

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

958 WRIT PETITION NO.4460 OF 2022

FUKRAN AASHIK ANSARI
VERSUS
SHAIKH MUSHTAK ABDULA AND OTHERS

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Advocate for Petitioner : Ms Pratiksha Chhaburao Kale
Advocate for Respondent Nos. 1 and 2 : Mr Anand P. Bhandari

CORAM : SANDEEP V. MARNE, J.
DATE : 22nd NOVEMBER, 2022

PER COURT :

1. By this petition, petitioner assails order dated 13.01.2022 passed by the 13th Civil Judge, Senior Division, Ahmednagar on application below Exh. 121 in R.C.S. No. 133/2016, thereby rejecting plaintiff's application for amendment of the plaint.

2. Ms Kale, learned counsel appearing for petitioner would submit that the amendment was necessitated on account of subsequent events. She would submit that on application being made by the plaintiff, the suit property was measured by the Court Commissioner and the extent of encroachment made by defendant No. 4 came to light. She would submit that an amendment was necessitated on account of these events.

3. Per contra, Mr Bhandari, learned counsel appearing for respondent Nos. 1 and 2 would oppose the petition and support the order passed by the trial court.

4. Respondent Nos. 3 and 4 are served and no one appears for them.

5. I have heard the learned counsel for the parties and perused the record. It appears that the plaint was once amended by the addition of defendant No. 4. While adding defendant No. 4, prayer for removal of encroachment of defendant No. 4 came to be incorporated in the plaint. Later, on an application made by the plaintiff, the Court Commissioner was appointed to measure the suit property. In the report of the Court Commissioner, it was revealed that the entire portion of the property was in possession of defendant No. 4. Therefore, the plaintiff was required to move another amendment application to bring on record the factum of encroachment of defendant No. 4 and seek removal of encroachment.

6. Contrary to Court Commissioner's report that defendant No. 4 alone is in possession of the land, the trial court has recorded a finding that the Court Commissioner has observed possession of plaintiff as well as defendant over the disputed property. This appears to be prima facie erroneous.

7. Amendment was undoubtedly necessitated on account of occurrence of events during the pendency of the suit and especially in view of the findings recorded by the Court Commissioner. Therefore, even though the trial in the suit had commenced, it cannot be stated that plaintiff was not vigilant enough to move an application for amendment in time. In my view, the due diligence is exhibited by the plaintiff in moving the

amendment application by taking timely steps. The order passed by the trial court is not sustainable.

8. Accordingly, the writ petition is allowed. The order passed by the 13th Civil Judge, Senior Division, Ahmednagar is set aside. The application filed by petitioner at Exh. 121 in R.C.S. No. 133/2016 is allowed in terms of prayers made therein. The defendants in the suit will have an opportunity to file additional written statement. Needless to state that the trial court shall decide the suit without being influenced by the observations made by this Court in the present order.

[SANDEEP V. MARNE, J.]

mta