care of the matter on behalf of defendant Nos.9 to 12 and therefore, she was not aware about litigation and details of the proceeding. After his death in the year 2015 she came to know about the litigation. She being a married lady is residing with her husband at Shirpur, Dist. Dhule as well as at Jalgaon, for work with her husband. Present litigation is pending at Khultabad, District Aurangabad. She is a housewife and is not aware about the legal proceedings. Therefore, after the death of her father she had difficulty in pursuing the litigation. She had to come to Aurangabad and meet her advocate before trial Court. In October, 2017, she came to know about the R.C.S. No.173/1967, however, she was not aware about the contents of the written statement filed by Aziz Baig and Isam Baig in the said suit. Therefore, only after getting knowledge of the contents of the written statement she has filed the application.

12. Learned advocate for petitioner submits that in fact the observations made by the Trial Court are not tenable in view of the

fact that in paragraph No.12 of the application itself she has categorically stated that since she was not in possession of the written statement filed in R.C.S. No.173/1967, she could not make pleadings to that effect.

13. Learned advocate for petitioner submits that the Courts are liberal while allowing the application for amendment in written statement than that of plaint, since the question of prejudice would be far less in the former than in the latter, so also, addition of new ground of defence or substituting or altering a defence or taking inconsistent pleas in written statement can also be allowed. In support of his contention, he has placed reliance on the judgment of Supreme Court in ***Sushil Kumar Jain Vs. Manoj Kumar and Another, [(2009) 14 SCC 38]***. Similar view has been re-iterated in case of ***Usha Balasaheb Swami Vs. Kiran Appaso Swami, [(2007) 5 SCC 602]***, in para 19 of the judgment it is observed that, the general principle that amendment of pleading cannot be allowed so as to alter materially or substitute cause of action or nature of claim, applies to amendment of plaint. It has no counterpart in principles relating to amendment of written statement.

14. Learned advocate for petitioner is also relying on the decision of Supreme Court in ***Sharadamma Vs. Mohammed Pyrejan (Dead) and Another, [(2016) 1 SCC 730]***. The judgment has been cited by petitioner in order to counter the

submission of learned advocate for respondents wherein he has taken objection to the right of petitioner to continue with the writ petition on the ground that petitioner has created third party right in the property. It is alleged that petitioner after getting stay to the suit in the writ petition has executed sale deed of suit land in favour of third party vide registered sale deed dated 16/04/2024.

15. Petitioner is relying on the order passed by the Supreme Court in ***Ram Sumiran and Others Vs. D.D.C. and Others, [(1985) 1 SCC 431]***, wherein it is held that, since appellants are admittedly from rural area in the country like ours where there is so much poverty, ignorance and illiteracy, it would not be fair to presume that everyone knows that on death of a respondent, the legal representatives have to be brought on record within a certain time. Learned advocate for petitioner submits that judicial note of the above said judgment also needs to be taken into consideration since the petitioner who is defendant No.12 also belongs to weaker section of the society who is not aware about her rights and the importance of taking timely steps in the pending proceedings.

16. Learned advocate for respondents has further opposed the prayer on the ground that as per the record defendant No.12 obtained copy on 30/10/2011 and proposed amendment has been filed in the year 2019, hence it cannot be said that defendant No.12 has exercised due diligence. Therefore, the application deserves to be rejected. It is further contended that this application is noting but

a stunt for protracting the litigation. When the matter is posted for cross-examination and major portion of cross-examination is already over by other defendants, the application for amendment of written statement has been filed. Hence, according to respondents defendant has failed to demonstrate that in spite of due diligence the defendant could not obtain the necessary information to incorporate in written statement before the trial commenced. In absence of explanation about exercising due diligence and satisfaction of the Court about it, application seeking amendment of written statement deserves to be rejected.

17. Trial Court has observed that, though it is claimed by defendant No.12 that she has obtained copy of written statement in R.C.S. No.173/1967 on 30/10/2017, she has filed application for amendment in written statement on 18/09/2019 i.e. after laps of almost 22 to 23 months. There is no explanation or reason given by defendant No.12 as to why inspite of written statement having been received on 30/10/2017, she remained silent for two years and what prevented her from making proposed amendment.

18. Learned advocate for respondents has opposed the writ petition by filing affidavit on behalf of respondent Nos.1A, 1B, 2A to 2H, 3 and 4. Respondents have opposed the petition on the ground that petitioner has suppressed material facts about having executed registered sale deed of the suit land in favour third party vide registered sale deed dated 16/04/2024. It is the contention of

respondents that since interest of the present petitioner is ceased in the matter, the petitioner has no right to continue with the present proceedings. The delay in preferring the application, after receiving copy of written statement has also not been explained by defendant No.12. There is enormous delay of 13 years in moving the application. In the written statement filed on 19/11/2007, petitioner has specifically pleaded that R.C.S. No.173/1967 filed by Hafizabee was decreed on 17/08/1968, hence, it is clear that petitioner was aware about said proceeding. Therefore, the application has been rightly rejected by the trial Court. Defendant No.12 has made false and incorrect statement in the application below Exhibit-95.

19. While opposing the application original plaintiffs have filed their say contending that the present petitioner had already appeared and filed written statement on 19/11/2007. After long gap of 12 years when the issues are already settled and affidavit in respect of examination-in-chief has already been filed, the application is moved for amendment in written statement. Though Order 6 Rule 17 provides that pleadings of the party can be amended at any stage, however, the proviso makes it clear that if the trial has commenced the party seeking amendment has to prove that in spite of due diligence the party could not have raised the matter before commencement of trial. In the present case, applicant has failed to demonstrate that in spite of due diligence

exercised by him, he has failed to incorporate proper pleadings.

