

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6861 OF 2015

Anil Jayram Mhatre

Petitioner

Vs

Shri Shankar Ganpat Mhatre and
Ors.

.. Respondents

Mr.Niketan Nakhawa, Advocate for the petitioner.

CORAM : R.G.KETKAR,J.

DATE : 16/07/2015

PC:

1. Heard Mr. Niketan Nakhawa, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the order dated 24.3.2015 passed by the learned Civil Judge, Jr. Dn, Uran below Exhibit 72 in Regular Civil Suit No.54 of 2006. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as 'plaintiff', for amending Plaint under Order 6, Rule 17 of C.P.C.
3. In support of this Petition, Mr. Nakhawa strenuously contended that the plaintiff has instituted suit on 30.6.2006 for perpetual injunction restraining the respondents, hereinafter referred to as defendants, from alienating the property in dispute or creating any third interest and also from taking possession of the property in dispute without following due

process of law. It is the case of the plaintiff that on 29.6.2005, defendants no.1 to 10 executed agreement of sale in respect of the property in dispute for a total consideration of Rs. 3,10,000/-. While instituting suit for injunction simplicitor, in paragraph 5 the plaintiff specifically asserted that the plaintiff reserves right to file suit for specific performance as also he has filed separate application along with suit under Order 2, Rule 2 seeking leave to file suit for specific performance.

4. Mr. Nakhawa submitted that on 30.6.2006 the learned trial Judge issued notice to the defendants as to why injunction should not be granted, as prayed, returnable on 7.7.2006. Till that date, the learned trial Judge directed the parties to maintain status-quo. He submitted that ultimately application Exhibit-5 was allowed on 22.12.2006. He submitted that the learned trial Judge restrained the defendants from creating third party interest. Despite that, on 26.8.2008 the defendants executed agreement of sale in favour of proposed defendants no.11 to 13. In view thereof, the plaintiff took out application under Order 6, Rule 17 for amending Plaint for adding defendants no.11 to 13 as specified therein as also for adding paragraphs 5A, 9A, 9AA as also prayers in the suit. By the impugned order, the learned trial Judge rejected the application on the ground that the suit is for perpetual injunction and if the amendment is allowed, it will change the nature of the suit. The learned trial Judge further

held that trial has already commenced as the suit is for cross examination. Mr. Nakhawa submitted that as these developments took place pending the suit, the learned trial Judge ought to have allowed the application for amendment.

5. I have considered the submissions advanced by Mr. Nakhawa. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for perpetual injunction reserving right to file suit for specific performance of agreement of sale dated 29.6.2005. Pending the suit, the application taken out by the plaintiff was allowed on 22.12.2006 restraining the defendants from creating third party interest. It is the case of the plaintiff that despite that the defendants have entered into agreement of sale in favour of the proposed defendants no. 11 to 13 on 26.8.2008. The question is whether the proposed amendment is necessary for determining the controversy raised between the parties and whether it changes the nature of the suit. Having regard to the fact that the defendants have entered into agreement of sale, it cannot be said that there is alienation of the property in dispute. Section 54 of the Transfer of Property Act, 1882 provides that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. That apart, suit is for perpetual injunction and by the proposed amendment the

plaintiff has sought declaration that the agreement of sale is illegal, invalid, null and void and is not binding on the plaintiff. By the proposed amendment, certainly nature of the suit is changed. It is also not disputed that till date the plaintiff has neither amended the plaint seeking relief of specific performance nor has instituted suit for specific performance of contract. In view thereof, I do not find that the learned trial Judge has committed any error. Hence petition fails and the same is dismissed. The observations made herein are only for the purpose of finding out whether the plaintiff has made out a case for amendment of Plaint. The learned trial Judge will decide the suit on the basis of evidence on record in its own merits and in accordance with law, uninfluenced by the observations made therein.

6. It is expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(R.G.KETKAR, J.)