

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 9563 OF 2016

Nabu Genu Jadhav & Anr. ... Petitioners
Vs.
Kashinath Shankar Jadhav & Ors. ... Respondents

Mr. Rameshwar N. Gite, Advocate for the petitioners.
Mr. N.M. Pujari i/b. Mr. P.N. Joshi, Advocate for respondent nos. 1, 2
and 4.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **7th June, 2018.**

P.C.:

This Writ Petition filed under Article 227 of the Constitution of India, is directed against the order dated 14th June, 2016 passed by the Joint Civil Judge Junior Division, Chandwad, District Nashik thereby Application for amendment in plaint under Order 6 Rule 17 of the Code of Civil Procedure is rejected.

2. By way of amendment, the petitioners/plaintiffs want to change the description of the property based on the measurement report of TILR dated 5th June, 2014, which is marked as Exhibit 34 by the trial Court.

3. The learned counsel for the petitioners submitted that the trial

Court has illegally rejected the application because the petitioners/plaintiffs have filed the suit for Court Commissioner and perpetual injunction. He submitted that in the prayer clause (b) of the plaint, the petitioners have specifically prayed that they be allowed to amend the description of the suit property as per the report of the Court Commissioner. He has further submitted that as per the case of the plaintiffs, there is encroachment in the suit property by the defendants. The prayers made in the plaint and amendment sought is consistent.

4. The learned counsel for respondents/defendants while opposing this Writ Petition has submitted that if this amendment is allowed, it will change the nature of the plaint and moreover it will come in the way of defence taken by the defendants. He has further submitted that he has relied on the order passed by this Court on 19th November, 2015 in the case of **Popat Chiman Bahiram & Anr. vs. Jaggnath Namdeo Gaikawad & Anr. in Writ Petition (St.) No. 27887 of 2015**. He submitted that in the identical case, this Court has taken a view that amendment is not to be allowed on the basis of report of T.I.L.R., who is appointed as Court Commissioner and it is necessary for the plaintiffs to prove the report and it is not necessary

to amend the plaint.

5. Heard the submissions. Perused the plaint and the order passed by the learned trial Judge. In the case of **Popat Chiman Bahiram** (*supra*), this Court has taken a view that proof of the report of the Court Commissioner may suffice the purpose and no amendment is required. However, in this case, the suit is totally based on the encroachment and in the plaint itself there is a specific prayer that the amendment be allowed as per the Court Commissioner's report. It is a settled principle of Rule of Evidence that if the document is disputed by the party, i.e., report of the Court Commissioner, then the Court Commissioner is to be called as a witness and through him the report is to be exhibited after giving opportunity to the contesting party to cross-examine the Court Commissioner. Without proper proof of such report, the document cannot be exhibited and read in evidence. I am informed by the learned counsel for the petitioners that the measurement report dated 5th June, 2014 prepared by the Court Commissioner is taken on record and exhibited as Exhibit 34 without calling T.I.L.R. as a witness. The trial Court will have to consider this aspect. Unless the T.I.L.R. is put in the box and the opportunity of cross-examination is

given to the other side, the document is not legally proved and contents cannot be read in evidence.

6. The amendment is in respect of area of the suit property. I am of the view that this amendment is to be allowed, the change of area of suit property will not change the nature of the suit. The respondents/defendants are allowed to file further written statement so that they can challenge this amendment and the area of the suit property. Even though the description of the suit property is changed or area of land is shown as larger, it is required to be proved by the petitioners/plaintiffs in the course of evidence.

7. With this, Writ Petition is allowed.

(MRIDULA BHATKAR, J.)