

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 712 OF 2020

1. Ankush S/o. Eknath Raut,
 Age 64 years, Occu. Agril.,
 R/o. Harshi Khurd, Tq. Paithan,
 District Aurangabad

2. Harichandra S/o. Ankush Raut,
 Age 34 years, Occu. Agril.,
 R/o. As above

3. Somnath S/o. Ankush Raut,
 Age 32 years, Occu. Agril.,
 R/o. As above.

.. Petitioners
 (Original Plaintiffs)

Versus

1. Baburao S/o. Eknath Raut,
 Age 69 years, Occu. Agril.,
 R/o. Harshi Khurd, Taluka Paithan,
 District Aurangabad

2. Dinkar S/o. Baburao Raut,
 Age 39 years, Occu. and
 R/o. As above.

.. Respondents
 (Original Defendants)

...

Mr. Pramod F. Patni, Advocate for Petitioners

Ms. Jayashree T. Ghorpade (Nawale), Advocate for Respondents

No. 1 And 2

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 13-12-2021

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with
 consent of the learned Advocates for the parties.

2. This petition is directed against the order passed by learned 2nd Joint Civil Judge, Junior Division, Paithan, below Exhibit-48 in Regular Civil Suit No. 326 of 2014, thereby rejecting the application filed by original plaintiffs-petitioners under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (in short, "CPC").

3. In application Exhibit-48, the plaintiffs contended that in the plaint, the boundaries are given as per record, however, the defendants have encroached on the Western side Shiv (boundary) till the Western bandh / boundary of the plaintiffs. So also, defendant no. 1 has encroached on the Northern side Shiv till the bandh / boundary of the plaintiffs. For bringing correct boundaries before the Court, plaintiffs may be permitted to amend the boundaries as - "towards West : encroached Shiv and thereafter land Gat No. 90, 87 and 92" and "towards North : encroached Shiv and land of defendant no.1".

4. The trial Court rejected the application by holding that the plaintiffs have specifically contended that towards Western side and Northern side of the suit land, there was a *Shiv* road. It is also contended that Shiv road is encroached by defendants and so the road is not in existence. Therefore, from the pleadings of the plaintiffs, it can be gathered that there is Shiv road. Whether there is encroachment on *shiv*-road or not, is a matter of evidence

and therefore, the trial Court held that there is no need of proposed amendment. It is further held that the amendment application is moved at belated stage and it is hit by the amended proviso to Order VI, Rule 17 of the CPC. The petitioners aggrieved by this order.

5. Heard the rival submissions of the learned Advocate for the petitioners and learned Advocate for respondents.

6. Perusal of record shows that in December-2014, the defendants have filed their written statement alongwith rough sketch of the suit property and adjoining suit property. In the said rough sketch, the Government Shiv rasta is shown abutting to the plaintiffs' Gat No. 21.

. In the evidence-affidavit filed by the plaintiffs, a specific averment is made that on the Western side and on the Northern side, there was Shiv (boundary) and the said Shiv is encroached by the defendants and they are cultivating the same. Therefore, presently there is no Shiv-rasta / boundary road available.

7. The amendment appears to be consistent with pleadings and evidence of the plaintiffs. No prejudice is likely to be caused to the defendants, if the said amendment is allowed. The trial Court ought to have allowed the amendment application keeping in the

mind the settled legal position that the amendment is to be liberally allowed if it does not cause any prejudice to the other side. The impugned order passed by the trial Court is therefore unsustainable.

8. It is a matter of record that the plaintiffs have belatedly moved the application seeking amendment to the plaint. Taking into consideration, lack of due diligence on the part of plaintiffs and since the amendment is proposed at the belated stage, the defendants are required to be compensated by awarding costs. Hence, the following order :-

ORDER

- I. Writ petition is allowed.
- II. The order below application Exhibit-48 in Regular Civil Suit No. 326 of 2014 dated 28.08.2019, passed by learned 2nd Joint Civil Judge, Junior Division, Paithan, is hereby quashed and set aside.
- III. Application Exhibit-48 is allowed.
- IV. The petitioners-original plaintiffs to carry out the amendment as set out in application Exhibit-48, within a period of two weeks from the date of receipt of writ of this order.
- V. The defendants-respondents will be entitled to file additional written statement, if any, within a period of

two weeks thereafter.

- VI. The suit to proceed further in accordance with law.
- VII. Rule is made absolute in the above terms with costs of Rs.5,000/- (Rs. Five Thousands) to be paid by the petitioners-plaintiffs to the respondents-defendants, in the trial Court.

(NITIN B. SURYAWANSHI)
JUDGE

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