



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7134 OF 2025

Dayabhai Nenshibhai Shah,
Age: 74 years, Occu : Business,
R/o. Subhash Road, Gujrathi Galli,
Vazirabad, Nanded
Through GPA Holder,
Kaushik Dayabhai Shah,
Age: 45 years, Occu : Tax Consultant,
R/o. Subhash Road, Gujrathi Galli,
Vazirabad, Nanded.

.. PETITIONER
[Original Plaintiff]

VERSUS

1] Hirachand Nensibhai Shah,
Through deceased through legal representatives.

1-A. Hemali Hiren Shiyal,
Age: 47 years, Occu : Service,
R/o. Third Floor, Bhalchandra Mansion,
Dilipsingh Colony,
Vazirabad, Nanded-431601

1-B. Dipesh Hirachand Shah,
Age: 42 years, Occu : Money Lender,
R/o. Third Floor, Bhalchandra Mansion,
Dilipsingh Colony,
Vazirabad, Nanded-431601

2] Laherchand Nensibhai Shah,
Age: 70 years, Occu : Business,
R/o. Visawa Nagar, Nanded.

.. RESPONDENTS
[Original Defendants]

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Mr.S.S.Bora, Advocate for the petitioner.

Mr.S.S.Gangakhedkar, Advocate for the respondent nos.1A and 1B.

...

CORAM : ARUN R. PEDNEKER, J.

DATE : 08.09.2025

JUDGMENT :

1] By the present Writ Petition, the petitioner challenges the order dated 25.02.2025 passed by the 4th Joint Civil Judge Senior Division, Nanded on an application below Exh.176 in Regular Civil Suit No.381/2011, whereby the Civil Judge was pleased to reject the application filed by the petitioner–original plaintiff under Order VI Rule 17 of the Civil Procedure Code praying for amendment of the plaint.

Brief facts leading to filing the present writ petition are as under :

2] The petitioner is the original plaintiff, who has filed Regular Civil Suit No.381/2011 for partition and

separate possession in respect of residential house, which is a double storied building bearing CTS No.3179 claiming his 1/3 share in the suit property and also prays for perpetual injunction. It is pleaded in the suit that the suit property was purchased by the father of the plaintiff and defendants on 07.01.1954 by a registered sale deed and after the demise of their father, in the year 1983 the suit property was mutated in the name of legal heirs i.e. the plaintiff and defendants and their mother namely, Devkaben. Devkaben died in the year 2008. However, there was no partition of the suit property and the plaintiff and defendant no.1 are residing in the same house i.e. suit property. In the year 2011 the plaintiff came to know that the defendant no.1 has mutated his name on P.R. card in city survey record behind back of the plaintiff. It was noticed that defendant no.1 entered his name in place of his mother, namely, Devkaben and the said entry was mutated on the basis of false, forged and manipulated Will Deed. It was further noticed by the plaintiff that the defendant no.1 also purchased share of defendant no.2 by way of sale deed dated 15.07.2011. The

petitioner – plaintiff thereafter filed suit for partition and separate possession of the suit property.

3] The defendant claimed in the written statement that Devkaben had executed a will deed in favour of defendant no.1 and thereby bequeathed her entire share in the suit property to the defendant no.1. It is contended that the sale deed executed by defendant no.2 in favour of defendant no.1 to the extent of share of defendant no.2 is also legal and proper.

4] During the pendency of the suit, the petitioner – plaintiff filed an application below Exh.176, praying for amendment to the plaint as well as praying for addition of party defendant to the suit. It is pleaded in the said application for amendment that the plaintiff as well as defendant were having one sister, namely, Manjula Pratap Maishery, who died in the month of October, 2010 but at the time of filing the suit, due to oversight her son, namely, Nikhil remained to be added as one of the defendants. Addition of party was prayed as the sister of the plaintiff as

well as defendants would also have a share in the joint family property. Also, the plaintiff prayed for declaration that the will deed dated 23.09.1994 be declared null and void. The defendant no.1 opposed the application by filing say, contending that there is no document placed on record to show relation between the proposed defendant, namely, Nikhil, with the parties to the suit. The amendment as claimed by the petitioner – plaintiff is as under :

