

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

WRIT PETITION NO.14864 OF 2019

SHAIKH IBRAHIM CHANDUBHAI AND OTHERS
VERSUS
SHAIKH SHAHID RASHID

...

Advocate for the Petitioners : Shri Dhorde Vikram R.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 10th December, 2019

Per Court:

1 The petitioners, who are the original defendants in Regular Civil Suit No.103/2012 (old No.195/2010), are aggrieved by the order dated 18.09.2019 passed by the Trial Court by which, the application exhibit 150 filed by the sole respondent/ original plaintiff seeking amendment to the plaint, has been allowed.

2 The learned advocate for the petitioners has strenuously criticized the impugned order on the basis of the grounds formulated in the memo of the petition and the record available. He submits that the plaintiff has actually filed the suit purely for perpetual injunction. Within less than one month of the lodging of the suit, the petitioners filed their written statement on 12.04.2010 along with their counter claim. They claimed ownership of the suit property and denied all contentions and averments of the plaintiff. Subsequently, the plaintiff had sought

amendment and the said amendment was granted by order dated 01.08.2015. By the said amendment, the plaintiff introduced the prayer for mandatory injunction.

3 It is further submitted that after the Trial Court framed issues on 22.01.2018, the plaintiff sought the appointment of a court commissioner. The said request was accepted and though the court commissioner could not have been appointed at a premature stage, the Trial Court had ordered such appointment. The court commissioner submitted his report and has mentioned in the report that the third party has encroached upon the suit land of the plaintiff. The grievance is that the entire nature of the suit would be altered by introducing the prayer for recovery of possession and by addition of the party by name Raju Mohammad. Such addition of a party and introducing a new prayer cannot be permitted and the impugned order deserves to be quashed and set aside.

4 I find from the record that initially the plaintiff had sought perpetual injunction and this was followed by introduction of a prayer of mandatory injunction. The defendants had denied the contentions of the plaintiff and had declared through the counter claim that the defendants are the owners of the portion of the suit property. It was on account of the report of the court commissioner that the plaintiff noticed that the third party, sought to be added, is found to have encroached upon the portion

of the plaintiff's land and it is the case of the plaintiff that he is close accomplice of the defendants. The court commissioner's report makes it evident, notwithstanding the contention of the defendants, that the plaintiff is disputing the report of the court commissioner on some counts.

5 I find that the plaintiff was compelled to introduce the prayer for recovery of possession after it was noticed that there is encroachment upon the suit property. He cannot be rendered remedy-less. Rather than instituting a fresh suit for recovery of possession, the plaintiff can conveniently introduce the said prayer, which is based on the report of the court commissioner. So also, the defendants would be at liberty to seek leave to file an additional written statement to counter the amended portion of the plaint. So also, all the litigating sides would be at liberty to lead evidence on their respective averments.

6 At this juncture, the learned advocate for the petitioners, on instructions, seeks leave to withdraw this Writ Petition. As such, this Writ Petition is disposed off as withdrawn. All contentions of the litigating sides are kept open.