

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 349 OF 2016

1. Sarjerao s/o Manikrao Chitale,
Age: 32 years, Occ: Agril.
2. Rupchand s/o Vinayak Chitale,
Age: 35 years, Occ: Agril.
3. Mandabai s/o Vishnu Chitale,
Age: 40 years, Occ: Agril.
All R/o Dangewadi, Tq. Pathardi,
Dist. Ahmednagar. ... Petitioners

Vs.

1. Bhausahab s/o Kisan Takale,
Age: 60 years, Occ: Agril.
2. Sow. Sainabai Vikram Barde,
Age: 50 years, Occ: Household
3. Smt. Rambhabai Kisan Takale,
Age: 70 years, Occ: Agril.
All R/o Dangewadi, Tq. Pathardi,
Dist. Ahmednagar
4. Ashok s/o Vitthal Diwate,
Age: 40 years, Occ: Agril.
R/o Mali Babhulgaon, Tq. Pathardi,
Dist. Ahmednagar. ... Respondents

 Mr. M.A. Kulkarni, Advocate for the petitioners.
 Mr. D.R. Markad, Advocate for the respondents.

CORAM : T.V. NALAWADE, J.
DATE : 16-09-2016.

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard both the sides by consent for disposal.

2. This petition is filed to challenge the order made on Exhibit-31 filed in R.C.S. No. 509 of 2012 which is pending before Civil Judge Junior Division, Pathardi. The application was filed for addition of more pleadings as follows.

"In the written statement filed by defendant, defendant has shown house property situated inside of his portion and the plaintiff wants to contend that the said house property does not belong to defendant but it belongs to one Akolkar".

"Defendant has shown one bore well inside of his portion and it is the case of the plaintiff that this bore well was taken by plaintiff after purchasing the property in the year 2009".

3. The trial court has rejected the application filed for amendment by holding that due diligence was not shown and further there is no record with the plaintiff to show that the house and the bore well were there in the suit property and if they were there prior to the date of the suit the plaintiff ought to have mentioned these things in the suit itself.

4. During arguments the learned counsel for the petitioners considered that, there was no need of making amendment in respect of the house property, if the plaintiff admits that the property does not belong to plaintiff and it belongs to one Akolkar. In view of this submissions and nature of pleadings the amendment to that extent could not have been allowed and the trial court has not committed error in that regard. However, there is a dispute in respect of the bore well and dispute is taken up to revenue authorities. Copy of mutation made by the revenue authority dated 08/08/2013 is produced on record and it shows that due to the dispute the revenue authority has shown the names of both plaintiff and defendant in respect of the bore well.

5. It is the contention of both the sides that the bore well was taken in the year 2012. Admittedly, the sale deed was executed in favour of defendant first in time in the year 1985 and if the property is to be measured the priority will have to be given to sale deed executed in favour of the defendant. The plaintiff wants to get fixed the boundaries of his property on the basis of sale deed executed in favour of plaintiff in the year 2009. Thus, the dispute can be settled once for all and it cannot be said that the nature of the suit is changing due to the amendment which plaintiff is seeking in respect of the bore well. The burden will be on the plaintiff to prove the case of plaintiff that the bore well was taken by plaintiff and so no prejudice will be caused to the defendant if such amendment is allowed. Learned counsel for the respondents places reliance in the case of **J. Samuel and Ors Vs. Gattu Mahesh and Ors.** reported in **2012(4) Mh.L.J.** and in the case of **Prakash Ratanlal @ Ratansa Kasari Vs. Bhika s/o Banda Dhage and Anr.** reported in **2010 (1) Mh.L.J.**, and he submitted that due diligence is not shown.

6. The facts and circumstances of each and every case are always different. In view of the nature of the dispute which is quoted above and the record which is available for deciding the dispute. This court holds that amendment with regard to the contention of bore well needs to be allowed. In the result, the petition is allowed. The order made by Learned Judge of the trial in respect of the bore well is hereby set aside and application only to that extent is allowed. Rule is made absolute in those terms

(T.V. NALAWADE)
JUDGE