

ORDER PASSED BELOW APPLICATION EXH. NO.49

(Passed on this **05th** Day of **March, 2016**)

01] The plaintiff made this application on affidavit under Order VI Rule XVII of Civil Procedure Code, 1908 for amendment of plaint and for addition of paragraph 02 a) after paragraph No.02. Perused the application and Say **Exh.No.52** filed by the defendants.

02] Plaintiff contends that he filed suit for Removal of encroachment and Perpetual Injunction. Court Commissioner (T. I. L. R.) commissioned survey No.999 and 1001 and filed report **Exh.No.45** with the map. Commission report discloses that, defendants encroached over the land of plaintiff to the tune of 21 square meter shown in blue ink. Hence, plaintiff intends to add pleading for removal of encroachment.

03] The defendants strongly opposed the application on the count that, Court Commissioner did not carry out measurement adhering to original record and map, he did not fix boundary marks. Hence, defendants have applied for reissue of Court Commission. Proposed amendment will change nature of suit.

04] Heard Ld. Adv. Mr. N. G. Deshmukh for the plaintiff and Ld. Adv. Mr. S. N. Sanap for the defendants.

05] Perused record and considered submissions. If nature of proposed amendment is considered, then it is manifest that it is regarding fact of alleged encroachment and its removal.

06] Ld. Adv. Mr. Deshmukh for the plaintiff argued that, as per order VI Rule XVII of C. P. C., amendment cannot be allowed only after commencement of trial. There is proviso to the said provision, and if facts and circumstances of the case permits the Court, then, amendment application can be allowed even after commencement of the trial, opening words of said provision discloses that, at any stage of proceeding, party can move the amendment application.

07] Ld. Adv. Mr. Sanap for the defendants submitted that amendment is devoid of merits, Commission report and map is founded on incorrect revenue record. He submitted that, application do not exhibit bonafides. Hence, defendants prayed for rejection of the application.

08] To decide present application I would like to make profitable reference to the judgment of Hon'ble High Court reported in **B. K. C. L. Vs. Precious Finance Investment, 2007(1) Mh. L. J. 331**. Entire judgment is relating to Order VI Rule XVII of C. P. C. Hon'ble High Court has thoroughly discussed various judgments of Hon'ble Supreme Court and certain guidelines have been elaborately given. From

the said guidelines, it is seen that Order VI Rule XVII of C. P. C. is directory and not mandatory. Similarly, it also discloses that by way of amendment application, even inconsistent plea can also be taken or raised by the party. However, inconsistent plea which would displace the plaintiff completely from the admission made by the defendant in written statement, such type of amendment cannot be allowed. Even court can allow the amendment application, at appellate stage for the purpose of determining the real question in controversy between the parties. It is also seen that the question of delay in moving an amendment application should be decided not by calculating the period alone, but by reference to the stage to which the hearing in the suit has proceeded. It is also seen from various judgments of Hon'ble of Supreme Court that dominant purpose of provision of Order VI Rule XVII of C. P. C. is to minimize the litigation. It has been also observed that amendment application should be allowed at any stage, if such amendment is significant one for deciding the real controversy between the parties once for all.

09] It is seen that amendment application cannot be allowed if it is filed **(1)** in order to delay the proceedings **(2)** if it withdraws the admissions given by that party so that it displaces the other party, if proposed amendment is allowed; **(3)** if nature of amendment is changing the entire nature of suit. Hence, in deciding application its dominant purpose and guidelines must be borne in mind.

10] Proposed amendment is relating to alleged encroachment and its removal. Issues are framed below **Exh.No.39** on **28-03-2013**. The plaintiff after framing of issues made an application **Exh.No.40** for appointment of Court Commissioner on **25.02.2014** which is decided on **06.09.2014**. Court Commissioner report **Exh.No.45** is received on **27.08.2015**. The plaintiff did not adduce evidence since then. The plaintiff despite leading evidence preferred instant application on **23-11-2015** for amendment of pleadings. Thus, the plaintiff prolonged trial for about three months by not adducing evidence. Suit is instituted in the year 2010. In the suit trial is not yet commenced owing to failure on the part of plaintiff to lead evidence. Defendants are dragged for the above period of three months without any just reason. It is true that, parties are at dispute relating to immovable property. Therefore, for deciding real controversy relating to immovable property once for all, the amendment application needs to be allowed. In a zeal to afford an opportunity to the plaintiff to amend his plaint in order to decide dispute once for all, time wasted by him of the Court as well as of defendants cannot be lost sight. There is no straight jacket formula for calculating cost occasioned. Rule of ordinary prudence and sky launching prices can be taken note of. Hence, for 3 months delay cost of Rs.500/- needs to be imposed on plaintiff. Plaintiff shall pay out of aforesaid cost, Rs.300/- to the defendants and Rs.200/- to the Government. In the result following order will meet the ends of justice.

ORDER

- 01]** Amendment application **Exh.No.49** stands allowed subject to cost of Rs.300/- to be paid by the plaintiff to the defendants and Rs.200/- to the Government. Cost payable till next date unless time extended.
- 2]** Defendants are at liberty to carry out consequential amendment in Written Statement if they so desires by making written application.
- 3]** Costs in the cause.

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(Subhash L. Phule)

**Civil Judge Junior Division, Roha.
District Raigad.**

**Place : Roha
Date : 05-03-2016**