

MHJN100003482011

**Order passed below Exh.83**

(Dt. 28/06/2023)

1] The present application is filed by the plaintiff under Order VI Rule 17 of Civil Procedure Code 1908. The applicant avers that, he has filed this suit for mandatory injunction directing defendants to reconstruct common bandh of land Gut No. 01 adm. 1 H. 99 R of village Naigaon, Tq. Mantha, Dist. Jalna.

2] Plaintiff further avers that, after filing this suit he has filed application at Exh. 54 under Order XXVI Rule 9 of CPC for appointment of Court commissioner for measurement of suit land and as per order below Exh. 54 DSLR Jalna was appointed as Court Commissioner and he measured suit land with CTS machine and filed his report. As per measurement report defendants No. 1 to 3 is having encroachment on the plaintiff suit land.

3] Plaintiff further contends that, as per measurement report he is having total area of 1 H. 99 R in Gut No. 1 at village Naigaon, Tq. Mantha, however as per measurement report only 1 H. 23 R is in possession of plaintiff and defendant No. 1 & 2 having title and possession on revenue record is 1 H 83 R, but as per measurement report defendant No. 1 & 2 is having possession of 2 H 38 R land and defendant No. 3 as per revenue record is having 1H 25R land but in his possession there is 1 H 29 R land.

**MHJN100003482011**

4] Plaintiff further avers that, as per measurement report excess area of plaintiff land 59 R is in possession of defendants No. 1 to 3 . Therefore such exact portion is to be required to amend in the plaint. Therefore necessary amendment requires for final adjudication of suit. As per measurement report necessary amendment requires to be made in prayer clause "B" in fourth line and defendants in its original portion as per measurement map of DSLR. If such amendment is allowed no any adverse effect of such amendment will be held on the right of defendants, no nature of suit will be change. Therefore prayed for granting the application.

5] Say of defendants was called upon. Defendants No. 1 to 3 have filed their common say vide Exh. 85 and objected the application on the ground that plaintiff has mentioned wrong case number in the application i.e. R.C.S. No. 54/2011 in place of R.C.S.No. 53/2011. Further the defendants objected the application on the ground that plaintiff has instituted the present suit for removal of encroachment, possession and injunction whereas in the application plaintiff has merely stated the suit is for injunction. Also the plaintiff has wrongly mentioned the exhibit number of DILR report which is on Exh. 73.

6] The defendants further contend that, as the plaintiff has filed present suit for removal of encroachment, it was duty of the plaintiff to get measured the suit property before instituting the suit and approxly mention in the suit about the so called encroached area by the defendants. Further in the present application plaintiff has not sought an amendment in the pleading of plaint, whereas plaintiff is merely seeking amendment in the prayer clause. Further if the plaintiff is seeking relief

**MHJN100003482011**

of removal of encroachment it is duty of the plaintiff to prove the alleged encroachment in the suit property. Thus application of the plaintiff is not tenable and liable to be rejected.

7] In order to decide the present application it is pertinent to consider pleadings of the plaintiff in the plaint. From perusal of the plaint it reveals that the plaintiff has stated about several transactions taken place in respect of Gut No.1 by the plaintiff ancestor and the defendants. Further the plaintiff has mentioned approximate area which comes in the share of plaintiff and defendants. On basis of that plaintiff has pleaded that defendants have encroached upon an area which is about 1 H and further it is also mentioned that plaintiff has filed the present suit for possession of encroached area which may reveal after measurement of suit land and defendant's land by TILR.

8] From above pleading of the plaintiff it is pertinent clear that plaintiff has kept scope open for mentioning the encroached area after measurement of suit property and defendants property together. Plaintiff had nowhere mentioned that the approximate area of alleged encroached land by the defendants is about 1 H. In the present application, plaintiff has stated that during pendency of the suit plaintiff had filed an application before the Court for appointment of Court Commissioner. Accordingly the court directed the measurement of the suit land. Earlier the suit properties were measured by the TILR. However as the plaintiff was not satisfied with his measurement the court redirected the measurement of suit property by DILR Jalna. Accordingly vide Exh. 73 DILR Jalna had filed on record his measurement report.

