

**Order below exhibit no.85 in Regular Civil Suit no.36 of 2015**

1. The defendant no.17 and 18 have filed this application for the amendment of their written statement to file their counter-claim. According to them, the plaintiffs have filed the present suit for partition but they have avoided number of ancestral properties to be included in the suit. They have further stated that, this fact has been raised by them in their written statement. Similarly, the fact that, the plaintiffs are taking profits from these properties has also been raised in the written statement of defendant no.1 to 8. They have further stated, that the plaintiffs have not included the properties which defendant no.1, 17 and 18 have mentioned in their written statement. Therefore, these defendants have prayed for the just decision of suit a partition all the properties available for the partition have to be included in the suit but the plaintiffs are not going so. Therefore, it became necessary for them to amend their written statement to file the counter-claim in respect of the suit properties which the defendants did not include in the suit.
2. The plaintiffs have filed their say to the application and they have objected the application. They have further stated that, at the time of filing their written statement these defendants had the knowledge of all the facts but they did not raise such facts in their written statement. They have further stated that, these defendants have not given all four boundaries of the proposed property. Therefore, these properties are not identifiable. They have further stated that, the properties situated at Sahapur, Thane, Igatpuri and Nashik are their self acquired properties therefore, defendant no.17 and 18 have no concerned with these properties. They have further stated that, as these properties are self acquired properties of the plaintiffs. Therefore, defendant no.17 and 18 have no any right mesne profits. They have further stated that, defendant no.17 and 18 have not valued their counter-claim properly. Therefore, they have prayed that the application may be rejected.
3. Heard both sides. Defendant no. 17 and 18 are asking for amend of their written statement. It is fairly settled in law that the amendment of pleadings under Order 6, Rule 17 is to be allowed if such an

amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of plaintiff, depending on facts and circumstances of a given case. However, mere delay in making an amendment application itself is not enough to refuse amendment, as the delay can be compensated in terms of money. Amendment is to be allowed when it does not cost serious prejudice to the opposite side.

4. It is also well settled that the principles applicable to the amendment of the plaint are equally applicable to the amendment of the written statement and that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice and that any admission made in favour of the plaintiff conferring right on him is not withdrawn.
5. Here, defendants no.17 and 18 are asking to include some properties which according to them are necessary to be included in the suit. The burden to prove the same would lie upon them. But suit being partition it would be necessary to include these properties to avoid multiplicity of the proceeding. If the proposed properties are included it would not cause any injustice to the plaintiffs as the fact that these properties are also available for partition would lie on defendants no.17 and 18. But if the amendment is not allowed then it would caused irreparable loss to defendant no.17 and 18. Furthermore, as discussed above, mere delaying is not sufficient to reject the amendment. Hearing of the suit has yet not commenced. The relief of mesne profits is ancillary relief to the main relief of counter-claim. Therefore, it is also necessary to be included. Therefore, considering all the above facts, it seems that it

would be in the interest of justice to allow the application so as to decide the suit on its merit and to avoid the multiplicity of proceedings. At the same time, it is necessary to compensate the plaintiffs for the delay the defendant have caused. Hence, I proceed to pass the following order.

**ORDER**

1. Application is allowed subject to payment of cost of Rs.3000/- to the plaintiffs.
2. Defendant no.17 and 18 to carry out necessary amendment within stipulated period.

***(K. I. Khan)***

***Date: 12 /02/2019***

***Civil Judge, Jr. Dn. Igatpuri.***