

**ORDER BELOW EXH-117 IN RCS No.52/2009.**

The present application is filed by the defendant under Order 6 Rule 17 of the C.P.C to amend the written statement.

02. In short it is the contention of the defendant that present suit is filed for the recovery of possession. He has filed the written statement at exhibit-22 on 13.4.2010. In written statement he has taken plea that deceased-Mahadu executed will-deed in favour of Bajirao Bhelonde. But further explanation regarding the will-deed remains to be inserted in the written statement. Therefore, the defendant wanted to amend the para no.12 after line no.3 and to insert the recital as given in page no.2 of the application exhibit-117. It is further contention of the defendant that said Bajirao alienated the suit property and partition the land. Both transactions are old one and the documents regarding the said transactions were not available with the defendant at the time of filing the written statement. Therefore, now the defendant wanted to insert para no.13-A to 13-D in written statement as mentioned in application exhibit-117. Due to amendment the nature of suit will not be changed. The amendment is in explanatory form. The defendants have not come with a new story. Therefore so as to resolve the disputes between the parties the present amendment is necessary. Hence, prayed to allow the application.

03. The plaintiff filed say at exhibit-119 and opposed the application. It is the contention of the plaintiff that present application is not tenable and maintainable in view of proviso to order 6 Rule 17 and order 6 Rule 2 of the C.P.C. The issues are framed at exhibit-44 on 21.6.2011. The plaintiff lead her evidence and closed her evidence. The application filed by the defendant to lead the secondary evidence is also rejected by this Court. Only to prolong the matter present application is

filed. The plaintiff has filed the application under Section 136 of the Evidence Act r.w. Order 18 Rule 4 of the C.P.C. Said application is pending. After knowledge of the lacuna the defendant has filed the present application, after commencement of the trial. The proposed amendment is altogether different than the earlier pleading. The defence of the defendant will be changed. Therefore, the application deserves to be rejected.

04. Heard both the parties. It is argued by Advocate Shri. S.S. Gopchade that the present application for proposed amendment will not change the nature of suit nor it will change the defence of the defendants. The present amendment is only in explanatory form and no new defence is taken by the defendants by way of proposed amendment. The transaction between the Bajirao and his alianee are old one. The defendant were not in possession of those documents therefore they were unaware about the said document due to this reason they could not take the specific defence about the same at the time of filing the written statement. Now, those documents are available with the defendants therefore the defendants wants to amend the written statement. The proposed amendment will not cause prejudice to the plaintiffs. Though, the trial is commenced and as per the proviso of amended Order 6 Rule 17 of the C.P.C. The amendment cannot be allowed after the commencement of trial. But the Court can permit to amend the pleading if the proposed amendment is necessary to elucidate the disputes between the parties. The proposed amendment will solve disputes between the parties once for all on merit. Therefore, it is necessary to grant the permission to amend the written statement.

05. On the contrary, it is argued by Advocate Shri. Botlawar for the plaintiff that in present matter the defendants have filed their written statement on 13.04.2010 and issues are framed on 21.6.2011. Thereafter,

the plaintiff lead her evidence and closed her evidence by filing the pursis. Thereafter, the defendant filed the application at exhibit-110 to grant permission to lead the secondary evidence. Same is rejected by the Court. Thereafter, so as to fill-up the lacuna the present application is filed by the plaintiff. It is the rule of pleading that facts has to be stated and not the evidence. Therefore, the proposed amendment cannot be allowed as same is in the form of evidence. Prior to filing of this application the plaintiff has filed application at exhibit-114 to strike out the certain paragraphs in the affidavit of the defendant. As the trial is already commenced this present application cannot be allowed. The defendants have not shown the due diligence in filing the application. Hence, prayed to reject the application.