1. That, the plaintiff filed the suit for partition and separate possession to the extent of 1/3rd share but, in fact due to oversight the plaintiff could not added the son of sister of plaintiff & defendants namely Nikhil S/o Pratap Maishery. The sister of plaintiff & defendants Manjula W/o Pratap Maishery is expired in October 2010. The said son of sister of plaintiff & defendants is must party to the suit therefore he is required to be added as defendant No.3 in the array of defendants as under :

*No.3 : Nikhil S/o Pratap Maishery
Age: 40 years Occu : Job
R/o. A-10 Anant Siddhi, LBS Road, Jain
Temple Compound, Bhandup West Mumbai*

2. That, the plaintiff claimed 1/3rd share in claim clause & prayer clause. So also in para no.14 & 17 mentioned about 1/3rd share. In place of '1/3rd' 1/4th is required to be replaced in claim clause and in para a No.14 & 17.

3. That, the plaintiff also wants to add para No.8 (a) as under

8 (a) "That, the sale deed executed by defendant No.2 in favour of defendant No.1 and alleged will

deed dated 23/09/1994 is without any partition and ascertainment of share of plaintiff and defendants their mother & sister. The said will deed is bogus one and from the contents of said will deed it can be gathered that said will deed is manipulated. The said Devkaben is having no right to fix her share without partition. The said sale deed and will deed are having no force in law and are required to be declared as null and void."

4. *That, the plaintiff wants to add following claim in claim clause as claim no.2 as under*

2- *"Declaration that sale deed bearing registration No.7245 dated 15/07/2011 and will deed dated 23/09/1994 are null and void and not binding upon plaintiff."*

5. *That, the plaintiff wants to add following prayer in prayer clause as prayer no.2 as under*

2- *"That sale deed bearing registration No.7245 dated 15/07/2011 and will deed dated 23/09/1994 may kindly be declared null and void and not binding upon plaintiff."*

5] By the impugned order dated 25.02.2025, the trial Court observed that the plaintiff was well aware about execution of the Will Deed at the time of filing of the suit and yet he had not prayed for declaration that the Will Deed is void as is sought by way of amendment to the plaint after commencement of trial. To the extent of addition of party, the trial Court held that as the sister of plaintiff expired in the year 2010. The suit was filed in the year

2011 and that the sister or her son has no right in the joint family property of the plaintiff.

6] By way of present writ petition, the petitioner challenges the impugned order. The petitioner contends that the suit is filed by the present petitioner for partition and separate possession. It is specifically contended in para no.7 of the plaint that the plaintiff came to know about the illegal act of the defendant no.1 in the month of July, 2011, when the defendant no.1 mutated his name on the P.R. Card in City Survey Record without consent and behind back of the plaintiff. The name of the defendant no.1 was entered in place of the name of the mother Devkaben by concerned authority of city survey office Nanded on the basis of false, forged and manipulated alleged Will Deed behind the back of plaintiff. Therefore, the said entry is not binding upon the plaintiff and other members of family.

7] Thus, the learned counsel for the petitioner submits that in para no.7 of the plaint, the plaintiff has specifically denied the Will of his mother as the true and

correct Will of her mother. As such, the prayer is made for 1/3rd share in the suit property. The learned counsel for the petitioner submits that the application filed by the petitioner/plaintiff for amendment and for addition of party ought to have been allowed by the trial Court. He further submits that the impugned order passed by the trial Court is illegal. The learned counsel for the petitioner relies upon the judgment in the case of **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited and another** reported in **2022 LiveLaw (SC) 729** and submits that all the amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other-side. He also relies upon the judgment of the Hon'ble Supreme Court in the case of **Dinesh Goyal Vs. Suman Agarwal (Bindal) and Ors** reported in **AIR 2024 SC 4779** , so also, he relies upon the judgment of this Court in case of **Ramdas Sitaram Zaware & others Vs. Namdao Kondiba Zaware & others** in **Writ Petition No.9793 of 2017**, decided on 8th August, 2025. As such, the learned counsel for the petitioner submits that

the impugned order be set aside and his application for amendment and for addition of parties be allowed.

