

**Order below Exh. 43 in R.C.S. No. 129/2011.**

1. Read application and say. Heard both the sides.
2. This is the application under Order 6 rule 17 of the C.P.C. filed by the plaintiffs. It is the contention of the plaintiffs that at the time of filing the suit the plaintiffs were under impression that the defendants have encroached over 77 R land i.e. defendant no.1 has encroached over 30 R land and defendant no.3 has encroached over 47 R land. It was revealed in the joint measurement that the defendant no.1 has encroached over 56 R area, defendant no.3 has encroached over 26 R area, and therefore, it is necessary to amend the plaint so as to correct the description.
3. The defendants have objected this application. It is their say that the application is not tenable. The mistake in the plaint is not due to over sight. The proposed amendment is based on the measurement carried during the pendency of the suit hence there would be change in the cause of action which is not permissible. A false report of the Court commissioner has motivated the present application. The plaintiffs are trying to mould up the pleading to match up the measurement. On these grounds the defendants are praying to reject the application.
4. Basically the suit is filed for recovery of possession. During the pendency, the plaintiff has filed application exh.38 and sought joint measurement of land gat nos.219, 220 and 221. The application was allowed and the T.I.L.R. was appointed as court commissioner for joint measurements. After measurement the TILR filed his report along with the map. The map prima facie shows that some of the area of the plaintiff's land is in possession of the defendants. Accordance with said report the plaintiff has filed present application so as to raise claim on said area. The defendants are objecting that the plaintiff is trying to change the cause of action but I do not found any force in this submission. Since the original suit was for recovery of possession it cannot be said that

the cause of action is going to be changed by subsequent joint measurement. The purpose of joint measurement is only to facilitate the court to determine the area of the encroachment and it would not called as any new cause of action. Therefore, I do not found any force in the submissions of the defendants that the cause of action would be changed due to proposed amendment.

5. During argument the learned advocate for the defendants has argued that the amendment has been sought at belated stage when the trial is already commenced, as such no amendment can be allowed. For that purpose he relied on **Mrs Vera Lelisa Viegas Pereira vs. Agnelo Ceatano Colaco & oth. 2013(6) ALL MR 347.** and **Ajendraprasadji N. Pandey Vs. Swamy Keshav Prakashdasji, AIR 2007 S.C. 808.**

The common ratio in the present case law is that- *“If the trial starts Proviso of Order 6 Rule 17 creates a bar”*

6. The learned advocate for the plaintiff argued that the trial is yet not commenced as the evidence is yet not adduced by any party. Merely because the issues are framed, it cannot be said that trial has been commenced. For that purpose he relied on **Mahadev Maruti Bhanje vs. Balaji Shivaji Pathade, 2012(6) AIR BOM. R 158.** The ratio of present case law is that *“the commencement of trial would be from the date of filing of affidavit in lieu of examination in chief and not from the date of framing of the issues”*.

7. In the present matter none of the party has yet adduced evidence on affidavit in lieu of examination in chief. The issues are framed and the matter was pending for the evidence of the parties. During the pendency the application for joint measurement was submitted and later on the matter was pending for the report of the TILR. As such in this matter it cannot be said that the trial has been commenced. Therefore, in my humble opinion the ratio cited in **Mahadev's** case is applicable in the

present matter and the ratio cited in the case of **Vera's & Ajendra's** are not helpful for the defendants.

8. The plaintiff is seeking amendment so as to give the correct description of the area possessed by the defendants. Such description is necessary to elucidate the real dispute or controversy between the parties. It seems that such amendment is necessary for the proper disposal of the suit. The plaintiff has relied on **Ushadevi vs. Rizwan Ahmed, 2008(5) Mh. L. J. 82.** The ratio of present case law is that "*If the proposed amendment is necessary for bringing to the fore the real controversy between the parties and its refusal would create complications at the stage of execution such amendment shall be allowed.*" Therefore, in the light of the ratio cited in above said case law, I hold that the present amendment deserves to be allowed. It would not cause any prejudice to the defendants nor would it change the nature of the suit. In the result I hold that application exh.42 is liable to be allowed. To that effect I pass following order.

**Order.**

1. Application exh.43 is allowed subject to cost of Rs.600/- (Rs. Six hundred only) payable to the defendants.
2. The plaintiff should pay the cost and carry the amendment as per sub para A, B, C, D & E of para 3 of this application, within 14 days from today.

Dated: 17.02.2014.  
Renapur

(A. A. Yadav)  
Civil Judge, Jr. Division, Renapur.

