

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO.27887 OF 2015**

Shri Popat Chiman Bahiram and
Anr.

..Petitioners

Vs

Shri Jaggnath Namdeo Gaikwad
and Anr.

.. Respondents

Mr. R,N,Haridas Advocate and Mr. Nikhil M. Pujari, Advocate for
Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 19/11/2015

PC:

1. Heard Mr. R.M.Haridas and Mr. Nikhil Pujari, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the order dated 4.9.2015 passed by the learned Civil Judge, Junior Division, Dindori below Exh.102 in Regular Civil Suit No.4 of 2003. By that order, the learned trial Judge rejected the application made by the plaintiffs under Order VI, rule 17 of C.P.C. for amending the Plaint. By the application at Exhibit 102, the plaintiffs desired to incorporate paragraph 5-A in the Plaint to the effect that in pursuance of the order dated 9.3.2009 passed by the learned District Judge-2, Nashik in Civil Appeal No.10 of 2006, Deputy Superintendent of

Land Records, Dindori submitted report dated 22.1.2014 at Exhibit 88 and the said report establishes the case of the plaintiffs that the defendants have encroached upon the plaintiffs' property.

3. In support of this petition, Mr. Haridas submitted that by order dated 23.12.2005, the learned trial Judge decreed the plaintiffs' suit and directed the defendants to deliver vacant possession of the suit land to the extent of 9 Gunthas to the plaintiffs, as shown in the measurement plan below Exhibit-41. Aggrieved by that decision, the defendants preferred civil Appeal. By order dated 9.3.2009, the learned District Judge set aside the trial Court's decree and remitted the matter to the trial Court for fresh trial. The trial Court was directed to take necessary steps as required under section 36-B of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and after receipt of findings and after hearing both sides, decide the suit in accordance with law at the earliest.

4. In pursuance thereof, the Deputy Superintendent of Land Records inspected site and submitted report dated 22.1.2014 at Exhibit 88. Since this development took place pending the suit, the plaintiffs took out application for incorporating paragraph 5-A. This was with a view to ensuring that the defendants do not take the plea that there are no pleadings as regards the report dated

22.1.2014. The learned trial Judge, however, rejected the application on the ground that the plaintiffs have to prove the commissioner's report and, therefore, it is not necessary to amend the plaint. He submitted that the plaintiffs will not be in a position to prove the contents of the report unless there is necessary pleading in the plaint.

5. I have considered the submissions advanced by Mr. Haridas and Mr. Pujari. I have also perused the material on record. As per the order of the learned District Judge, Deputy Superintendent of Land Records carried out measurements and submitted report dated 22.1.2014 which is produced on record at Exhibit 88. It is, therefore, necessary for the plaintiffs to prove that report by adducing evidence. Mr. Haridas submitted that in the absence of pleadings, the plaintiffs will not be in a position to prove that report. I do not find any merit in this submission as the report is submitted on the basis of the order passed by the learned District Judge. In my opinion, it is necessary for the plaintiffs to prove the report and it is not necessary to amend the plaint. While rejecting the application, the learned trial Judge recorded the submissions advanced by the advocate for the defendants that at the time of evidence, the report will have to be either proved or disproved and relying on the finding of the commission, there is no need to amend the plaint. Subject to above, no case is made

out for invocation of powers under section 227 of the Constitution of India. The Petition fails and the same is dismissed.

6. It is, however, expressly made clear that where a decree is appealed from by the petitioners, 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 Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)