



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

WRIT PETITION NO.1268 OF 2020

Sheshrao Devidas Tonge

...PETITIONER
(Orig. Plaintiff)

-VERSUS-

Balu Irba Tonge and others.

...RESPONDENTS
(Orig. Defendants)

**WITH
WRIT PETITION NO.12456 OF 2021**

Balu Irba Tonge and others.

...PETITIONER
(Orig. Defendants)

-VERSUS-

Sheshrao Devidas Tonge.

...RESPONDENT
(Orig. Plaintiff)

...
Shri S.G. Joshi, Advocate for the Plaintiff.
Shri A.M. Gaikwad, Advocate for the Defendants.

...

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : 23rd April, 2025

PER COURT :

1. Since the impugned orders passed by the Trial Court arise from the same suit and the parties are the same, therefore,

these two Writ Petitions are decided by this common order and the parties are referred to by their nomenclature in the suit.

2. Heard advocate Shri S.G. Joshi, learned counsel for the plaintiff and advocate Shri A.M. Gaikwad, learned counsel for the defendants.

3. In Writ Petition No.1268/2020, the plaintiff has challenged the order dated 10.10.2019 passed by the learned Civil Judge, Junior Division, Loha, District Nanded, on the application at exhibit-80 in Regular Civil Suit No.76/2011 thereby, rejecting the said application for amendment of the suit.

4. In Writ Petition No.12456/2021, the defendants have challenged the order dated 14.06.2019 passed by the learned Civil Judge, Junior Division, Loha, District Nanded, on the application at exhibit-75 in Regular Civil Suit No.76/2011 thereby, rejecting the said application for amendment of their counter claim.

5. The plaintiff has filed Regular Civil Suit No.76/2011 claiming the relief of declaration and permanent injunction with respect to the agricultural land bearing Gat No.303 situated at

Mauje Dapshed, Taluka Loha, District Nanded. The defendants had appeared in the suit and filed their counter claim.

6. At the instance of the defendants, an application below exhibit 43 under Order XXVI Rule 9 of the Civil Procedure Code seeking appointment of the Court Commissioner was filed on 10.01.2013, which was decided by the Trial Court by order dated 02.05.2013 thereby, appointing the Cadastral Surveyor from the office of the City Surveyor as the Court Commissioner to measure the suit land and to find out encroachment if any. Pertinent to note, the order directing appointment of the Court Commissioner categorically notes that in view of the controversy it is necessary to measure the suit land of the plaintiff and the defendants, which will help the Court to decide the original suit and counter claim on merits. This order of appointment of the Court Commissioner was not challenged by any of the parties and accordingly, the Court Commissioner carried out the measurement.

7. On 31.08.2018, the defendants filed an application below exhibit 75 under Order VI Rule 17 of the Code of Civil Procedure on 31.08.2018 seeking amendment to their counter

claim allegedly based on the measurement carried out by the Court Commissioner. By way of this proposed amendment, the defendants have prayed for amendment to their counter claim to incorporate pleadings with respect to subsequent developments based on the Commissioner's report and to amend prayer clauses incorporating rectification and correction of the document of Sale Deed No.3129 dated 18.12.1974. Thus, the proposed amendments sought by the defendants are two fold in nature, one part being based on the report of the Court Commissioner and the second part is in the nature of correction of the document of sale deed of the year 1974.

8. On 26.07.2019, the plaintiff also filed an application under Order VI Rule 17 of the Civil Procedure Code for amendment thereby, proposing to add certain contentions based on subsequent developments in view of the measurement carried out by the Court Commissioner.

9. Insofar as the application exhibit-75 filed by the defendants is concerned, the plaintiff opposed the said application on the ground that trial has already commenced. The Trial Court rejected the application exhibit 75 by the impugned

order dated 14.06.2019 holding that the counter claim will not be within limitation if the prayer of rectification in the sale deed is permitted and further the proposed amendment is not necessary for the purpose of determining the real controversy between the parties.

10. As regards the plaintiff's application for amendment seeking amendment of the plaint, the defendants strongly opposed the application on the ground that trial has commenced and the plaintiff was also cross examined. The Trial Court passed the impugned order dated 10.10.2019 thereby, rejecting the plaintiff's application exhibit-80 for amendment mainly on the ground that the suit was fixed at the stage of evidence and that the trial has commenced.

11. Shri Joshi, learned counsel for the plaintiff, vehemently submits that the impugned order dated 10.10.2019 demonstrates hyper-technical approach of the Trial Court. He submits that by way of the proposed amendment, the plaintiff wants to bring on record the subsequent developments based on the Commissioner's report. His main thrust of arguments is that the Commissioner was appointed at the instance of the

defendants and the proposed amendments are necessary for deciding the real controversy involved in the suit. He submits that although evidence has started, in view of the fact that the defendants had also prayed for amendment based on the Commissioner's report, the Trial Court had adopted perverse approach in rejecting the application exhibit 80 by only considering the stage of the civil suit.

