

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 379 OF 2020

1) Gajanan s/o Shalikram Badarkhe,
Aged about 54 years,
Occupation – Agriculturist,
R/o Nimkarda, Tahsil – Balapur,
District – Akola.

2) Kailash s/o Shalikram Badarkhe,
Aged about 44 years,
Occupation – Agriculturist,
R/o Nimkarda, Tahsil – Balapur,
District – Akola.

.... **PETITIONERS**

VERSUS

Mahadeo s/o Baliram Pakdane,
Aged about 64 years,
Occupation – Agriculturist,
R/o Nimkarda, Tahsil – Balapur,
District – Akola.

.... **RESPONDENT**

Mr. S.V. Sohoni, Counsel for the petitioners,
Mr. A.B. Patil, Counsel for the respondent.

CORAM : ROHIT B. DEO, J.

DATED : 12th JANUARY, 2022

ORAL JUDGMENT :

Heard. Rule. With consent, the petition is heard finally.

2. The petitioners are the original defendants in Regular Civil Suit

35/2010 which is instituted by the respondent-plaintiff seeking declaration and permanent injunction. The declaration sought is that the plaintiff is the owner of the suit property.

3. The suit property is described in paragraph 1 as open land used for storing agricultural implements admeasuring 2520 square feet.

4. While no details are mentioned, it is averred that an open land which is used for keeping agricultural implements and fuel sticks which is admeasuring 2520 square feet, which is bounded by -

To the East -	Land previously owned by Patharkar and now by Vitthalrao Tathod,
To the West -	Gaiwada owned by Vitthalrao Tathod,
To the North-	Land owned by deceased Shewantabai,
To the South-	Land owned by Patharkar and now owned by Vitthalrao Tathod.

The above property is situated at village Nimkarda, Tq. Balapur, District Akola.

5. The defendants preferred written statement dated 04-8-2010 denying every averment in the suit plaint. The defendants averred thus in paragraph 14 :

“14. It is submitted that the property Nazul sheet No. 3 plot No. 336 area 341.3 sq.mt. is owned and possessed by the defendants which came to the defendant by way of succession after the death of their father. It is submitted that during the life time of the father of the defendants was utilising the above property as a owner thereof without the obstruction of anybody and after the death of father of the defendants are utilising the same peacefully personally without obstruction of anybody as a owner thereof and this fact is well within a knowledge of the plaintiff, not only the plaintiff but also the father of the plaintiff and inspite of this fact the plaintiff has moved this bogus suit with intend to grab the property of the defendants it is submitted that towards the northern side of the defendants plot there is a government road which is passing from west to east and towards the northern side of the said government road there is plot bearing nazul sheet no. 3 and plot no. 330 area 205.6 sq. mt. which is stand no the name of father of plaintiff by name Baliram Ganpat Pakdane. It is submitted that there is no plot owned by the plaintiff adjacent to the plot of the defendants.”

6. It is common ground that after the trial commenced, the defendants preferred application for amendment dated 21-8-2019 seeking to incorporate pleadings that the property owned by the defendants was measured on 26-6-2010.

7. The trial Court was pleased to reject the amendment reasoning that the conditions of the proviso to Order VI Rule 17 of the Civil Procedure Code are not satisfied. The defendants have not established due diligence, and since the trial has commenced, the amendment cannot be allowed, is the view taken by the learned trial Judge. The learned trial Judge further held that the proposed amendment is not

relevant since it is not the case of the defendants in the written statement that the plaintiff has encroached over their property.

8. Apart from the fact, that I broadly agree that the observation that the defendants did not establish due diligence, and that having submitted the written statement within two months of the alleged measurement, it is inconceivable that the defendants could have forgotten to incorporate the factum of measurement due to inadvertence, I am satisfied that there is no prejudice which is likely to cause to the defendants. Considering the rival pleadings, the factum of measurement of plot can always be brought on record during the evidence. I see no reason to interfere in the writ jurisdiction. The petition is dismissed. The amount deposited by the defendants in the trial Court shall be refunded to the defendants.

JUDGE

adgokar