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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 2733 OF 2015

1. Sahebrao Dadarao Kharat,
Age: 50 years, Occu: Agriculture,
R/o. Kawadgaon (Bujurg),
Tq. Wadwani, Dist. Beed
2. Laxman Dadarao Kharat,
Age: 48 years, Occu: Agriculture,
R/o. As above
3. Jaganath Santram Kare,
Age: 45 years, Occu: Agriculture,
R/o. As above
4. Narsu Narayan Kale,
Age: 40 years, Occu: Agriculture,
R/o. Suranwadi, Tq. Dharur,
Dist. Beed
5. Uttam Deorao Kharat,
Age: 20 years, Occu: Agriculture,
Age: Kawadgaon,
Tq. Wadwani, Dist. Beed

..PETITIONERS
(Orig.defts.)

VERSUS

1. Akbarali s/o Aabedali,
Age: 48 years, Occu: Agriculture
2. Haiderali s/o Aabedali,
Age: 4 years, Occu: Agriculture
3. Afsarali s/o Aabedali,
Age: 40 years, Occu: Agriculture
4. Muddasirali s/o Mazarali,
Age: 32 years, Occu: Agriculture
5. Mubbashirali s/o Mazarali,
Age: 30 years, Occu: Agriculture
6. Muddabirali s/o Mazarali,
Age: 27 years, Occu: Agriculture
7. Munnajibali s/o Mazarali,
Age: 25 years, Occu: Agriculture

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All are R/o Kawadgaon (Bujurg),
Tq. Wadwani, Dist. Beed.

..RESPONDENTS
(Orig. Plaintiffs)

Mr S. J. Salunke, Advocate for petitioners;
Mr D. P. Deshpande, Advocate for respondents

CORAM : N.W. SAMBRE, J.

DATE : 9th December, 2015

ORAL ORDER :

Respondents-plaintiffs instituted Regular Civil Suit No.24 of 2013 seeking a decree for redemption of mortgage. In the said suit, the respondents filed application Exh.37, under Order VI, Rule 9 of the Code of Civil Procedure for amendment of plaint, thereby seeking relief of declaration, that the sale deeds bearing No.280 of 1957 and 281 of 1957, dated 6th July, 1957 are sham and bogus and not binding on them. The said amendment is allowed by the Trial Court by order dated 17th November, 2014. Thus, the present petition.

2. Learned Counsel appearing on behalf of the petitioner – defendants would urge that although the amendment sought for is allowed by the Court below prior to the commencement of the trial, the same is with an intention to introduce altogether a new case, which is not in tune with the case that was earlier pleaded in the plaint. He would urge that the new case sought to be introduced by virtue of amendment. Same has no cause of action and the cause of action that is already pleaded, cannot be

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considered in support to the amended portion. According to him, challenge to the sale deeds as is sought to be raised by virtue of amendment, has been illegally granted by the Court below without considering the scope of the suit that was already filed.

3. Learned Counsel appearing on behalf of respondents-plaintiffs, while opposing the claim and supporting the order impugned, would urge that since the trial in the suit has not commenced, the Court below was right in granting the amendment, particularly in the matter of challenge to the sale deeds dated 6th July, 1957. Relying upon the judgment of this Court, in the matter of ***Dhanaji Kashinath Shendkar vs. Khemchand S. Chawla & ors.***, reported in **2012 (3) Bom C R 633**, he would urge that such amendment which is necessary for deciding the controversy in the case and which is in tune with the earlier pleadings needs to be granted and according to him, is rightly granted by the Court below. He has prayed for dismissal of the present petition.

4. With the assistance of respective learned Counsel, I have perused the plaint (Exh.1), filed by the respondents herein, in which the cause of action that is pleaded is pursuant to the notice dated 16th January, 2013, which contains attribution only as regards redemption of mortgage and there is no case at all of the plaintiffs as regards the alleged false and bogus sale deeds.

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5. It is upon the written statement filed by the petitioners wherein they have placed on record the registered sale deeds executed pursuant to the permission granted by the revenue authorities, the respondents-plaintiffs have sought amendment in the plaint. Perusal of the application Exh.37, in which the pleadings to be incorporated by virtue of amendment are brought on record, depicts that the petitioners are trying to espouse altogether a new case on new ground with a prayer for setting aside of the sale deeds on the ground of it being executed by misrepresentation and by playing fraud.

6. If the above referred conduct of the respondents-plaintiffs is considered, a case which was not in tune with the originally pleaded in the plaint, is sought to be inserted by questioning the legality and validity of the sale deeds, which was never part and parcel of the original plaint.

7. Paragraph 19 of the judgment of this Court, relied upon by the learned Counsel appearing on behalf of the respondents-plaintiffs, in the matter of Dhanaji Kashinath Shendkar (supra) is required to be taken note of, which reads thus :-

“19 It is well settled that the amendment which is necessitated and is essential on account of subsequent events, must be allowed. All the controversies between the parties to the suit in respect of premises involved in the suit must be allowed to be adjudicated upon and for that purpose the amendment, if necessary, has to be allowed. In the case of Ganesh Trading Co., 1978 (2)

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MANU/SC/0018/1978 : 1978 (2) SCC 91, the Supreme Court has observed thus :

"5. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometimes be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleadings are generally curable if the cause of action sought to be brought out was not *ab initio* completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with.

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It is only if lapse of time has barred the remedy on a newly constituted cause of action that the courts should, ordinarily refuse prayers of amendment of pleadings."

8. In view of above observations, having reached to a conclusion that the case that is sought to be introduced by way of amendment is not in tune with the earlier pleadings, but is altogether a new case, for which no cause of action is pleaded, in my opinion, needs no consideration. The Court below as such, has committed an error in granting application Exh.37 by the order impugned. Thus, the order impugned is not sustainable. Writ Petition thus succeeds. I, therefore, pass following order :-

The order dated 17th November, 2014, passed by Civil Judge Junior Division, Wadwani, below Exh.37, in Regular Civil Suit No.24 of 2013, is set aside. Consequently, application Exh.37 stands rejected.

Writ Petition stands allowed in above terms with no order as to costs.

(N.W. SAMBRE, J.)

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