06. Upon hearing both the parties and perusing the R & P of the matter it appears that in present matter written statement is filed by defendants on 13.4.2010 and issues are framed on 21.6.2011. Thereafter, the plaintiff has filed her affidavit of examination-in-chief on 9.8.2011. It means the trial commence when the plaintiff has filed her affidavit of examination-in-chief on 9.8.2011. In present matter Advocate for the plaintiff filed the following reported case law **Madhav Maroti Bhanje vs. Balaji Shivaji Patare and others reported in 2012 (5) Bom. C.R.**, in this reported case law the Hon'ble Bombay High Court has held that the trial commence after filing of the affidavit in lieu of examination-in-chief of witnesses. The Hon'ble Bombay High Court further held that proviso Order 6 Rule 17 will come into play only after stage of filing of affidavit in lieu of examination-in-chief. If this ratio laid down by the Hon'ble High Court taken into consideration then in present matter before me the trial is commenced on 9.8.2011, when the plaintiff filed her affidavit of examination-in-chief.

07. It further appears that the cross examination of the plaintiff is completed on 7.10.2011. Thereafter, the plaintiff has filed the affidavit of PW2 Maroti Nawde at exhibit-89 on 2.11.2011. The plaintiff filed evidence close pursis at exhibit-105 on 25.4.2013. Therefore, the evidence of the plaintiff is closed on 25.4.2013 and the matter was posted for the evidence of the defendants. Thereafter, the defendant no.1 filed the affidavit of examination-in-chief on 27.9.2013 at exhibit-105 and filed application at exhibit-110 to grant the permission to lead the secondary evidence in respect of sale-deed. The application filed for permitting to lead the secondary evidence was opposed by the plaintiff and after hearing both the parties that application came to be rejected.

08. Thereafter, the plaintiff filed application at exhibit-115 to strike out the para no.4,5 and 7 of the affidavit of examination-in-chief of the defendant as there was no pleading in respect of the recitals stated in paragraph nos.4, 5 and 7 of affidavit of examination-in-chief. Thereafter, the defendant has filed the present application at exhibit-117 to amend the written statement.

09. On perusing the contention raised in proposed amendment it appears that by way of amendment the defendant wants to insert some portion in para no.12 after line no.3 of the written statement in respect of will-deed executed by deceased Mahadu. In the proposed amendment in that para the defendant wants to insert the contentions regarding the sanction of mutation entry in the name of Bajirao on the basis of will-deed executed by deceased Mahadu. So far as this amendment is concerned it does not appears that due to said amendment the defendant are trying to take a new defence or contrary stand than the earlier pleadings. There is specific pleading in written statement regarding the will-deed executed by

deceased Mahadu. Therefore, the proposed amendment is only in explanatory form and it will not take away the rights which are accrued to the plaintiff or by way of that amendment the defendants are not withdrawing any admission which are previously given. Therefore, the proposed amendment in para no.12 will not affect to the case of plaintiff.

10. So far as, the amendment which the defendant wants to insert by way of para no.13A to 13D is concerned, it appears that by way of that amendment the defendants are trying to insert the new pleading which is already not taken by them in their written statement. On perusing the entire written statement it no where appears that the defendants have pleaded that they are the owners of the suit property or they have purchased the property from Bajirao. Therefore, due to this new pleading the defendants wants to insert a total new theory. Therefore, the proposed amendment by way of para no.13A to 13D is the surprise to the plaintiff.

11. In present matter Advocate for the defendants filed on record the following case laws 1) Punjab National Bank vs. Indian Bank., 2) Bharat Petroleum Corporation Limited vs. Precious Finance Investment Private Limited, 3) P. Kunjukrishna Pille vs. D. Shrikanthan Nyar, 4) Vidyabai vs. Premalata, 5) Surendrakumar Sharma vs. Makhansing, 6) J. Samuel vs. Gattu Mahesh, 7) Rameshkumar Agrawal vs. Rajmala Export Private Limited and 8) Abdul Raheman vs. Ruldu. On relying the all these case laws Advocate for the defendants submitted that though by way of amendment the defendant is taking contrary plea, though the plea might be time barred and though the application for amendment is not filed within limitation even though the Court can grant the amendment if the proposed amendment is necessary to elucidate the disputes between the parties.

