

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

WRIT PETITION NO. 7010 OF 2017

**DEVARAM VITHOBA GADHE AND OTHERS
VERSUS
SADASHIB APPAJI GADHE AND OTHERS**

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Advocate for the Petitioners : Shri Balaji Shinde h/f.
Shri V. P. Latange

Advocate for Respondent Nos. 1 to 3 : Shri R. R. Karpe

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 8th AUGUST, 2018.**

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PER COURT :

1. The petitioners/plaintiffs are aggrieved by the order dated 02/03/2017, by which, application Exhibit 122 seeking amendment in the plaint to introduce two small paragraphs with regard to the law of easement of necessity and a prayer based on subsequent events, has been rejected. While rejecting the said application, the Trial Court has concluded that though the amendment application is to be liberally considered, the plaintiffs have failed to explain lack of due diligence and the trial in the suit has already commenced.

2. I have considered the submissions of the learned

Advocates for the respective sides.

3. Shri Karpe learned Advocate appearing on behalf of the defendants has strenuously opposed this petition and prays for its dismissal by imposing heavy costs. It is contended that these defendants have acquired the exclusive right on the suit way on account of a registered sale-deed and have, therefore, become the exclusive owner of that portion on which the plaintiffs are seeking to exercise a right of easement by necessity. He, therefore submits that there cannot be any prayer against the exclusive rights of the defendants, who have also filed the counter claim. He further adds that a reply to the counter claim has been filed by the plaintiffs and the same stand has been taken that the said way is to be used by the plaintiffs and the defendants. He further submits that after the plaintiffs closed their oral evidence by a pursis dated 26/09/2016, Exhibit 122 has been filed on 08/12/2016.

4. I find from the record that the plaintiffs have sought perpetual injunction against the defendants from obstructing the plaintiffs while using the 10 ft. suit road. Specific

pleadings have been set out in the plaint indicating that the plaintiffs and their predecessor in title have been using the same way for more than 50 years. This way is, therefore, a right of the plaintiffs to approach their agricultural lands. I, therefore, find that having set out these pleadings in the plaint as well as in the written statement to the counter claim, the plaintiffs propose to add 10A-1 and 10A-2 to contend that they have a right of easement. When the necessary pleadings are available in the plaint, I do not find that the proposed paragraph Nos. 10A-1 and 10A-2 would be necessary. The rejection of application Exhibit 122 to this extent cannot be faulted.

5. The prayer sought to be put forth is in the nature of seeking a direction to the defendants to restore the way that has been purportedly destroyed during the pendency of the suit. As the plaintiffs are seeking injuncion so as to use the said way, any destruction of the same on account of subsequent events, can be a subject matter of an amendment and the prayer to that extent could be allowed. It, however, cannot be ignored that as the plaintiffs have closed their oral evidence.

They may have to lead further evidence which would cause hardships to the defendants. These hardships will have to be softened by imposing costs on these petitioners.

6. The learned Advocates for the respective sides jointly submit that the suit can be expedited, keeping in view the advanced age of the litigating sides, one being in his eighties .

7. Considering the above, this petition is partly allowed. The impugned order dated 02/03/2017 is sustained to the extent of refusing the amendment in terms of the proposed paragraph Nos. 10A-1 and 10A-2 as the said pleadings are available in the plaint. The impugned order is modified to the extent of granting leave to add prayer clause B-1 in the plaint. The amendment shall be carried out within 3 weeks from today.

8. The plaintiffs shall deposit a total amount of Rs. 10,000/- before the Trial Court on or before 31/08/2018 as costs and the defendants would be at liberty to withdraw the said amount in equal proportionate without conditions.

9. If the defendants desire to submit an additional written statement, they would be at liberty to do so. If the litigating sides desire to lead evidence, they make a request application before the Trial Court and the Trial Court would permit them to lead oral evidence in view of the amended portion only.

10. Needless to state since the defendants have not yet adduced their evidence, they would be at liberty to do so in view of their written statement and counter claim.

11. Considering the joint request of the learned Advocates, the Trial Court would endeavour to decide RCS No. 335/2013 as expeditiously as possible and in any case, on or before 30/04/2019.

(RAVINDRA V. GHUGE, J.)

shp/-