

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

WRIT PETITION NO.1120 OF 2022

1. Mahadu Maruti Jawale
Age: 57 years, Occu: Agri.
R/o : Jamkhed, Taluka Jamkhed,
District Ahmednagar
2. Sahadu Maruti Jawale
Age: 57 years, Occu: Agri.
R/o : As above.
3. Anil Maruti Jawle
Age: 50 years, Occ: Agri.
R/o : As above.
4. Rajendra Vithal Jawale
Age: 49 years, Occ: Agri.
R/o : As above.
5. Vijay Vithal Jawale
Age: 47 years, Occ: Agri.
R/o : As above.
6. Sanjay Vithal Jawale
Age: 43 years, Occ: Agri.
R/o : As above.
7. Dattatraya Tukaram Jawale
Age: 54 years, Occ: Agri.
R/o : Jamkhed, Taluka Jamkhed,
District Ahmednagar
8. Bhaskar Tukaram Jawale
Age: 56 years, Occ: Agri.
R/o : As above.

... Petitioners

Versus

Pralhad Bhanudas Jawale
Age: 57 years, Occu: Agri.
R/o : Jamkhed Taluka Jamkhed,
District Ahmednagar

... Respondent

...

Advocate for Petitioners : Mr. Satyajit S. Bora

Advocate for Respondent : Mr. V. H. Dighe

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CORAM : NITIN B. SURYAWANSHI, J.**DATE : 09th FEBRUARY, 2022****ORAL JUDGMENT :**

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.
2. This petition challenges the order dated 18-12-2021, passed below Exhibit-100 in Regular Civil Suit No.93/2014, by the learned Civil Judge, Junior Division, Jamkhed, thereby rejecting the application filed by the petitioner – plaintiff under Order VI Rule 17 of the Code of Civil Procedure, for amendment.
3. The plaintiffs have filed the suit for declaration that they are the owners of the suit property bearing Gut No.590, admeasuring 0.71R, situated at Jamkhed, Taluka Jamkhed, District Ahmednagar. The prayer is also made that permanent injunction be granted against the defendant that he should not disturb the peaceful possession of the suit property of the plaintiffs and should not encroach and construct in the suit property. Earlier an application for amendment at Exhibit-56 was filed by the plaintiffs which was rejected by the trial Court. This Court in

Writ Petition No.3497/2016, in which the trial Court's order was challenged, held thus:

"5. Considering the above, this petition is disposed off by permitting the litigating sides to make a joint application or the plaintiffs may do so for seeking appointment of the TILR as the Court Commissioner under Order XXVI Rule 9 of the CPC. The defendants would not oppose the said application in so far as appointment of the Court Commissioner is concerned. Such an application would be filed by either of the parties or jointly, within a period of four weeks from today.

6. The trial Court, while allowing the said application, would take the assistance of the litigating sides and issue appropriate directions to the TILR to carry out the joint measurements of the land Gut Nos.590 and 592. He shall be directed to fix the boundaries and submit a proper map indicating the proper directions.

7. After the above exercise is concluded and the map and report of the TILR is placed on record, the petitioners / plaintiffs would be at liberty to move an application for amendment based on the map and report of the TILR, under Order VI Rule 17 CPC, if felt necessary. Needless to state, the contentions or objections, if any, on the report of the TILR and amendment are left open. The impugned order dated 9.2.2016 would, therefore, not been an impediment."

4. Pursuant to the order passed by this Court, the TILR carried out joint measurement and submitted report Exhibit-82. The said report is accepted by the defendant but the plaintiffs objected the said report by filing application Exhibit-88. The plaintiffs, thereafter, filed application Exhibit-100 under Order VI Rule 17, raising the same contentions which are made in the earlier application Exhibit-56 and

sought amendment in the plaint. The amendment for mandatory injunction is prayed for removal of illegal construction made by the defendant in the suit property. The application was opposed by the defendant by filing written say at Exhibit-106. The trial Court rejected the application Exhibit-100, hence, the present petition.

5. I have heard the rival submissions of the learned advocate for petitioners and the learned advocate for respondent. Perused the record and affidavit-in-reply filed by the respondent.

6. The plaintiffs have filed the suit seeking declaration that they are the owners of the suit property and permanent injunction is sought against the defendant that he shall not disturb the peaceful possession of the plaintiffs and shall not encroach and raise construction in the suit property.

7. Earlier, in Writ Petition No.3497/2016, this Court has granted liberty to the plaintiffs to file an amendment application based on the map and report of TILR, if felt necessary. The contentions or objections on the report of TILR and the amendment are kept open by this Court. The report of TILR *prima facie* appears to be not clear and the same is objected by the plaintiffs vide Exhibit-88.

8. Application Exhibit-100 is filed by the plaintiffs under Order VI Rule 17, raising the same contentions which were made in the application Exhibit-56. However, the application is rejected by the trial Court holding that the application is not as per the directions of the High Court. The trial Court also observed that the issues are framed in the suit on 28-11-2014 and the plaintiffs have not filed affidavit of their evidence. Therefore, the application filed by the plaintiffs appears to be mala fide and if the amendment is allowed the nature of the suit will be changed. There was no subsequent event or cause of action which has arisen to the plaintiffs for filing application for amendment.

9. While rejecting the application filed by the plaintiffs, the trial Court has ignored the settled legal position that amendments are to be liberally allowed. Taking into consideration the pleadings in the plaint and the prayers made therein, it is not possible to accept the finding of the trial Court that nature of the suit will be changed if the amendment is allowed. In the prayer clause it is specifically prayed by the plaintiffs that permanent injunction be granted against the defendant that he shall not encroach by way of construction in the suit property. By way of amendment the plaintiffs propose to bring on record the fact that during the pendency of the suit the defendant has made construction in the suit property by way of encroachment and the same

needs to be removed. Since these are the subsequent developments occurred after filing of the suit, according to the plaintiffs, the same needs to be brought on record by way of amendment and the trial Court ought to have allowed the amendment. The ratio in *Writ Petition No.3204/2020 (N. C. Banerjee and Company Vs. Manoj Balkrishna Shah and Others)*, supports the case of the plaintiffs. Though the learned advocate for respondent vehemently opposed the petition on the ground that amendment is mala fide and the same changes the nature of the suit and is not necessary for decision of the suit, so also the application Exhibit-100 is not based on the map and report of the Commissioner, taking into consideration the facts of the present case, I am unable to accept the submissions of the respondents. The trial Court has lost sight of the settled legal position that merits of the amendment cannot be considered while deciding the amendment application.

10. It appears from record that the issues are framed in the year 2014 and till date plaintiffs have not filed their evidence affidavit. In view of the directions issued by this Court in earlier round of litigation to decide the suit expeditiously, following order is passed:-

ORDER

(I) Writ petition is allowed in terms of prayer clause 'B'.

- (II) Application Exhibit-100 in Regular Civil Suit No.93/2014 is allowed.
- (III) The plaintiffs shall carry out amendment within a period of two weeks from today and the defendant may file additional written statement within a period of two weeks thereafter.
- (IV) After filing of additional written statement, the plaintiffs shall file their evidence affidavit within a period of two weeks thereafter and the trial Court shall proceed with the trial.
- (V) Rule is made absolute in the above terms, subject to the plaintiffs paying cost of Rs.10,000/- (Rupees Ten Thousand Only) to the defendant before the trial Court.

(NITIN B. SURYAWANSHI, J.)