

MHAU060007032009



**IN THE COURT OF CIVIL JUDGE JUNIOR DIVISION, KANNAD, DIST.
AURANGABAD**

RCS NO.65/2009

**Mr. Abdul Samad Najmoddin (dead)
through LR's**

...Plaintiffs**Versus**

Mr. Abdul Wahed Shaikh Amir

...Defendant

ORDER BELOW EXH.95

1. The defendant has filed this application under Order 6 Rule 17 of the Code of the Civil Procedure (for short "C.P.C.") for the amendment in the written statement.
2. The defendant contended that, the suit is pending for the evidence of the defendant. That after filing affidavit in lieu of evidence by the defendant, a dispute erupted and after years saw conclusion by the Hon'ble High Court. That during pendency of the Writ Petition and also after its decision, much water has flown which resulted in considerable changes about the suit property. In this context, elucidation about these facts and changes is certainly called for by necessary amendment. In as much as the plaintiff is in actual physical possession of the suit property as he had always been at all the relevant while. So the defendant wants to amend the written statement adding para No.9-A after the end of para No.9 with following contents.

“9-A : That, since immediately after death of the defendant's father and plaintiff's father, the defendant has always been in possession of the entire land in the suit property survey no.108. Now since before institution of the suit the defendant is continuously in possession of southern 10 acres and 7 Aars of the block no.108.”

3. The defendant has filed 16 documents in support of the application. It is contended that the afore stated amendment is necessary for adjudication. By this amendment nature of the suit doesn't change nor the plaintiff is likely to suffer any kind of loss or injury. On the contrary the defendant will suffer irreparable loss if the amendment is not allowed.

4. The plaintiffs filed their say below Exh.102 and strongly objected the application. The plaintiffs contended that the application is misconceived and not tenable at law. The defendant not come with clean hand before the Court. Whatever stated before the Hon'ble High Court is a matter of record. The plaintiff is in actual physical possession of the suit property. The defendant has no any concern with the suit land and as he was disturbing the possession for the plaintiff the present suit for grant of perpetual injunction is being filed against him. The defendant has engineered the documents so as to grab the property of the plaintiffs and hence now is trying to create a new theory by way of amendment and is trying to introduce altogether new case, which cannot be permitted in the eyes of law that too at the fag end of the case. The defendant is prolonging the hearing of the matter unnecessarily. It is further false to allege that, the afore stated amendment is at all necessary for the adjudication of the suit and the same would not change the nature of the suit. The defendant is not entitled to seek the relief as has been sought in the application. Hence, prayed to reject the application with costs.

5. Perused the application, say and pleadings of both parties. Heard learned advocate Mr. R. H. Siddique for the defendant and advocate Mr. K. U. Nikam for the plaintiffs.

6. The Suit is filed for permanent injunction to restrain the defendant from obstructing possession of the plaintiff on the suit property. The suit is filed on 2.05.2009. The suit is pending for cross examination of the defendant witness DW 1 since 6.10.2016. By way of this application defendant is prayed to add the para no.9-A as mentioned above in the written statement (Exh.19).

7. The learned advocate for the defendant submitted that there is change in circumstances during the pendency of Writ Petition. Possession is important, it plays pivotal role. The so called partition is not proved. The defendant is in possession of the suit property. Hence, prayed to allow the application.

8. The learned advocate for the plaintiff submitted that, there is no change in circumstances. The defendant is trying to implead no any new fact. The defendant has not shown any due diligence for the proposed amendment. The defendant is prolonging the matter since last six years. The documents filed by the defendant are not vital. The citations filed by the defendant are not at all applicable to the present case. The proposed amendment is contrary to the written statement. Therefore, application cannot be allowed.

9. I have gone through the pleading and above submission. By way of proposed amendment the defendant wants to add para no.9A in

the written statement as mentioned above. I have minutely gone through the proposed amendment of the defendant. It appears that in the proposed amendment the plaintiff has taken two fold defence, firstly, he stated that since, immediately after the death of his father and plaintiff's father, he has always been in possession of the entire land in the suit property survey no.108. Secondly, it is contended that, now since before institution of the present suit the defendant is continuously in possession of the southern 10 Acres 7 Aare land of block no.108. It shows that the defendant firstly contended about the possession on entire suit land and subsequently he contended that he has possession over 10 Acres 7 R land from southern side. It appears that the defendant himself has no conformity about the exact land in his possession.

10. Moving ahead, the defendant contended that there is change in the circumstances. But what kind of change has been occurred during the pendency of the suit was not stated by the defendant. I am saying so because if we perused the proposed amendment it reveals that the plaintiff is claiming his possession since before institution of the present suit. If this is the position then question arose in mind that why the defendant is asking for such amendment at the time of his evidence instead of stating it in his pleading as he is possession since before filing the suit. The defendant has not given any reasonable and justifiable ground that in spite of due diligence he could not have raised the matter before the commencement of trial. The defendant also filed 16 documents along with the application which are also mentioned in the application in respect of showing his possession. However, I am of the view that the defendant may lead evidence about the said documents as per law, as his evidence is yet to be concluded. Mere mentioning the list of documents in the proposed amendment would not sufficient to allow the application, rather it is

settled law that the evidence should not be impleaded in the pleading. Moreover, If we perused the issues framed below Exh.41, the burden of proving the possession is casted upon the plaintiff and not on the defendant. Thus, in the light of the above discussion I am of the considered view that the application is not filed with due diligence, there is no change in circumstances.

