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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5000 OF 2015

Mohammad Ismail Mohammad Yusuf
Age – 52 years, Occ – Business
R/o Kokamthan, Taluka – Kopargaon,
District – Ahmednagar,
Presently residing at
Dhake Colony (Arco Transport)
Jalgaon, Taluka and District – Jalgaon

PETITIONER

VERSUS

1. Changdev Ganpat Bhagwat
Age – 55 years, Occ – Agriculture
2. Sandip Changdev Bhagwat
Age – 32 years, Occ – Agriculture
3. Ganesh Changdev Bhagwat
Age – 29 years, Occ – Agriculture
4. Suresh Changdev Bhagwat
Age – 55 years, Occ – Agriculture

RESPONDENTS

No.1 to 4 R/o Malwadi (Kokamthan)
Behind Jangale Aashram,
A/p Kokamthan, Taluka – Kopargaon,
District – Ahmednagar

5. Sanjay Kashinath Dandawate,
Age – 45 years, Occ – Agriculture
R/o Teen Chari, Kokamthan,
Taluka – Kopargaon,
District – Ahmednagar

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Mr. Zafar M. Pathan, Advocate for the petitioner
Mr. Milind Patil, Advocate for respondents No.1 to 5

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 14th MARCH, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties finally with consent.

2. Regular Civil Suit No.85 of 2015 has been instituted by present petitioner claiming rights to the property concerned in his own right, *inter alia* a will and as such, had been claiming to be in possession. The plaintiff alleged threats to his said possession and instituted the suit claiming permanent injunction against the defendants.

3. The defendants, on appearance, filed their written statement and pointed out that as a matter of fact the rights being claimed by the plaintiff to the suit property are absolutely misconceived and that he himself has sold the property to a firm and as such, the firm is the owner of the property.

4. Subsequently, the petitioner moved an application Exhibit-28 seeking amendment to the plaint making correction in the title clause, he being one of the partners of the firm to which the property has been purportedly sold. The application was resisted by the defendants contending that by very own acts of the

plaintiff it emerges that the plaintiff has no title to the suit property. The application is *mala fide* and that with the amendment sought the suit would undergo alteration.

5. The trial court, under its order dated 21st April, 2015 rejected the request observing that the amendment, if allowed would undergo conversion from a suit by plaintiff in his individual capacity into a suit by and on behalf of a firm and as such, there would be change in the nature of the suit.

6. Learned advocate for the petitioner contends that it cannot be denied that the erstwhile plaintiff had been a partner of the firm, who has been managing affairs of the firm. In the course of time, while exigency had arisen to institute the suit, it has slipped out of his memory that the property had been dealt with by him in favour of the firm, wherein also he is a partner. He further refers to that it cannot be denied that in either capacity he claims to be in possession of the suit property and as such, the suit for injunction can be maintainable. The change being brought about under the amendment is an effort to bring the suit in compliance with the legal procedural requirements. He submits that the main texture and structure of the suit being injunction would hardly change and as such, the apprehension

entertained by the trial court upon submissions of the defendants is misconceived and untenable. He submits that as yet the suit has not ripened for evidence and the Supreme Court and High Courts have all along considered that approach to an application for amendment should be liberal. He submits that as far as relief claimed against the defendants is concerned, it would not undergo any change. It would continue to be of injunction and no prejudice in the circumstances can be said to have been caused to the defendants' case in that matter. According to his submissions, in the present case possession would be the primary matter. He further refers to that the plaintiff had relied on various citations which have been referred to by the trial court in the impugned judgment. However, the spirit and ratio under the same appears to have been missed out while deciding the application for amendment.

7. Mr. Milind Patil, learned advocate for the respondents – defendants vehemently submits that the impugned order had been rightly passed. The whole basis of the suit undergoes change if amendment as sought is allowed. He submits that there are lot of avenues open for the plaintiff, even under the procedure. He may institute a fresh suit through the firm and / or he may withdraw the suit with liberty to institute a fresh suit

on the same cause of action. According to him, since the original plaintiff had no title to the suit property on the date of the suit, the suit could not have been maintained and the situation could have been continued even up to the end of the suit. He submits that the application has been moved *mala fide* in order to cause prejudice to the interest of the defendants. It is being submitted that the defendants are in possession of the suit property.

8. After having considered the submissions on behalf of the learned advocates for the parties, it ought to be seen that the suit is yet to reach the stage of evidence. Issues do not appear to have been framed as yet. The approach to amendment application generally will have to be liberal. In the present case, it cannot be gainsaid that the plaintiff who had originally instituted the suit for injunction claims to be in possession of the property with reference to certain rights to the suit property and as such, claims simplicitor injunction against the defendants, who allegedly were causing obstruction and hindrance to his possession. It is also not denied that the plaintiff is partner of the firm to which the property has been sold by him. The other partner, who according to learned advocate Mr. Patil is not before the court has not shown any interest in the suit and has not filed any application in this respect, is of little significance as far as

present matter is concerned. It is not denied that he is also a partner of the firm. An application has been moved by a partner of the firm for amendment. In the circumstances, a corrective action pursuant to the factual position emerges wherein the original plaintiff who is partner of the firm appears to be interested. Any deficiency, discrepancy, defect or lacunae emerges on allowing the amendment, those would have to be dealt with in accordance with facts and law.

9. In the circumstances, looking at that a suit otherwise could have been maintained by the plaintiff in his capacity as a partner, the plaintiff claims to be in possession of the property. If it is brought to the notice that the circumstances refer to that they are little different than what has been contended and corrective action at appropriate stage has been taken instead of relegating the petitioner to follow procedure of withdrawal of suit or for that matter filing a fresh suit, the defendants having considered that the very property was sold by the plaintiff to a firm wherein he is a partner, in this case, the amendment may not be said to change nature of the suit and as such, the application deserves a proper treatment, according to the principles of justice, equity and good conscious. However, cost of Rs.10,000/- is imposed on the petitioner. The costs be paid to

the defendants. The costs be deposited in the trial court within a period of four weeks from the date of receipt of writ of this order to the trial court. If the amount of costs is not deposited within stipulated period, this order should be deemed to have been recalled. Upon amendment it is open for the parties to agitate such points as are are advised in accordance with facts and law.

10. Writ petition, as such, stands allowed in terms of prayer clause “B”. Application Exhibit-28 stands allowed. Rule is made absolute accordingly. Suit be proceeded with accordingly.

[SUNIL P. DESHMUKH, J.]

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