



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

WRIT PETITION NO. 2702 OF 2024

Pankaj S/o. Deochand Karemore,
Age about 42 years, Occ. Doctor,
R/o. Gujrati Colony, Near Shiv Mandir,
Kalamna, Nagpur.

....PETITIONER

....VERSUS....

- 1) Kishor Deharwal,**
Aged Major, Occ. Not Known,
R/o. Bharatwada, Ward No. 21,
Teh and Distt. Nagpur.
- 2) Kavita W/o. Purushottam Bavistale,**
Aged about 38 years, Occ. Housewife,
R/o. Post Ramakona, Teh. Saoner, Distt.
Chhindwara, Madhya Pradesh.
- 3) Shri Prahladsingh S/o. Fakirsingh**
Pardhi, Aged about Major,
Occ. Business, R/o. Plot No. 29,
Gulmohar Nagar, Bharatwada Road,
Nagpur.
- 4) Smt. Ushabai Ramrajji Ponde,**
Aged about Major, Occ. Housewife,
R/o. Plot No. 28, Gulmohar Nagar,
Bharatwada, Nagpur.

....RESPONDENTS

Shri S.S. Sitani, Advocate for petitioner.
Shri Vikas Jaiswal, Advocate for respondent No. 2.
Shri Mahesh Rai, Advocate for respondent No. 4.

CORAM : SMT. M.S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 27/03/2025

DATE OF PRONOUNCING THE JUDGMENT : 06.05.2025

JUDGMENT

Rule. Rule returnable forthwith. Heard finally with the consent of the learned Counsel appearing for the parties.

2] Being aggrieved and dissatisfied by the impugned order dated 02/08/2023 passed below Exhibit-45 and 46 by the learned 4th Joint Civil Judge Senior Division, Nagpur in Regular Civil Suit No. 543/2013, thereby rejecting the applications filed under Order 1 Rule 10 and Order 6 Rule 17 of the Code of Civil Procedure respectively, the present petition is filed.

3] The petitioner had filed applications for adding the present respondent Nos. 2 to 4, as defendant Nos. 2 to 4 being proper and necessary party and further amending the said suit for seeking relief of possession against them in the said suit.

4] The petitioner is the lawful owner of Plot No. 8 admeasuring 1925 Sq. ft. of area, situated at Mouza

Bharatwada, KH No. 68/7, P H No. 17, Ward no. 21, Tahsil and District Nagpur. On 17/04/2013, the petitioner visited the suit premises and found that respondent No.1 is carrying out construction on the adjoining plot and further noticed that said construction was illegal as the same was being made on the plot owned and possessed by the petitioner.

5] The petitioner requested the respondent No. 1 not take law into his hand and restrained him carrying out construction on the plot owned by the petitioner. In spite of complaint lodged with Police Authorities, they failed to act upon the same and hence, the present petitioner filed a suit for permanent injunction bearing Regular Civil Suit No. 543/2013 on 20/04/2013. The learned Trial Court issued notices. The respondent No. 1 appeared and informed that he is not the owner of the said adjoining plot but one Smt. Kavita Purushottam Bavistale i.e. respondent No.2, is the owner of the said plot and she is responsible for the said construction.

6] On 06/06/2013, the respondent No. 2 *suo motu* appeared in the said suit and filed an undertaking before the

learned Trial Court stating that she is the owner of the adjoining plot to the petitioner's plot and further stated on oath that she is ready to get the plots measured and also undertook to demolish the construction, if found on the plot owned and possessed by the petitioner.

7] On 22/03/2018, the learned Trial Court directed the Court Commissioner to measure both the Khasras i.e. KH Nos. 68 and 67. Accordingly, the measurement was carried out and as per the report submitted by the Commissioner, the petitioner's plot No. 8 was encroached by the respondent No.2 and some other persons i.e. proposed respondent Nos. 3 and 4. The present petitioner thereafter requested the respondent Nos. 2 to 4 to remove the said encroachment and handover the possession, but the respondents refused to act upon the same.

8] On 08/11/2021, the petitioner moved an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (for short the "CPC") below Exhibit-45 for adding respondent Nos. 2 to 4 as a party defendants in the

said suit and also moved an application under Order 6 Rule 17 of the CPC below Exhibit-46 for amending the suit for seeking the relief of declaration and possession and further to add/amend the pleadings accordingly. Thereafter, respondent No.2 filed her reply to the said applications below Exhibit-45 and 46 on 27/02/2022. The learned Trial Court vide order dated 02/08/2023, passed order below Exhibit-45 and 46 and rejected both the applications. The aforesaid order is the subject matter of challenge in the present writ petition.

9] Learned Counsel for the petitioner contended that the learned Trial Court committed a grave error by rejecting the application under Order 6 Rule 17 of the CPC as it failed to appreciate the law laid down by Hon'ble Apex Court in ***Life Insurance Corporation of India vs. Sanjeev Builders Pvt. Ltd.***, reported in ***AIR 2022 SC 4256***, that if amendment is sought before commencement of trial, the Court is required to be liberal in its approach. In the present case, since the trial is yet to commence, the application below Exhibit-45 and 46 ought to have been allowed.

