

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6260 OF 2015

Waman Mahadu Walake,
deceased through legal heir -
Dnyandev Waman Walake

Petitioner

Vs

Shri Popat Sitaram Tapkir, since
deceased, through legal heirs-
1a) Janabai Sitaram Tapkir and
Ors

.. Respondents

Mr. Milind M. Sathaye, Advocate for the petitioner.

CORAM : R.G.KETKAR,J.
DATE : 30/07/2015

PC:

1. Not on Board. At the request of Mr. Sathaye, taken up for admission. Heard Mr. Milind Sathaye, learned counsel for the petitioner.
2. By this Petition under Article 227 of the Constitution of India, original plaintiff-appellant has challenged the Judgment and order dated 2.3.2015 passed by the learned District Judge -16, Pune below Exhibit 47 in Civil Appeal No.780 of 2005. By that order, the learned District Judge dismissed the application taken out by the petitioner under Order 41 Rule 27 and Order 41 Rule 23 of C.P.C.
3. In support of this Petition, Mr Sathaye submitted that demarcation/measurement of land adjacent to the Shiv of village

Perne and Vadhu Budruk was carried out in the year 2008. The said development took place during the pendency of appeal and, therefore, it is necessary to bring this material on record by way of additional evidence. He has further submitted that the plaintiff who is the main contesting respondent did not file reply and only co-plaintiff who did not file appeal, opposed the application by filing reply. In any case, no prejudice would be caused to the respondents in case the application is allowed. He has further taken me through the application filed by the petitioner on 7.6.2015. In that application, it is nowhere contended that the petitioner acquired knowledge about carrying out demarcation in the year 2011. However, during the course of arguments, the petitioner's Advocate submitted that the petitioner came to know about carrying out demarcation/measurement in the year 2011. The said submission is not supported by any material on record. He, therefore submitted that the impugned order deserves to be set aside.

4. I have considered the submissions made by Mr Sathaye. I have also perused the material on record. In paragraph 8 of the impugned order, the learned District Judge noted that during the course of arguments the petitioner's Advocate submitted that though the measurement was done in the year 2008, the petitioner came to know in the year 2011. In paragraph 10, the learned district Judge observed that contents of the application

go to show that the demarcation of lands adjacent to Shive of village Perne and Vadhu Budruk was carried out in the year 2008 and the application is moved on 15.12. 2014, i.e almost after six years. That apart, the petitioner came to know about fact of demarcation in the year 2011. Even accepting that submission, no explanation is given as to why the application was not moved in the year 2011 after getting knowledge. The learned District Judge, therefore, concluded that the application is not bonafide and genuine one, more so when the appeal was fixed for arguments and the petitioner sought adjournments from time to time by moving application and by the present application on 15.12.2014. In paragraph 12, the learned District Judge noted that the petitioner is not interested in proceeding with appeal. Mr. Sathaye submitted that the submission made on behalf of the petitioner about acquiring knowledge in 2011 is not supported by any material on record. Even if this submission is accepted for a moment, in that case there is no explanation for filing application after 6 years.

5. In view thereof, I do not find that the learned District Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed.

6. Notwithstanding dismissal of the appeal, where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be

set forth as a ground of objection in the memorandum of proceedings as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)