11. The learned advocate for the defendant relied on the following citations in support of the application.

Gurubakhsh Singh & others Vs. Buta Singh & another, [2019 (1) Mh.L.J.481]

In this citation the amendment sought after commencement of trial. The suit was filed by appellant for setting aside exparte decree. Nature of proposed amendment neither changes character and nature of suit, nor does it introduce any fresh ground. At the time of application for amendment only two official witnesses were examined. Delay in filing application could be due to inability in obtaining particulars regarding impugned suit. Amendment ought to have been allowed as it could not have caused any prejudice to defendants.

12. I have gone through the above observations. I respectfully submits that the facts of the citation and the case in hand are different. In the case in hand necessary pleadings about the possession are already in existence in the written statement of the defendant. The defendant has not shown any due diligence for the proposed amendment. Hence, the observations made in the above citation are not helpful to the defendant.

Teotonio Faustino Vas and Another Vs. Ana Maria Rodrigues and others. [2019 (1) Mh. L. J. 668]

In this citation Hon'ble High Court in para no.11 observed that

as per Order 6, Rule 17 of C.P.C amendment of pleadings by the defendant ought to be allowed where purpose of the proposed amendment is to elaborate the defence and to take additional plea in support of the case. It has also been laid down that where there is a direct admission in the original pleadings, it is open to the defendants to explain the same.

13. In the case in hand the defendant in his written statement already stated that he is owner and possessor of the half of the suit property. The suit property is admeasuring 24 Acres 14 R. In that circumstances the defendant is the owner and possessor of 12 Acre 7 R land. However, now by way of proposed amendment the plaintiff stated that he has possession over the 10 Acres and 7 R land which is somehow contrary to the earlier pleadings of the defendant. In such circumstances the observations made in the above citation are not helpful to the defendant.

Dagu Gangadhar Dongre Vs. Gopinath Mahadu Thore (died) through LR's and others. [2019(1) Mh.L.J. 375].

In this citation the main issue involved as to whether, in every case of grant of amendment, the concerned party has to necessarily filed a fresh typed copy of the amended plaint/ written statement/ Darkhast/ Counter claim etc. It was held that when any document undergoes an amendment, if amendment can be conveniently embodied in basic document like plaint/ written statement/ Darkhast/ Counter claim etc. same could be permitted even without freshly typed document for said purpose. However, if a plaint undergoes, an amendment where a few paragraphs, few prayers etc. are introduced, trial Court or any concerned Court can insist upon litigate to file a freshly typed document post amendment.

14. I have gone through the ratio laid down in the above citation.

I respectfully submits that the facts of the citation and the facts of the case in hand are not identical. In the present case there is no dispute about the filing copy of amended plaint or written statement. Therefore, the ratio laid down in the above citation is not helpful to the defendant's case.

Babarao Pandurangji Patil and Another Vs. Kalavati Rambhauji Sathawane and others. [2019 (4) Mh.L.J. 255]

In this citation the suit was instituted for declaration and permanent injunction. The respondent/plaintiffs in their pleadings claimed share and equal right in suit property. In application for amendment of plaint plaintiffs sought to add only an additional prayer pertaining to decree of partition and separate possession in suit property. Facts of the case shows that ingredients of O. 6 R. 17 of the Code stood satisfied and trial Court was justified in allowing application for amendment filed by plaintiffs.

15. I have gone through the above observations made by Hon'ble High Court. In the case in hand the defendant is seeking amendment about the pleading of possession. As discussed above the pleading of possession is already exists in the written statement of the defendant. However, the proposed amendment is somehow contrary to the original pleading about the area. Moreover, the defendant has neither filed counter claim nor seeking any prayer. The defendant has not shown any due diligence for the proposed amendment. Therefore, the observations made in the above citation are not helpful to the defendant.

Maruti Vithoba Kulal and another Vs. Nivrutti Deoram Kulal and others. [2018 (5) Mh. L. J. 290]

In this citation the plaintiff amended his plaint after the measurement, but the defendant failed to amend the written statement and counter claim in spite of due diligence. Therefore, defendant filed application for amendment to written statement and also filing counter claim at the

stage of pronouncement of judgement. The Hon'ble High Court observed that the pleadings can be allowed to be amended in accordance with law at any stage of proceedings, including when the case is reserved for judgement.

16. I have gone through the observations made in the above citation. I respectfully submits that the facts of the above case and the facts of the case in hand are different. The defendant in his written statement already stated about his possession. Now by way of proposed amendment he again making statement about his possession since before the institution of suit. There is no material change in the proposed amendment which goes to the root of the case. Therefore, the observations made in the above citation are not helpful to the defendant.

