



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 6574 OF 2024

1. Sheikh Bismilla Sheikh Bandu,
Aged about 65 years, Occu.: Labour,
2. Sheikh Abdulla Sheikh Bandu,
Aged about 62 years, Occu.: Labour,
Both R/o Saikalpura, Ward No.21,
Malkapur, Tahsil Malkapur,
District Buldhana.

....PETITIONERS

....VERSUS....

1. Jabiullakha Mujibullakha,
Aged about 62 years, Occu.: Labour,
2. Bashirullakha Mujibullakha,
Aged about 58 years, Occu.: Labour,
3. Nazirullakha Mujibullakha,
Aged about 56 years, Occu.: Labour,
4. ~~Sultanabi J. Shamimullakha,~~
~~Aged about 65 years, Occu.: Household,~~
5. Idabi J. Chandkha,
Aged about 63 years, Occu.: Household,
6. Burakhbi J. Mehamudkha,
aged about 60 years, Occu.: Household,

Deleted as per
Court/s order
dt.16.01.2025.

Nos.1 to 3 are R/o. Malvipura, Malkapur,
District Buldhana.

No.4 is R/o. Jawai Nagar, Malkapur,
District Buldhana.

No.5 is R/o Dahigaonne, Tahsil
Shevgaon, District Ahemadnagar,

No.6 is R/o Ghodegaon, Tahsil
Telhara, District Akola.

....**RESPONDENTS**

Mr. A.A. Naik, Senior Advocate assisted by Mr. Madhur Deo,
Advocate for petitioners

Mr. K.S. Narwade, Advocate for respondent Nos.1 to 3, 5 and 6

CORAM : SMT. M. S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 05/02/2025

DATE OF PRONOUNCING THE JUDGMENT: 21/02/2025

1. **Rule.** Rule made returnable forthwith. Heard finally with
consent of the learned Counsel for the parties.

2. The petitioners/defendants are aggrieved by impugned
order dated 30/09/2024, passed below application Exhibit-49 in
Regular Civil Suit No.9 of 2018 thereby rejected the application
filed by the defendants seeking amendment of written statement.

3. The case of the plaintiffs is that the property located at
Mouza Malkapur, having Nazul Sheet No.16, Plot No.68,
admeasuring 2519 sq.ft. According to the respondents/plaintiffs,

out of the said area of 2519 sq.ft., they are the owners of 660 sq. ft. towards the northern part. A house property constructed in the above area of which the plaintiffs are the alleged owners has been described in the plaint as under:

East	:	Road,
West	:	Government Road,
North	:	Government Road,
South	:	House of Tanvir Hussain and the defendants.

4. According to the plaintiffs, the defendants are in occupation area of 1260 sq.ft. of Plot No.68; whereas one Tanvir Hussain is in possession of remaining 600 sq.ft. of Plot No.68. The plaintiffs claim that they had given the suit property on licence to the defendants and upon their refusal to hand over possession, they filed civil suit seeking possession of 660 sq.ft. of land in Plot No.68 and mesne profit. Defendants filed their written statement and denied all the contentions in toto. The petitioners/defendants claimed to be the owners of the entire land in Plot No.68 except for the area occupied by Tanvir Hussain and pressed their ownership through the sale deed dated 07/05/1952. The plaintiffs filed amendment application which came to be allowed. In view of amendment application of plaintiffs is allowed, defendants have

applied for consequential amendment of written statement which was permitted. After that matter was posted to frame additional issues. On 15/07/2022, order passed below Exhibit-1 by the learned Trial Court stating that there is no requirement for framing additional issues.

5. The petitioners/defendants moved another application for amendment to the written statement vide Exhibit-49. By the said application, the defendants wanted to clarify that they are owners of 1950 sq.ft. area of Plot No.68 and not 1260.25 sq.ft. as was stated in the written statement. However, the said figure is incorrect therefore, the petitioners/defendants moved a pursis dated 30/08/2024 below Exhibit-64, clarifying typographical mistake in the application for amendment filed below Exhibit- 49.

6. The plaintiffs/respondents filed their reply and opposed the application. The defendants also filed application vide Exhibit-58 for framing additional issue. Trial Court framed three additional issues vide order 16/08/2024 passed below Exhibit-58, but rejected the application for amendment of written statement below Exhibit-49 by observing that this is the second application of the defendant

to amend their written statement, the said amendment could have been sought in the earlier application and no due diligence shown to seek the said amendment after commencement of the trial and therefore rejected the application. The said order is subject matter of challenge in the present writ petition.

7. learned Counsel for the petitioners contended that the learned Trial Court has rejected the application for amendment of the written statement on the ground that the petitioners/defendants are trying to withdraw the admission by substituting the area of their ownership from 1260.25 sq.ft. to 1950 sq.ft. The said reasoning is erroneous. The learned Trial Court ought to have considered that the petitioners/defendants are not trying to withdraw the admission but are trying to clarify the factual position, which is certainly permissible under the provisions of Order VI Rule 17 of the Code of Civil Procedure. It is further contended that by incorporating the amendment, the petitioners are merely trying to clarify the fact that they are the owners of area admeasuring 1950 sq.ft., which is apparent from the sale deed dated 07/05/1952 which is already on record. Permitting such an amendment would not have caused any prejudice to the

respondents/plaintiffs. The aforesaid impugned order needs interference of this Court and also needs to be set aside.

