

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

WRIT PETITION NO. 3406 OF 2017

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| <p>1) Maheboobkhan s/o Gulamkhan,
Age : 54 yeas, occup. Labour,</p> <p>2) Raufkha s/o Gulamkhan,
Age : 52 years, occup : Labour,</p> <p>3) Aalamkhan s/o Gulamkhan,
Age : 50 years, occup. Labour,</p> <p>All r/o Warkheda, Tq. Sengaon,
District : Hingoli</p> | <p>.. Petitioners/
Original
Plaintiffs</p> |
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versus

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| <p>1) Tahsildar, Sengaon,
Tq. Sengaon, Dist. Hingoli</p> <p>2) Talathi Khakar (Budruk)
Tq. Sengaon, Dist. Hingoli</p> <p>3) Manshadas s/o Tataladas,
Age : Major, occup. Agril,
R/o Kasar Galli, Parbhani,
Tq. and Dist. Parbhani</p> <p>(Respondents no. 2 and 3
are deleted as per court's
order dated 20-07-2018)</p> <p>4) Ananda s/o Gangaram Gandhile,
Age : Major, occup. Agri.,
R/o Waghjalee, Tq. Sengaon,
District : Hingoli</p> <p>5) Pralhad s/o Gangaram Gandhile,
Age : Major, occu. Agril.
R/o Waghjalee, Tq. Sengaon,
District : Hingoli</p> | <p>.. Respondents/
Original
Defendants</p> |
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Mr Arun G. Dalal, Advocate for petitioners
Mr S. P. Tiwari, Assistant Govt. Pleader for respondent no.1
Mr S. S. Londhe, Advocate for respondents no. 4 and 5

CORAM : SUNIL P. DESHMUKH, J.

DATE : 28th August, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for appearing parties by consent finally.

2. Aggrieved by rejection of application Exhibit - 35 in regular civil suit bearing no. 1 of 2014 for amendments, by joint civil judge, senior division, Hingoli under order dated 17-12-2016, petitioners - original plaintiffs are before this court, questioning validity of said order.

3. Learned counsel for petitioners contends that suit has been filed for declaration of ownership and recovery of possession of land bearing gut no. 220 admeasuring 3 *Hectare*, 1 *Are*. He submits, while preparing pleadings, under inadvertence, reference to specific boundaries of suit property had remained to be made and as such upon realizing that, by way of abundant precaution an application for amendment Exhibit - 35 had been moved with a view to have incorporation of boundaries of suit property, in order to obviate further lengthening of litigation on that count. He submits, while application had been filed, from the record, it appears that the proceedings had not travelled

beyond framing of issues. In such a case, the considerations which have weighed with learned judge are not compatible with the object underlying the provisions of Order VI, rule 17 of the Code. The court had unnecessarily got overwhelmed with proviso under said rule. He submits that it is not a case where it can be said that trial had commenced. The court had also failed to appreciate that the amendment had been intended at obviating a dispute over boundaries. Having regard to the nature of suit, he submits, no prejudice would be caused to other side, if amendment is allowed.

4. On the other hand, learned counsel Mr Londhe appearing for contesting respondents i.e. respondents no. 4 and 5 submits that the petitioners have been approaching litigation rather too casually as can be gathered from their application which has been filed without affidavit and are contending that under inadvertence, incorporation of boundaries of suit property had remained to be made. He further purports to submit that casual approach of petitioners is clear since in the application they claim that there have been no issues framed while the record speaks otherwise. He submits, it is too much to consider that it is a case of inadvertence, on two occasions, one at the time of lodging plaint and again while filing application for amendment without affidavit. He submits that trial court has taken stock of

the situation and has taken into account the events as those have occurred. He submits that trial court has rightly placed reliance on decision in the case of *Mohammad Salim vs. Nasir Ahemed*, reported in *AIR 2007 Delhi 48* wherein it has been observed that an amendment would not be possible to be allowed after commencement of trial and framing of issues and the dates fixed for filing of affidavits of evidence. He further purports to advert to that there had been at least two adjournments after matter had been fixed for evidence. He, therefore, urges not to indulge into the request being made under writ petition.

5. Perusal of order impugned shows, the court has considered that there is no particular reason as to why boundaries were not mentioned earlier while drafting plaint and that the plaintiffs have not been able to file a document like a sale-deed which would have been relevant to corroborate the boundaries sought to be added. Court has also considered that there is no affidavit supporting the application and that plaintiffs had not been able to show that there had been due diligence on their part in prosecuting the suit. The court has also adverted to that despite framing of issues, the plaintiffs went on to refer to that there have been no issues framed and further that there had been two adjournments for evidence by plaintiffs.

6. Having regard to the facts as aforesaid, one may have to consider that the plaintiffs have been before the court seeking declaration and recovery of possession of land gut no. 220 ad-measuring 3 *Hectare*, 1 *Are* situated at village Warkheda in taluka Sengaon, district Hingoli. It is not the case of the other side that the petitioners are not claiming gut no. 220 or for that matter there has been no gut formation in the village. In the circumstances, it appears that the petitioner has referred to specific land bearing gut no.220 ad-measuring 3 *Hectare*, 1 *Are* and are purporting to claim that the suit land is situated in the boundaries being referred to which may have its genesis in the gut formation. The suit is at the stage of giving evidence. There have been decisions that stickler's approach be avoided while considering applications for amendments and it cannot be said that in present case while the matter has been adjourned for evidence the trial may not be said to have been commenced in true sense. As such, while the courts have been considering that the amendments can be resorted to at any stage and the courts have to be liberal in respect of the same and while the reason is being put forth of inadvertence at the time of drafting pleadings which cannot be wholly attributed to petitioners, this aspect deserves some due. However, inconvenience caused in the process to the defendants may have to be taken care of.

7. In the circumstances, writ petition is allowed. Impugned order dated 17-12-2016 rejecting application Exhibit – 35 is set aside. Said application is allowed subject to costs of Rs.2,500/- payable to defendants no. 4 and 5. It is also expected that procedural compliances with respect to deficiency in the application particularly about affidavit in support of the same may be allowed to be rectified. Costs are to be deposited in trial court for onward disbursement to defendants no. 4 and 5. within a period of four weeks from the date of receipt of writ of this order by the trial court as well as procedural deficiency is expected to be removed within said period.

8. Rule made absolute in aforesaid terms.

9. Writ petition is disposed of.

SUNIL P. DESHMUKH
JUDGE

pnd/-