20. It is further contended that the so-called admission in the written statement in R.C.S. No.173/1967 has been rejected by the trial Court and the suit was decreed vide judgment and decree dated 17/06/1968. Thus, there is no necessity of bringing the pleadings in earlier written statement on record, since eventually that suit has been decreed and contents of that written statement would not be acceptable in the present litigation. Therefore, according to the respondents since the application is moved after huge delay for which there is no justifiable explanation, the same is rightly rejected by the Trial Court.

21. Learned advocate for respondent has also relied on the judgment of this Court at Nagpur Bench in Writ Petition No.3147/2014 (*Chandrashekhar Vs. Balkrishna and Others*), wherein importance of due diligence has been observed. In the said judgment, this court has observed that, the application filed by petitioner seeking permission to amend the written statement after commencement of trial could not have been entertained and allowed by trial Court as petitioner has not even averred as to what prevented him from bring on record the facts sought to be incorporated by the proposed amendment.

22. Learned advocate has also relied on the judgment of this Court at Nagpur Bench in Writ Petition No.1322/2013 (*Jayashree Subhash Kalbande and Others Vs. Bhaurao Nagorao Derkar and*

Others), wherein the law of due diligence has been summarized. Para 8 of the said judgment reproduces the various principles on the issue of due diligence. He has also submitted various judicial pronouncements of Supreme Court in support of his contention that, if there is delay in filing application seeking amendment of written statement, the same cannot be allowed if it is filed at the fag end of the trial and in absence of explanation about exercise of due diligence.

23. Though the provision of Order 6 Rule 17 is very much liberal and it permits amendment of pleadings at any stage, but these powers are restricted upon commencement of trial. Only in case the party demonstrates that inspite of a due diligence he has failed to raise the issue before commencement of trial, the Court can grant such application.

24. After hearing the respective parties and upon going through the documents placed on record, in order to decide the correctness of the order passed by Civil Judge, Junior Division, Khultabad, I have gone through the amendment application at Exhibit-95 filed by defendant No.12 under Order 6 Rule 17 of C.P.C. So far as the amendment of pleadings is concerned, it is governed by order 6 Rule 17 of C.P.C. which reads thus,

“The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Though the rule provides that the pleadings could be amended at any stage of the proceedings, however, the proviso to the rule states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence party could not have raised the matter before commencement of trial.

25. In the application, petitioner has merely stated that the written statement has been filed on 19/11/2007. When she got the knowledge about earlier R.C.S. No.173/1967 filed by Hafizabee against Aziz Baig and Isam Baig in October, 2017, she has, thereafter immediately filed application for getting certified copy of the judgment and decree along with the written statement filed by Aziz Baig and Isam Baig. When she received those copies on 13/10/2017 she has filed the application below Exhibit-95. That is the only statement made regarding due diligence while making the application. Due diligence is not an empty formality but it is to be reflected by way of explanation as to what prevented the person seeking amendment from making such application prior to commencement of trial and what efforts were taken by that person despite which he could not make the pleadings in the plaint or written statement.

26. In the present matter, mere statement has been made by the petitioner that she came to know about the written statement in the year 2017, and therefore she could not file said application prior to that. In the written statement filed by defendant No.12 itself the reference is made to the suit filed by Hafizabeen which was decreed and the Collector has also effected partition as per the procedure provided under the provisions of law. Though it is claimed that written statement is filed on behalf of defendant Nos.9 to 12 by defendant No.9, however, upon going through the written statement it transpires that signature of the present petitioner appears on the written statement. Title shows that all the defendants have filed common written statement and each of them have attested their signatures. Therefore, the story put forward by petitioner that her father defendant No.9 was looking after the suit and only after his demise she had to take the responsibility of the proceedings, is not supported by the written statement.

27. It also needs to be appreciated that all the explanation regarding due diligence, appears to be in the memo of writ petition and not in the application Exhibit-95 filed before the trial Court. The lacunae appearing in the application have been filled in by the petitioner by incorporating pleadings in present writ petition in support of the reasons due to which she was prevented from filing application prior to 2017. It is on the basis of the pleadings in the application, the Civil Judge, Junior Division, Khulatabad, has rejected

the application Exhibit-95. Therefore, in absence of pleadings in respect of due diligence in the application, the order passed by the trial Court does not deserve to be interfered. The trial Court has rightly rejected the application on the basis of contents of the application and averments made therein.

28. Useful reference can be made to the decision of the Supreme Court in ***Vidyabai and Others vs. Padmalatha and Another, [AIR 2009 SC 1433]***, wherein it is observed that, it is primary duty of the Court to decide as to whether such amendment is necessary to decide the real dispute between the parties. The proviso appended to Order 6 Rule 17 restricts powers of the Court. It embarks on the exercise of its jurisdiction. The Courts jurisdiction in a case of this nature is limited. Thus, unless the jurisdictional fact as envisaged therein is found to be existing, the Court will have no jurisdiction to allow the amendment of plaint. Hence, in view of the position of law that has been settled in the above judicial pronouncement, which is squarely applicable to the present case, the order passed by the trial Court does not deserve to be interfered with. Accordingly writ petition is dismissed.

(MANJUSHA DESHPANDE, J.)