8] *Per contra*, the learned counsel for the respondent nos.1A and 1B submits that the amendment is belated and the petitioner-plaintiff was fully aware of the Will Deed at the time of filing of the suit. The suit is filed by the petitioner – plaintiff in the year 2011 and after more than 10 years, the application for amendment of plaint, so also, for addition of party is filed in the year 2022.

9] The learned counsel for the respondents submits that the aforesaid amendment is belated and the same is hit by the Proviso to Order VI Rule 17 of the CPC. He further submits that before commencement of trial, the suit can be amended liberally. However, after commencement of trial, it is not permissible to amend the pleadings unless the party shows due diligence that the party could not apply for amendment before the commencement of trial in view of the proviso to Order VI Rule 17 of the CPC. He further submits that if the

amendment is allowed, prejudice would be caused to the respondents – defendants. As such, he submits that the impugned order be maintained and petition be dismissed. The learned counsel for the respondents relies upon the judgment in the case of **Basavaraj Vs. Indira and others** reported in **[2024] 3 SCC 705**. He further relies upon the judgments in the case of **Francis D'Souza and another Vs. Rozy D'Souza alias Rosa Isabela Zuzarte alias Isabela Rosa Zuzurate and others** reported in **2024 SCC OnLine Bom 4118**, so also, in the case of **Nandini Raju Vs. Raghuhari and others** reported in **2025 SCC OnLine Bom 1110** and also in the case of **Pandit Malhari Mahale Vs. Monika Pandit Mahale & others** reported in **[2020] 11 SCC 549**.

10] Having considered the rival submissions. The issue arises for consideration as to whether Amendment Application should be allowed or the same should be rejected as contended by the defendants in view of Proviso to Order VI Rule 17 of CPC. Order VI Rule 17 of the CPC is quoted below :

17. Amendment of pleadings. - *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :*

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

11] The law on the subject of amendment to the pleadings is crystallized in the case of **Life Insurance Corporation of India Vs. Sanjeev Builders Private Limited & anr.** reported in **2022 LiveLaw (SC) 729** at para no.70, as under :

70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word

"shall", in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is malafide, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pinpointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi & Ors., 2022 SCC OnLine Del 1897)

Basavaraj Vs. Indira and others reported in [2024] 3 SCC 705 has observed that proviso to Order 6 Rule 17 CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The Court in the case of *Basavaraj [supra]* has also observed that one of the important factors to be seen at the time of consideration of any application for amendment of pleadings is that right accrued to the opposite party cannot be taken away on account of delay in filing the application. The Court thereafter applied the law to the facts of the case before it and refused to grant amendment as it was observed that the reason given for belated amendment was oversight and the same cannot be accepted as a ground to allow any amendment in the pleadings at the fag end of the trial especially when admittedly the facts were in knowledge of the plaintiffs.

13] This Court in the case of **Francis D'Souza and**

another Vs. Rozy D'Souza alias Rosa Isabela Zuzarte alias Isabela Rosa Zuzurate and others reported in 2024 SCC OnLine Bom 4118 at para no.19 has observed that prior to amendment of the proviso to Order VI Rule 17 of CPC, it was a trend of allowing the amendment liberally. However, after introduction of the proviso, parties must disclose due diligence. Apart from such due diligence, it is the duty of the Court to find out whether such amendment is in fact necessary for deciding the issue in the suit. The other parameters are also required to be established. In the case of Nandini Raju Vs. Raghuhari and others reported in 2025 SCC OnLine Bom 1110 this Court has observed that in the present case, respondent nos.1 and 2 by way of amendment, seeks permission to add prayer clause in the suit, to the effect that "sale deed dated 06.01.2004, 11.03.2005 and 15.06.2006 or any other transactions took place *inter se* in between defendants on the basis of so called power of attorney dated 10.05.2009 are null and void and same are not binding upon plaintiffs". The perusal of averment / pleading of the suit made it clear that,