12. On the contrary, advocate for the plaintiff cited following case laws 1) Hiralal vs. Kalyan Mal and others, 2) Janu Laxman Khumbar vs. Pandurang Laxman Khumbar, 3) Lalu Maroti Dadhe and others vs. Limba Maroti Dadhe and others, 4) Ajendraprasadji N. Pande vs. Swami Keshavprakashdasji and others. By relying these case laws advocate for the plaintiff argued that amendment cannot be allowed after commencement of the trial. The admission which are given in favour of the plaintiff cannot be withdrawn or the rights which are accrued to the plaintiff cannot be withdrawn by way of proposed amendment.

13. On perusing the all above case laws the crux of the all above citations is that after the commencement of the trial the Court cannot permit to amend the pleadings, if by way of the proposed amendment either parties wants to withdraw some admission or the rights which are accrued in favour of other parties. It has also held that though the amendment is sought after the commencement of the trial and if the proposed amendment is necessary to solve the disputes between the parties then the amendment can be allowed. Considering these preposition laid down in above reported case laws, the application in present matter has to be decided.

14. First of all, it is necessary to see whether the defendants are due diligent in applying for the amendment. On perusing the R & P it appears that the trial is commenced on 9.8.2011 and the defendants are remained silent till rejection of application for leading secondary evidence. When the application for permission to lead the secondary evidence came to be rejected then the defendants have filed this application for amendment. It means so as to fill-up the lacuna which is left on the part of the defendant the present application is filed. Due to rejection of application of

secondary evidence certain rights are accrued in favour of the plaintiff. If the proposed amendment came to be granted it will take away the rights which are accrued in favour of the plaintiff.

15. Further, it is also necessary to see whether the defendants were aware about the execution of sale-deed prior to filing of affidavit of examination-in-chief by defendant no.1 or before the closing of evidence of the plaintiff. On perusing the sale-deed bearing no.638/1970 it appears that said copy is received to the defendant on 7.4.2012. The mutation entry no.855, mutation entry no.210 are also available with the defendants prior to closing of evidence by the plaintiff. It means the defendants were fully aware about the documents which were in their possession before the commencement of the trial. Therefore, filing a application at belated stage does not fall within the scope of due diligence.

16. Further by way of amendment the defendant wants to insert the pleading contending that they are the bonafide purchaser, they have perfected their title by way of long standing possession and the original documents are misplaced due to which they wants to lead secondary evidence. If all these pleadings is permitted to be inserted then it will definitely cause prejudice to the plaintiff and will be surprise to the plaintiff.

17. Further, it is also necessary to see whether the proposed amendment is necessary to solve the disputes between the parties. On perusing the defence it appears that the defendants have come with specific pleading that deceased-Mahadu executed the will-deed in favour of Bajirao and the Bajirao alienated the property to various persons. It means if the defendants succeeds to show that deceased Mahadu has executed a will-deed in favour of the Bajirao then the question about the ownership of the

plaintiff or the defendants will be automatically get decided. Therefore, the proposed amendment in para no.13A to 13D is not necessary. In view of all these discussion the application is liable to be partly allowed to the extent of insertion of pleading in para no.12 after line no.3 of the written statement. Rests of the amendment is not liable to be allowed. Hence, I pass the following order.

**ORDER**

- 1) The application is partly allowed to the extent of insertion of portion stated in paragraph no.3 of application exhibit-117, after line no.3 in para no.12 of the written statement.
- 2) The proposed amendment by way of insertion of para no.13A to 13D is rejected.
- 3) The defendants shall carry out the amendment within limitation.

sd/-

( R.P. Kulkarni )

CJJ, Naigaon (Bz).

Date : 12.3.2015.

**CERTIFICATE**

I affirm that the contents of this P.D.F. file Judgment are same word to word, as per the original Judgment.

Name of the Stenographer : P.N. Karre,

Court Name : Court of Civil Judge Jr.Divn., Naigaon(Bz)

Date : 12-3-2015

Judgment signed by the Presiding Officer on : 12-3-2015

Judgment uploaded on : 18-3-2015

**P.N. KARRE**

**(STENO)**