12. As against this, Shri Gaikwad, learned counsel for the defendants, strongly opposed the petition filed by the plaintiff. He submits that the plaintiff has proposed to amend the plaint after his cross-examination was over and after the defendants have disclosed their defence. He submits that the plaintiff has failed to file any amendment immediately after the report of the Court Commissioner was filed and has waited till the completion of his cross-examination and thus, the amendment application does not demonstrate due diligence on the part of the plaintiff. He submits, on the contrary, the application filed by the defendants demonstrate due diligence on their part.

13. Rival contentions thus fall for my consideration.

14. It has to be noted that the plaintiff has filed the application for amendment to incorporate subsequent events based on the report of the Court Commissioner. So also, the defendants also filed the application for amendment to their counter claim after the report of the Court Commissioner. It is pertinent to note that the Cadastral Surveyor of the City Surveyor Office was appointed as the Court Commissioner at the instance of the defendants. Although the evidence in the suit has started and the plaintiff was cross-examined, considering the fact that the plaintiff as well as the defendants filed the applications for amendment based on the Commissioner's report, it becomes clear that the pleadings based on the Commissioner's report are relevant for the purpose of deciding the real controversy between the parties. The very purpose of appointment of the Court Commissioner, as observed by the Trial Court while passing the order on the application under Order XXVI Rule 9 of the Civil Procedure Code, was to get the lands of the plaintiff and the defendants measured which would help the Court to decide the original suit and counter claim on merits. As such, the proposed amendment to incorporate the pleadings based on the Commissioner's report is necessary for complete and effective

adjudication of the controversy involved in the suit and counter claim.

15. Although the plaintiff filed the application for amendment after his cross-examination was over, however, denying him an opportunity to place on record the relevant pleadings will be detrimental. In the peculiar facts of this case, rejection of the plaintiff's application for amendment only because his cross-examination was over, demonstrates extremely pedantic approach. Further, the proposed amendment based on the report of the Court Commissioner, could not be termed to be absence of due diligence on the part of the plaintiff.

16. The position of law emanating from the judgment of the Honourable Supreme Court in the matter of ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and another, 2022 (16) SCC 1 : AIR 2022 SC 4265***, need to be taken into consideration. After considering series of judgments dealing with the provisions of Order VI Rule 17 of the Civil Procedure Code, the Honourable Supreme Court arrived at final conclusions, which are mentioned in paragraph No.70, of which relevant points are mentioned below:-

“70. *Our final conclusions may be summed up thus:*

- (i)*
- (ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the Code of Civil Procedure.*
- (iii) The prayer for amendment is to be allowed*
 - (i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and*
 - (ii) to avoid multiplicity of proceedings, provided*
 - (a) the amendment does not result in injustice to the other side,*
 - (b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and*
 - (c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).”*

17. In the light of these observations of the Honourable Supreme Court, amendments proposed by the plaintiff in the instant case being necessary for determining the real questions in

controversy, need to be allowed. As regards the issue of prejudice and injustice to the defendants, in view of the amendment proposed, being based on the report of the Court Commissioner, who was appointed at the instance of the defendants, there is no question of prejudice to the defendants. Thus, I am of the considered view that the amendment application filed by the plaintiff deserves to be allowed.

18. In the peculiar facts of this case, in view of the amendment proposed by the defendants, the amendment to the extent of seeking to amend prayer clause of the counter claim will definitely cause prejudice to the plaintiff as the same amounts to changing the nature of the suit to claim the time barred relief. After considering parameters as laid down in the above referred judgment of the Honourable Supreme Court, I am of the considered view that the amendment proposing to incorporate pleadings based on the Commissioner's report need to be allowed, however, the second part of amendment seeking to amend the prayer clause for rectification of the sale deed dated 18.12.1974, needs to be rejected.

19. Since the suit is of the year 2011 with respect to

agricultural lands of the parties and further that proceedings in the suit were stayed by interim order dated 21.01.2020 passed by this Court in Writ Petition No.1268/2020, it is in the interest of justice that the suit and counter claim are decided expeditiously. Hence, I pass the following order:-

(a) Writ Petition No.1268/2020 is allowed.

(b) The impugned order dated 10.10.2019 passed by the learned Civil Judge, Junior Division, Loha, District Nanded, in Regular Civil Suit No.76/2011 below application at Exhibit 80 is quashed and set aside.

(c) The application for amendment filed by the petitioner/ plaintiff at exhibit 80 in Regular Civil Suit No.76/2011 is allowed.

(d) Writ Petition No.12456/2021 is partly allowed.

(e) The impugned order dated 14.06.2019 passed by the learned Civil Judge, Junior Division, Loha, District Nanded, on the application below exhibit 75 in Regular Civil Suit No.76/2011 is modified to the extent of partly allowing the said application thereby, permitting the defendants to amend their

counter claim by adding proposed paragraph No.7-A.

(f) Regular Civil Suit No.76/2011 and the Counter Claim filed by the defendants be decided expeditiously.

(g) No order as to costs.

kps

(PRAFULLA S. KHUBALKAR, J.)