respondent nos. 1 and 2 knowing that sale deeds are executed before filing of the suit, restricted their prayer for possession, perpetual injunction and damages only. However, the respondent nos. 1 and 2 for a period of 14 years, kept silent in the suit. But now, want to seek declaration by adding prayer in the suit by way of amendment application. The Court observed that it is now well settled proposition of law, that where plaintiff in a suit seeks permission to amend a fresh claim in respect of cause of action which since the date of institution of the suit had become barred by limitation, cannot be permitted to brought on record and limitation prescribed to challenge the legality and validity of sale deed or for seeking declaration of same is 3 years.

14] In the case of **Life Insurance Corporation of India [supra]**, the Hon'ble Supreme Court has held that the prayer for amendment is to be allowed (i) if the amendment is required for proper adjudication of the controversy between the parties and (ii) to avoid multiplicity of

proceedings provided, (a) the amendment does not result in injustice to the other side, (b) amendment does not withdraw clear admission and (c) does not raise a time barred claim. As regards delay in amendment, the Supreme Court observed that delay alone is not a ground to disallow the prayer of amendment and the issue of limitation can be framed separately.

15] In the case of **Basavaraj** [supra] the Supreme Court has held that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

16] In the case of **Dinesh Goyal** [supra], the Hon'ble Supreme Court has held that Court has to be liberal in allowing amendment and delay alone will not defeat the application for amendment, if the amendment is required to avoid multiplicity of proceedings and decide the controversy between the parties.

17] From the reading of the judgments of **Life Insurance** [supra], **Basavaraj** [supra] and **Dinesh Goyal** [supra], the law on the subject of amendment to pleading under Order VI Rule 17 is that the pleadings have to allowed to be amended liberally till the stage of commencement of trial. After commencement of trial, the party praying for amendment has to show due diligence i.e. the amendment could not have been prayed earlier as the facts were not within the knowledge of the party. However, in all cases where the party seeking amendment is not able to show due diligence, the Court may in its discretion allow the amendment application, if the Court is of the view that the amendment would avoid multiplicity of proceedings between the parties and that the amendment would help pin-pointedly to decide the dispute between the parties. The Proviso to Order VI Rule 17 would not restrict the Courts powers entirely. This interpretation of the proviso to Order VI Rule 17 is necessary as it a part of procedural laws and would be necessary to give just decision. In all cases of

delay, without due diligence the Court may not dismiss the application for amendment. The object of Order VI Rule 17 is aimed at preventing multiplicity of litigation or multiple avenues of litigation, subsumed under the umbrella of one dispute. The Court may not allow the amendment if it finds that the delay may create unjust situation for the opposite party. The proviso to Order VI Rule 17 will restrict the right of the party seeking amendment to pleading after the trial has commenced unless it shows due diligence. However, the proviso would not restrict the power of the Court in granting the amendment if the amendment is necessary to avoid multiplicity of proceedings and to completely resolves the dispute between the parties and does not cause injustice to the other side. While granting amendment the Court may consider whether the predicted facts are already stated in the pleadings and the amendment is consequential or that the amended pleadings raised are necessary to decide real controversy in issue. The Court may also consider whether the plea for amendment is not bona fide and is made only to delay the proceedings. The Civil Court may not grant

amendment to pleadings after commencement of trial if the party is not diligent keeping the legislative intent in mind of delay caused in trial, where the amendments are allowed unless the Court finds that the amendment is necessary to avoid multiplicity of proceedings and would not cause prejudice to the opposite party.

18] In the instant case admittedly the amendment is applied after the commencement of trial i.e. after the defendant has entered in witness box. Also the plaintiff was aware of the existence of the Will Deed at the time of the filing of the suit. The plaintiff was also aware of the surviving son of his sister, yet he had not made him a party to the suit. The plaintiff has not taken care to apply for amendment of plaint before the commencement of trial, however, the predicted facts of non-binding nature of Will are mentioned in the plaint. The reason mentioned for not applying for amendment before commencement of trial is inadvertence.