Chandrakant Rambhau Khachane and others Vs. Nandlal Govradhandas Chanke, 2018(3) Mh.L.J.165.

In this citation the Hon'ble High Court reiterated six principles of amendment laid down by Hon'ble Supreme Court in the case Revajeetu Builders and Developers.

17. I have gone through the observation and principles mentioned in the citation. I respectfully submits that the proposed amendment in the written statement is not imperative because it is some show contrary to the statement already there in the written statement. Moreover, the application is mala fade because the suit pending for the cross examination of the DW 1 since 2016. The defendant filed his affidavit of examination in chief below Exh.74 in which there is mistake in boundary mentioned in the para no.4 line no.10. Therefore, the defendant filed fresh affidavit of examination in chief at Exh.76 against which the plaintiff moved to the Hon'ble High Court. The Hon'ble High Court in W. P. No.1892/2017 discarded the fresh affidavit of examination in chief

(Exh.76) of the defendant and permitted him to step in to witness box to record further examination in chief in stead of filing fresh affidavit. In spite of that the defendant again moved application below Exh.91 to amend his affidavit of examination in chief (Exh.74) which was also rejected on 21.10.2021. Subsequently the defendant moved this application which is baseless and without any change in circumstances. It shows that the defendant any how wants to amend his affidavit of examination in chief by taking recourse of amendment of written statement. Moreover, refusing amendment would not lead to injustice to the defendant as the burden of proving the possession lies on the plaintiff and not on the defendant. Therefore, I am of the view that the observations made in the above citation is not helpful to the defendant.

Piedade Fernandes Vs. Charlene Leitao [2012(1) Mh.L.J. 317]

In this citation it was observed that all the facts which were sought to be incorporated in the written statement came to the knowledge of the petitioner during the pending of the appeal and for which reason an application to produce additional documents which came to his knowledge was filed before the Appellate Court. Therefore, the Hon'ble High Court allowed the application for amendment in the written statement.

18. In the case in hand the it is not the case of the defendant that he came to know about the proposed amendment during the pendency of the suit. On the contrary he came with the case of his possession on the half of the suit property since beginning. The amendment is afterthought and similar contents about the possession are already exists in the written statement except some minor discrepancies. Hence, the observations in the above citation are not helpful to the defendant.

Prabhakar Xembu Bhandari and another Vs. State of Goa and others. [2013 (6) Mh. L. J. 440].

In this citation Hon'ble High Court observed that Court should allow all amendments that would be necessary for determining the real question in controversy. The Hon'ble High Court rejected the proposed amendment at paragraphs 22(a), 22(b) and 22 (c) stating that this being part of the evidence the same need not be included in the pleadings. However, the Hon'ble High Court allowed the amendment only in the prayer clause.

19. In the case in hand the defendant wants to add contents about the possession and the list of documents. However, the contents of possession are already impleaded in the written statement and the documents being part of the evidence need not be included in the pleadings. Therefore, the observations in the above citation are not helpful to the defendant.

The learned advocate for the defendant also relied on the following citations.

Kamlesh Jagannath Suryavanshi and another Vs. Kalyan Shishir Kumar Dutta and another [2013 (6) Mh.L.J. 193].

Hakim Vs. District Judge Deoria, Lex(ALL)2004 (3) 93.

C. R. Janardhan Vs. N. S. Vinutha, LEX (KAR) 2002 (1) 57.

Sivdas Vs. Lakshmi, LEX (KER) 2002 (9) 42.

Surinder Singh Vs. Kapoor Singh (dead) through LR's and others, [2005 (3) Mh.L.J. 747].

20. The above citations also given on the point that application for the amendment can be filed at any stage of the proceeding. Amendment of pleadings must be allowed to do substantive justice between the parties. However, as discussed above I would like to reiterate that in the case in hand the defendant is not seeking amendment of any new fact, the fact which is proposed to be amended is already existed in

the pleading and in respect of the documents the defendant can lead evidence. The documentary evidence need not be impleaded in the pleading. Therefore, the observations in the above citations also not helpful to the defendant.

21. Thus, from the above discussion I am of the view that the proposed amendment is not with due diligence and it is already incorporated in the written statement. Hence, considering all the above circumstances I pass following order.

ORDER

1. The application Exh.95 is rejected.
2. No order as to costs.
(Pronounce in open Court)

Kannad
Date : 11.08.2022

(P. M. Kolse)
Civil Judge J.D. Kannad.

CERTIFICATE

I affirm that the contents of this PDF file judgment are same word for word as per original judgment.

Name of Court	:- P.M.kolse. Jt. Civil Judge Jr. Div., Kannad.
Name of Steno	:- Y. S. Mali.
Date of Decision Judgment	:- 11/08/2022
Signed by Presiding Officer On	:- 11/08/2022
Judgment upload on	:- 16/08/2022