

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1724 OF 2025

Abdul Kadir Ahmedsaheb Kokni & Anr ..Petitioners
Versus
Abedin Mohammad Mohiyoddin Kokni & Ors ...Respondents

Mr. Vivek Punjabi, for the Petitioners.

CORAM: N. J. JAMADAR, J.
DATED : 10th FEBRUARY 2025

P.C.:

1. Heard learned Counsel for the Petitioner.
2. The Petitioner assails the legality, property and correctness of an Order dated 26th September 2024 passed by learned Civil Judge, Nashik, whereby an application for amendment in the Plaint preferred by the Respondents came to be allowed.
3. The Respondents have instituted the Suit for cancellation of a gift executed on 10th October 2017 by Defendant Nos. 1 to 5 in favour of Defendant Nos. 8 and 9, and declaration that the Defendant Nos. 1 to 7 and 10 have gifted their undivided interest in the suit property by an oral gift (Hibba) and the said gift has been accepted by the Plaintiffs and acted upon, and for consequential reliefs.

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4. In the Plaint, it was *inter alia* asserted that Defendant Nos. 1 to 7 had sworn an Affidavit in the year 2013 giving their consent to mutate the names of the Plaintiffs in the record of rights of the suit property.

5. By the proposed amendment, the Plaintiffs professed to incorporate an averment in the Plaint that the Defendant No. 10 had also agreed to file an Application before the Revenue Authority to mutate the names of the Plaintiffs and, therefore, his name was shown in the Application. However, later on, Defendant No.10 sought time to file such Application as Defendant No. 10 intended to purchase land, and agreed to file the Application after the said land was purchased. Thus the name of Defendant No.10 remained on the Application though he had not signed the said Application.

6. Mr. Punjabi, learned Counsel for the Petitioners, would urge that the aforesaid amendment was actuated by a design to overcome a patent defect in the Plaintiffs' case. Application for temporary injunction, preferred by the Plaintiffs, was rejected by the trial court explicitly observing that the said Application for mutation of names appeared to be suspicious. Thus, to fill in the lacuna in the Plaintiffs' case, the instant Application for amendment was filed.

7. Mr. Punjabi further submitted that issues were settled in the year 2019. The Plaintiffs did not led evidence till the year 2024. Thus, the decision of Supreme Court in the case of **Vidyabai And Others Vs**

Padmalatha And Anr¹ governs the situation at hand and it can be said that the trial had commenced.

8. The learned Civil Judge recorded that though issues were settled, trial had not commenced. The said finding of the learned Civil Judge appears to be impeccable. In the case of **Vidyabai** (Supra), the Supreme Court has ruled, in clear and explicit terms, that filing of an Affidavit in examination-in-chief of the witnesses would amount to “commencement of proceeding”. Thus the interdict contained in the proviso to Rule 17 of Order VI of the Code of Civil Procedure 1908, did not come into play.

9. The learned Civil Judge was of the view that the proposed amendment was necessary for the determination of real question in controversy.

10. It is trite that all amendments which are necessary for the determination of the real controversy are required to be allowed. Undoubtedly the element of potentiality of a prejudice to the Opponents and the possibility of complete change in the nature and character of the Suit, if the amendment is allowed, are few of the other factors which bear upon the exercise of discretion to permit the amendment in the pleading.

11. On the aforesaid touchstone, reverting to the facts of the case, by no stretch of imagination can it be said that proposed amendment either changes the nature or character of the Suit completely or

1 (2009) 2 SCC 409.

otherwise cause irretrievable prejudice to the Defendants. The amendment, in a sense, relates to an ancillary aspect of the matter, namely, the Application preferred by the Defendants to mutate names of the Plaintiffs to the record of rights of the suit land. The substance of the claim is that Defendant Nos. 1 to 7 and 10 had gifted their undivided share in the suit property by an oral gift (Hibba). The fate of the suit would thus hinge upon proof of Hibba. The proposed amendment does not change the said foundation of the Plaintiffs claim.

12. Therefore, this Court does not find any infirmity in the impugned order whereby amendment has been allowed at a pre-trial stage.

13. Petition thus stands dismissed.

[N. J. JAMADAR, J.]