19] The plaintiff has averred in the plaint that the

Will Deed is not the true will of his mother and that it is not binding upon him. It is required to be noted that unlike a sale deed where the transfer of property is immediate the Will comes into effect on the demise of testator. However, there is no immediate or automatic transfer of the property to the beneficiary mentioned in the Will on the demise of the testator. The Will has to be given effect to as provided in the Indian Succession Act. Section 213 of the Indian Succession Act provides that if Wills are made within the local limits of the ordinary original Civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situated within those limits, no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction has granted probate of the Will under which the right is claimed. In the present case, the suit property is situated outside the local original civil jurisdiction of the High Court of Bombay and there is no compulsion to probate the Will in order to give effect to the Will. However, the propounder of

the Will in order to give effect to the Will would have to make an application to the concerned authority for transfer of property under the Will and only if legal heirs of the testator does not object to the Will then the beneficiary of the Will can get property transferred in his name. However, if there is objection to the Will, the propounder of the Will would have to establish the Will before the competent civil court so as to give effect to the wishes of the testator. There is no automatic transfer of property on the demise of the testator of the property mentioned in the Will. In the instant case, the defendants are claiming the property through the Will Deed of the deceased. Some of the natural heirs are excluded under the Will. The defendants will have to be prove the Will Deed in the Civil Court to get benefit of the Will. In the case of **Jitendra Singh Vs. State of M.P.** reported in **2021 SCCOnline SC 802**, the Hon'ble Supreme Court has observed that in cases where the will is disputed the party claiming the title under the will must go before appropriate Civil Court to establish their right. In absence of the issue framed as regards the validity of the Will, the partition suit

would proceed without a declaration being made as regards to the validity of the Will Deed. The Hon'ble Supreme Court in the case of **Dinesh Goyal** [supra] had in a similar situation allowed amendment to plaint by observing that the overarching Rule is that a liberal approach is to be adopted in consideration of such applications and that in the larger scheme, this dispute pertains to succession. If there is a Will, it has to be honoured. If one of the parties, who will be affected by the Will coming into effect, challenges it on one ground or the other, the process of succession cannot go forward without determination of the dispute regarding the Will. Any and all delays in judicial processes should be avoided and minimised to the largest extent possible, and should generally be, and are rightly frowned upon. However, not in all cases can delay determine the fate of a suit. It is observed that if the time gap between submitting the written statement to the suit and the presentation of the application seeking leave to amend is unexplained and this argument of the defendant is accepted, the question of Will shall remain undecided or at

best will be decided with great delay. The trial which has admittedly already commenced, would be stalled by way of a challenge to the framing of issues which, in turn, would not be in consonance with the object of Order VI Rule 17 of Code of Civil Procedure which is aimed at preventing multiplicity or multiple avenues of litigation, subsumed under the umbrella of one dispute. Keeping in view the above, along with the fact that without determination of the question of will and its genuineness, the partition of the suit property would not be possible and thus the Hon'ble Supreme Court proceeded to allow the amendment to the plaint although the same was applied after the commencement of trial and without positive finding on the due diligence.

20] The trial Court has also erred in observing that the son of the deceased sister is not required to be added as party to the suit for partition as he has no right in the suit property. The plaintiff has filed a suit for partition and has claimed that all the parties are necessary in the suit for

partition of the joint family property. All the heirs are necessary parties in the suit for partition of the joint family property. The trial Court has erred in observing that the deceased daughter would have no share in the joint family property and has accordingly not allowed the prayer to add the son of the deceased sister of the plaintiff in the partition suit. The present Writ Petition is accordingly allowed. The application for amendment is allowed and the plaintiff is granted four weeks time to amend the plaint on cost of Rs.5,000/- to the defendant.

[ARUN R. PEDNEKER]
JUDGE

DDC