8. Learned Counsel for petitioners relied on following citations :

- (i) ***Usha Balashaheb Swami and others Vs. Kiran Appaso Swami and others***, reported in ***(2007) 5 SCC 602***,
- (ii) ***State of Bihar and others Vs. Modern Tent House and another***, reported in ***(2017) 8 SCC 567***,
- (iii) ***Maria Santana Lobo and others Vs. Cofre de Capela de S. Joao Baptista De Umtavaddo Calangute alias Capela De Sao Joao Batista Do and others***, reported in ***2018 SCC OnLine Bom 6072***,
- (iv) ***Dinesh Goyal alias Pappu Vs. Suman Agrawal (Bindal) and others***, reported in ***2024 SCC OnLine SC 2615***

9. Learned counsel for the respondents supported the order passed by the Court below and contended that the defendants were knowing the area of their own plot since earlier and they were sure that they were not having more than 1260 sq.ft. area and if had, they did not try to amend their written statement earlier. All these facts are rightly taken into consideration by the learned lower Court and passed an appropriate order which needs to be confirmed.

10. Learned Counsel for respondents relied on the judgment of Hon'ble Apex Court in ***Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria and others***, reported in ***(2015) 10 SCC 203***.

11. Heard both the parties at length. Perused the impugned order and considered citation relied on by both the parties.

12. It is contention of the petitioners that additional issues were framed on 16.08.2024. As such, it cannot be said that trial is commenced and amendment cannot be allowed. Earlier there was one application filed by the plaintiffs for amendment, which was allowed. Written statement was amended as there was amendment to the plaint. It appears that the petitioners have filed another application for amendment in written statement contending therein that earlier contention in the written statement regarding the area admeasuring 1260.25 sq.ft. owned and possessed by them is their *bonafide* mistake caused by the misunderstanding. When the suit is posted for evidence and when minutely a registered sale deed dated 07/05/1952 is studied, the defendants came to know that earlier owner and seller had sold 1950 sq.ft. of plot to their father.

Both the defendants are illiterate and they were having misunderstanding regarding the ownership and area of plot and because of the same, they had made an application in Land Record Department and mentioned the area of the said plot as 1260.25 sq.ft. therefore, wrong area is mutated in Property Card, because of which, instead of 1950 sq.ft. they informed 1260.25 sq.ft. area to their Counsel.

13. Learned counsel for the petitioners drawn my attention to page 46 – Annexure ‘C’, which is copy of sale deed dated 05/07/1952, executed in favour of the father of defendants. As per the sale deed even as per the boundary limits, the ownership of the plot of defendants has to be decided. Therefore, the defendants prayed for area admeasuring 1260.25 sq.ft. mentioned in para 14 be struck off and in its place substitute the area admeasuring 1950 sq.ft. It is also pointed out the said sale deed, there are boundaries mentioned, those are from East-45 ft., West-26 ft., North-44 ft. and South-27 ft. except the land admeasuring 31 x 18 ft. belonging to Abdullakha Durajikha, excluding that land, the land inside the said boundaries was sold to the father of the petitioners. It is contention of the plaintiffs that when plaint was amended, the defendants

were having opportunity to amend their written statement by way of consequential amendment however, at that time, this point was not raised. Thereafter, issues were framed and plaintiffs filed affidavit of evidence. On 03/05/2023 further examination of chief of the witness of plaintiffs is recorded.

14. Learned Counsel for the petitioners relied on ***Usha Balashaheb Swami*** (supra), wherein the Hon'ble Apex Court referred the judgment of Privy Council in *Ma Shwe Mya Vs. Maung Mo Hnaung*, AIR 1922 PC 249, which reads as under :

“All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.”

15. The Hon'ble Apex Court also held that the amendment application for amendment in plaint and amendment application for amendment in written-statement stands on different footing. The Hon'ble Apex Court in para 19 held as under :

“19. It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.”

16. In my considered opinion when there is a prayer to amend the written-statement on the basis of sale deed, copy of which is already on record and this fact is also admitted by plaintiffs, in such circumstances, amendment in the area on the basis of said sale deed can be substantiated by leading evidence. In fact, it would resolve the controversy once for all otherwise there would be chances of multiplicity of litigation. At this stage, there is no need to go into the merits of the amendment.

17. Learned Counsel for the petitioners also relied on ***State of Bihar Vs. Modern Tent House*** (supra), wherein the Hon’ble Apex Court in para 8 held as under :

“8. We have perused the amendment application filed by the appellants. We find that firstly, the proposed amendment is on facts and the appellants in substance seek to elaborate the facts originally pleaded in the written statement; secondly and in other words, it is in the nature of amplification of the defense already taken; thirdly, it does not introduce any new defense compared to what has originally been pleaded in the written statement; fourthly, if allowed, it would neither result in changing the defense already taken nor will result in withdrawing any kind of admission, if made in the written statement; fifthly, there is no prejudice to the plaintiffs, if such amendment is allowed because notwithstanding the defense or/and the proposed amendment, the initial burden to prove the case continues to remain on the plaintiffs; and lastly, since the trial is not yet completed, it is in the interest of justice that the proposed amendment of the defendants should have been allowed by the Courts below rather than to allow the defendants to raise such plea at the appellate stage, if occasion so arises.”

