

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

909 WRIT PETITION NO.514 OF 2020

NETAJI SHIVAJI GADEKAR
VERSUS
TULSIRAM TUKARAM GADEKAR AND ANOTHER

...
Advocate for Petitioner : Mrs. Kulkarni M.A.

...

**CORAM : ROHIT B. DEO, J.
DATED : 31th JANUARY, 2020.**

PER COURT:-

. The petitioner is the plaintiff who has brought suit for declaration of ownership. The suit property is a agricultural land ad-measuring 1 H 11 R, which is described by the plaintiff as middle portion of Gat No.149.

2. It appears, that even before the commencement of trial, a Court Commissioner was appointed to measure the land. The plaintiff objected to the Commissioner's report and sought re-measurement, which request is rejected by the Trial Court on 14.07.2016. Be that as it may, the learned counsel for the petitioner-plaintiff is right in the submission that there is no finality to the report of the Commissioner and that the plaintiff shall bring on record inaccuracies and flaws in the Commissioner's report at an appropriate stage.

3. Presently, the plaintiff is aggrieved by the order

impugned, whereby the Trial Court permitted the defendants to amend the written statement and to lodge a counter claim. The counter claim is lodged on the premise that in the Commissioner's report, it has come to the notice that it is the plaintiff who has encroached the portion ad-measuring 34 R.

4. The learned counsel for the petitioner-plaintiff would submit that the counter claim ought to have been rejected and the observation of the Trial Court that the cause of action arose when the land was measured, is clearly erroneous. In essence, the submission is that the counter claim is bared by limitation.

5. The observation in the order impugned is prima facie in nature. It is obvious that the petitioner-plaintiff shall be entitled to urge every contention including the contention that the counter claim is bared by limitation and if such contention is raised, the same shall be decided by the Trial Court on its own merits. The learned counsel for the petitioner-plaintiff further states that, since the counter claim is entertained on the basis of the Commissioner's report, the petitioner-plaintiff may be permitted to amend the plaint and in addition to incorporating certain averments, the petitioner-plaintiff be further permitted to

add Smt. Jayshree Gadkar as party defendant, who also has encroached on land ad-measuring 47 R of the plaintiff, if the Commissioner's report is to be believed. It is quite clear, that if such an application for amendment is moved by the plaintiff, the same shall be considered on its own merits and in accordance with law and keeping in mind the need to avoid multiplicity of litigations.

6. Subject to the aforesaid observations/directions, the order impugned is not interfered with. The petition is disposed of.

(ROHIT B. DEO, J.)