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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11731 OF 2019

Sadashiv Genu Durane and Ors

..... Petitioners.
(Original Defendants)

V/s

Suraj Mahadev Nale and Ors.

..... Respondents.
(Original Plaintiffs)

Mrs. Gauri Shah i/b Surel S. Shah for the Petitioners.

Mr. Prabhakar Jadhav for the Respondents.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 25, 2021

P.C.:-

1] This Petition is by the original defendants to RCS No.56 of 2019 pending on the file of Civil Judge, Senior Division Malshiras. Respondents/Plaintiffs filed suit for simpliciter injunction based on title.

2] Exhibit-21 is an application moved by the Plaintiffs for

appointment of Court Commissioner which came to be allowed on 21/11/2006.

3] Petitioners/Defendants moved another application for appointment of Court Commissioner vide Exhibit-38 which came to be allowed on 2/8/2011. I am informed that there is third application for appointment of Court Commissioner which is moved by the Respondents/Plaintiffs which is pending adjudication.

4] Based on the aforesaid Report of the Court Commissioner, there appears to be encroachment on the land of the Plaintiffs. Application-Exhibit-31 came to be moved under Order 6 Rule 17 for carrying amendment to the Plaint which is allowed vide impugned order dated 03/09/2019. As such, this Petition.

5] The submissions of the learned Counsel for the Petitioners/Defendants are, the Court below has committed an error in passing the order impugned and since the Respondents/Plaintiffs was not in agreement with the first Court Commissioner's Report, same has to be termed as discarded. According to her, before filing the suit,

Respondents/Plaintiffs should have been diligent enough to find out encroachment, if any, and pleaded for recovery of possession. She would further urge that prayer for amendment is based on belated cause of action and therefore the order impugned allowing the same is required to be quashed and set aside. The further contention is, proceedings in the nature of Order 26 Rule 9 are relied by the Respondents/Plaintiffs so as to collect evidence which is found to be the basis for carrying out amendment to the suit.

6] While resisting the submissions, learned Counsel for Respondents/Plaintiffs would urge that, initially, suit was for simpliciter injunction based on title, as there was threat of encroachment. According to him, from the Report of the Court Commissioner, it is for the first time noticed in 2011 that there exists an encroachment and as such, application for amendment came to be moved which is rightly allowed. Apart from above, submissions are, since the suit has not travelled at advance stage, amendment is rightly granted.

7] Considered rival submissions.

8] Amendment is based on developments which are noticed during pendency of suit by way of Report of the Court Commissioner tendered pursuant to the provisions of Order 26. Of-course, such a Report will be subject to scrutiny as parties who are objecting to such Report are required to cross-examine the Court Commissioner and establish that the Report of the Court Commissioner is incorrect. However, that by itself will not preclude the Respondents/Plaintiffs from moving an application for amendment once the cause of action accrues to them based on such Report which is formed to be the basis for moving an application for amendment.

9] Apart from above, considering the fact that the suit is not at advance stage of the trial the grant of amendment is quite justified.

10] However, in the facts and circumstances of the case, amendment should have been allowed on certain condition.

11] As such, Writ Petition is dismissed. However, Respondents/Plaintiffs are directed to pay costs of Rs 5000/- to be

deposited in the Trial Court within a period of four weeks from today.

Petitioners/Defendants will be entitled to withdraw the said costs.

12] Petition stands disposed of in the above terms.

(NITIN W. SAMBRE, J.)