**MHJN100003482011**

9] As per measurement report, plaintiff is having total area of 1 H 23 R in possession whereas in actual as per revenue records, the plaintiff is possessing an area 1 H 99R. The defendants No. 1 & 2 on revenue records are entitled to an area 1 H 83 R, but as per measurement report defendants No.1 & 2 are possessing an area of 2 H 38 R. Defendant No.3 as per revenue record is possessing an area 1 H 25 R, but as per measurement report he has shown in possession of an area 1 H 29 R land. Thus the measurement report shown an excess area in possession of defendants whereas plaintiff is possessing less area i.e. 59 R which is in possession of defendants No. 1 to 3.

10] Hence the plaintiff by present application is seeking exact portion of the encroachment be amended in the plaint. The plaintiff further contends that if the present amendment is allowed it will be easy for the court to decide the suit on merit and the nature of the suit will not be change by said amendment.

11] Heard Ld. advocate for plaintiff and defendants at length. The objection raised by the defendants to the present application are basically technical or typographical mistake done by the plaintiff in present application. So more emphasis is not given to the said objection. Further though it was necessary from the part of plaintiff that before instituting the present suit, measure the suit property and mention the exact encroached area by the defendants. However it is not mandatory on the plaintiff to always do the same fact. The another objection raised by the learned advocate for the defendants is that plaintiff has not sought any amendment in the pleading of plaint and only seeking amendment in prayer clause. But it is pertinent to note that in the plaint plaintiff has

**MHJN100003482011**

specifically stated that he is seeking possession of 1H encroached area by the defendants or the area whichever will be found encroached after the measurement by TILR. Thus as the report of DILR is record of the Court I don't found it necessary by the plaintiff to make additional amendment in the pleading of plaint in respect of the the report of measurement.

12] While deciding the present application it is necessary to considered the provision of **Order VI Rule 17 of Civil Procedure Code 1908** -

*The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*

*Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in site of due diligence the part could not have raised the matter before the commencement of trial.*

13] From perusal of above provision it is pertinent clear that the Court may at any stage of the proceedings allow the parties to amend the pleadings if it is necessary for purpose of determining the real question in controversy between the parties. In the present suit the controversy between the parties is in respect of alleged encroached area upon suit property by defendants. Thus it is necessary in order to determined this question of alleged encroachment by defendants on suit property to allow the plaintiff to amend the suit.

**MHJN100003482011**

14] Though in proviso of **Order VI Rule 17 of CPC** it is provided that the Court shall not allow to amend pleadings after the trial has commence. However at present stage the suit is pending for evidence of plaintiff. It means the trial has been commenced after framing of issue by the Court. But it needs to be considered that after the DILR report the plaintiff has reveal the fact about the approx encroached area in suit property by the defendants. Thus it can be said that prior to institute the suit or at the time of institution of the suit the plaintiff was not in position to determined the exact area alleged to be encroached by the defeated on suit property. This fact is newly revealed to defendant after measurement report. Hence the proviso to Order VI Rule 17 of CPC is not applicable to the plaintiff in present case.

15] Further considering the nature of proposed amendment in the plaint it reveals that if the said amendment is allowed no such injustice or hardship is going to cause to the defendants nor it is changing the nature of suit. In fact if the said amendment is allowed it will be easier for the Court to determine the real question in controversy between the parties. Also if the said amendment is not allowed it may lead to multiplicity of the proceedings. Hence it will be just to allow the plaintiff to amend the prayer clause in the plaint and mention the approx alleged encroached area by the defendants in suit property. However considering the delay caused by the plaintiff in applying for amendment of the suit property and presenting the present application, the application needs to be allowed with cost. Thus following order.

MHJN100003482011

**ORDER**

- 1] Application vide Exh. 86 is hereby allowed.
- 2] Plaintiff shall pay cost of Rs. 500/- (Five Hundred) out of it Rs. 100/- be paid to Legal Aid and Rs. 400/- be paid to defendants.
- 3] Plaintiff is directed to carry out the necessary amendment in the plaint within 14 days from the date of this order.
- 4] Plaintiff to file on record the amended plaint as soon as possible.

Dt. 28.06.2023.

( Ms. P. M. Suryawanshi )  
Civil Judge Junior Division  
Mantha.

**CERTIFICATE**

I affirm that the contents of this PDF file are word to word as per original Judgment.

Name of the Stenographer : S.S. Khandare

Name of the Court : C.J.J.D. Mantha

Date of PDF : 30/06/2023

Sd/-  
Stenographer (L.G.)