

ORDER BELOW EXH. 72 IN R.C.S. NO. 72/2007

(Balasaheb Mule & ors. V/s. Ramchandra Koli & ors.)

1. Present application filed by plaintiffs under Order 6 Rule 17 of the Code of Civil Procedure for amendment of pleadings.

2. Perused application and Say.

3. In present application plaintiffs submitted that they filed present suit on 18/09/2007 for perpetual injunction. Defendants filed counterclaim in this proceeding. Meanwhile on 19/09/2007 plaintiffs filed application Exh. 7 under Order 6 Rule 9 of the Code of Civil Procedure for appointment of court commissioner. Said application was allowed. Accordingly court commissioner-T.I.L.R. conducted measurement and filed his report along with map on record. It is further submitted by plaintiffs that, during commission T.I.L.R. found 80R encroachment done by defendants over suit property. Accordingly court commissioner shown the same in map. Defendants possessed over encroached portion. Hence, it is just and relevant to amend pleadings in order to avoid multiplicity of litigation.

4. Defendants filed their Say and objected subject of proposed amendment. Defendants submitted that matter is for the stage of hearing on Exh. 5. Defendants strongly opposed to report of court commissioner and claimed for superior test but said application of defendants rejected. Defendants further submitted that plaintiffs suit is for perpetual injunction and if their *prima facie* possession over 2 Hectares 6R PK 4R, then only they claim for injunction and by way of proposed amendment, plaintiffs claimed different subject matter. Secondly, cause of action mentioned by plaintiffs is of the year 2006 and commission held on 30/03/2009. It means cause of action changed. Defendants submitted that defendants objected as plaintiffs mentioned wrong boundaries of suit property, in between to that boundaries of encroached portion are also wrong one. Court commissioner ought to measure whole Survey No. 19 but he not done so. Hence, measurement dated 30/03/2009 is inaccurate one. Lastly defendants submitted that no explanation put forth by plaintiff as to why they are seeking amendment. Likewise if proposed amendment solicited, nature of suit will be changed. Hence, application be rejected.

5. Heard.

6. It is pertinent to note that subject of proposed amendment is incident during pendency of suit and same was not within knowledge of plaintiffs at the time of institution of suit. During pendency of suit plaintiffs revealed the alleged encroachment when T.I.L.R. submitted his report and map. Objection raised by defendants as to change of cause of action, divergent claim, not measured whole survey numbers, all these objections are part and parcel of evidence. At this preliminary stage, to avoid multiplicity of litigation it is just and necessary to allow the application. No nature of suit changes if amendment allowed. Yet trial is not commenced. No prejudice will be caused to defendants as they are at liberty to lead evidence. Accordingly, order follows.

ORDER

- (1) Application Exh. 72 allowed.
- (2) Plaintiffs to carry out amendment within 14 days from the date of this order.
- (3) Plaintiffs to file amendment plaint thereof.

Jath
Date :- 03/12/2012

Sd/-xxx
(D.S.Thorat)
Civil Judge, Junior Division, Jath