18. Learned Counsel for the petitioners also relied on the judgment of this Court in ***Maria Santana Lobo*** (supra), wherein it is observed in para 14 as under :

“14. It is now well settled that the Court can allow all such amendments, at any stage of the suit, which are necessary for deciding the real controversy between the parties. Such a finding that the proposed amendment is necessary for the purpose of determining the real questions in

controversy between the parties is the first jurisdictional fact before allowing any such amendment. After the introduction of the proviso to Order VI, Rule 17 of CPC, there is a second jurisdictional fact introduced, which applies where the application for amendment is brought after the commencement of the trial. The expression “commencement of trial” has not been defined in CPC and has been subject matter of several decisions of the Supreme Court and the High Courts. In the case of Vidyabai (supra), amendment of the written statement was sought, when the affidavit in evidence was filed.”

This Court also referred to the decision of the Hon’ble Apex Court in ***Ragu Thilak D. John Vs. S. Rayappan***, reported in ***(2001) 2 SCC 472***, in which it has been held that, “dominant purpose of allowing an amendment is to minimize litigation, even admission can be withdrawn or explained”. This court also held that, “amendment can be liberally granted if it is necessary for deciding a real controversy in dispute and particularly having regard to the fact that the documents on the basis of which the said plea sought to be substantiated are already on record”.

19. The learned Counsel for the petitioners also relied on ***Dinesh Goyal alias Pappu*** (supra), in this matter, the Hon’ble Apex

Court placed reliance on *Life Insurance Corporation of India vs. Sanjeev Builders Pvt. Ltd. & Anr.*, reported in *2022 SCC OnLine SC 1128*, wherein, certain factors have been outlined while considering the application of Order VI Rule 17 of the CPC. It is held that, “applications should be ordinarily allowed if the amendment is for effective and proper adjudication of the controversy between the parties to avoid multiplicity of proceedings, provided it does not result in injustice to the other side”.

20. Learned Counsel for the respondents submitted that this amendment would definitely withdraw the clear admission by the defendants. He relied on *Ram Niranjana Kajaria* (supra), wherein the Hon’ble Apex Court in para 23 observed as under :

“23. We agree with the position in Nagindas Ramdas (1974) 1 SCC 242 and as endorsed in Gautam Sarup vs. Leela Jetly, (2008) 7 SCC 85 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 vs. Jyoti Sahay, 1984 Supp SCC 594, does not reflect the correct legal position and it is overruled.”

However, it is also made clear in para 24 by the Hon'ble Apex Court that, "admission can be clarified or explained by way of amendment and the basis of admission can be attacked in substantive proceedings".

21. I have also perused the amended written-statement, wherein a specific pleadings it is mentioned in para 10 that except 31 x 18 ft. land, remaining land of the said Sheet No.16, Plot No.68 was sold by Namdeo Khusal Patil to his father Shaikh Bandu Shaikh Nazar Mohammad by way of sale deed dated 07/05/1952. It is reiterated in para 14, that the land within four boundaries as mentioned in the sale deed belongs to defendants except land sold to one Shaikh Bandu Shaikh Nazar. As such, in my considered opinion the sale deed dated 07/05/1952 is already on record therefore, no prejudice is going to cause to the plaintiffs, otherwise also only the plaintiffs have filed their evidence of affidavit, the cross-examination of the plaintiffs is yet to began. It is necessary to note that there was a Regular Civil Suit No.114/1999, wherein the present plaintiff filed application to add as a plaintiff No.2, however, it appears that that application was rejected and the appeal is also rejected. The mutation entries are taken on the basis

of affidavit however, it is alleged that there was a mistake in calculation on the basis of document which already on record would not cause prejudice to the plaintiffs. Both the parties will get opportunity to substantiate their claim.

22. In view of the settled position of law, amendment needs to be liberally allowed if they are essential to adjudicate the real controversy between the parties. If such amendment is allowed, at the most, the document which is already on record, it can be tested on the basis of evidence led by parties. Learned Trial Court has not considered this aspect and rejected the application. In my considered opinion, the order is erroneous and has not considered that the amendment is to the written-statement in view of the settled position of law. The amendment to written-statement stands on different footing than the amendment to the plaint. The defendants can even raised contrary pleadings in the written-statement. As such, the order needs to be set aside.

23. In view of that, the writ petition is **allowed**.

24. The order dated 30.09.2024, passed below Exhibit-49 in Regular Civil Suit No.09/2018, is hereby quashed and set aside.

The amendment application Exhibit-49, filed by the defendants is allowed. Amendment to be carried out within a period of three weeks.

The writ petition stands **disposed of** in the above terms. No costs.

(SMT. M.S. JAWALKAR, J.)

Kirtak