10] Learned Counsel for the petitioner further contended that the learned Trial Court failed to appreciate the Court Commissioner's report, in which the respondents were found to have encroached upon the plot owned and possessed by the present petitioner and therefore, the petitioner had no other alternative to claim relief of possession against the respondents and on this ground, the impugned order dated 02/08/2023 passed by the learned Trial Court below Exhibit-45 and 46 needs interference by this court and also needs to be set aside.

11] The learned Counsel for the petitioner relied on the following citations:-

- 1) ***Rajesh Kumar Aggarwal and Ors. V/s. K.K. Modi and ors. [(2006) 4 SCC 385]***
- 2) ***Life Insurance Corporation of India V/s. Sanjeev Builders Pvt. Ltd. and Ors. [AIR 2022 SC 4256]***

12] On the contrary, the learned Counsel for respondent No. 2 supported the order passed by the learned Trial Court and contended that the learned Trial Court in its

order dated 02/08/2023 rightly held that the Commissioner has not done his work as per Court's Order when he was directed to measure Plot No.8 and Plot No.30, he measured Kh. Nos. 67 & 68 and there is no situation to show that, without proposed defendant Nos. 3 and 4, suit cannot be proceeded and come to the conclusion that, the application for addition of party is not maintainable and thereby rejected the same and passed the judicious order below Exhibit Nos.45 and 46, which do not require any interference.

13] Learned Counsel for respondent No. 4 submitted that, the report was submitted on 13/08/2018 and the applications for the amendment and addition of party were filed after more than 3 years without there being any explanation of delay. In the Commissioner's report when it is not disclosed which portion is encroached and exact area of encroachment by which person, then the objection made by the respondent No. 2 seems to right. The observation of the learned Trial Court that, there is a mistake by the Court Commissioner, therefore it cannot be relied upon. The

application filed by the petitioner is only on the basis of the alleged report and measurement, which are already discarded by the learned Trial Court and thus, the petition is liable to be dismissed.

14] Heard learned Counsel for both the parties. Perused the applications and impugned orders thereon and considered the citations relied on by both the parties.

15] There were two applications filed by the present petitioner, one is for addition of parties and second is for amendment in the plaint. It is matter of record that on plaintiff's applications for appointment of Court Commissioner for local inspection and measurement of Plot No.8 owned by the plaintiff admeasuring 1925 sq.fts., Khasra No.68/7, P. H. No.17, situated at Mouza Bharatwada, Tahsil and District Nagpur, wherein it appears that only map came to be filed by the Court Commissioner. There is nothing on record to show that on what basis, the petitioner claiming addition of parties or amendment of the suit. However, it appears from the impugned order passed below Exhibit-45 that the learned

4th Joint Civil Judge, Senior Division, Nagpur observed that the Court Commissioner has not done work as per the order. The Court Commissioner shows portion of construction in the map, however, it is not sufficient to hold that there was any encroachment of proposed defendants. Even on perusal of order Below Exhibit-46, it is observed by the learned 4th Joint Civil Judge, Senior Division, Nagpur that it appears some mistake committed by the Court Commissioner, thus, on that basis if any report is filed, it is very difficult to take cognizance. Hence, considering the *prima facie* mistake committed by the Court Commissioner, the learned 4th Joint Civil Judge, Senior Division, Nagpur do not find any substance in the application at that stage before confirming the Court Commissioner report.

16] Learned Counsel for the petitioner relied on ***Rajesh Kumar Agrawal*** (supra), wherein the Hon'ble Apex Court in para 16 held as under :

“16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is

imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties”.

17] Learned Counsel for the petitioner also placed reliance on ***Life Insurance Corporation of India*** (supra), wherein certain principles/guidelines laid down by the Hon’ble Apex Court while deciding the application for amendment that, “Where the amendment application filed before commencement of trial, the Court is required to be granted it liberally. Even amendment after commencement of trial, if are necessary to decide the real controversy between the parties can also be allowed, if it does not change the nature of contest between the parties”. In the present matter, it is true that amendment application and application for addition of parties are moved prior to commencement of trial, however, this fact cannot be overlooked that the Commissioner’s report is not very specific in that regard and only map is placed on record from which it is difficult to ascertain that proposed parties to be added have encroached any portion of plaintiff’s property.

The learned Trial Court when satisfied that there is a mistake in the report of Court Commissioner, the learned Trial Court requires to appoint or direct the said Commissioner to place on record detailed report in respect of suit property. Even though the Commissioner was directed to measure the adjacent plot, the Commissioner be granted liberty to measure the plot of plaintiff and there is any other persons' encroachment so as to specify the same in the report.

18] In view of this, there is no error in the order passed by the learned trial Court rejecting application for addition of parties and amendment application. However, learned trial Court is hereby directed to reissue the Commission and call the report accordingly. The petitioner herein is at liberty, if required, to move an application for amendment as well as addition of parties after receipt of detailed report of Commissioner. As such, the Writ Petition stands dismissed with above directions. No order as to costs.

(Smt. M.S.Jawalkar, J.)