

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

WRIT PETITION NO. 8851 OF 2010

Shri. Vishnu Vaman Gharat & Ors.	... Petitioners
V/s.	
Rasna Randhir Behel & Ors.	... Respondents

Mr. Jayesh Joshi for the Petitioner.
None for the Respondents.

**CORAM : K. K. TATED, J.
DATED : 09/06/2016**

PC.:

. Heard learned Counsel for the petitioner. None for the Respondents, though duly served.

2 By this Petition, the petitioners third party challenges the order dated 08.07.2010 passed by Civil Judge, Senior Division, Alibag below Exh. 39 in Special Civil Suit No. 57 of 2007 allowing Respondent No.1/Plaintiff's application under Order VI Rule 17 of Code of Civil Procedure, 1908 to carry out amendment in the plaint of Special Civil Suit No. 57 of 2007.

3 For the sake of convenience the nomenclature of the parties will be referred as before the Trial Court i.e. Petitioners are newly added Defendant Nos. 2 to 10, Respondent No.1 is plaintiff, Respondent No.2 is Defendant and Respondent No.3 is added Defendant No.11.

4 Few facts of the matter are as under:

a) In the present proceeding, the plaintiff filed Special Civil

Suit No. 57 of 2007 in the Court of Civil Judge, Senior Division, Alibag for Specific Performance of Agreement for Sale dated 21.12.2006 in respect of suit property i.e. land admeasuring 67.5 R from Gat No. 986 (Original survey No. 346 Hissa No.2/2).

b) In that suit, defendant filed his written statement and disclosed that added defendants have filed Regular Civil Suit No. 39 of 2008 in the Court of Civil Judge, Junior Division, Alibag at Raigad for partition and separate possession of HUF property including the suit property. In the present proceeding i.e. Special Civil Suit No. 57 of 2007 on the basis of written statement the plaintiff preferred an application under order VI Rule 17 of Code of Civil Procedure, 1908 for carrying out amendment for adding Petitioners as defendants in Special Civil Suit No. 57 of 2007 and for setting aside the judgment and decree passed by Civil Judge, Junior Division Alibag in Regular Civil Suit No. 39 of 2008.

c) Being aggrieved by the said order, the petitioners/proposed defendants preferred the present Writ Petition.

4 The learned counsel Mr. Jayesh Joshi appearing on behalf of Petitioners/proposed defendants submits that the Court below erred in coming to the conclusion that plaintiff made out a case under Order VI Rule 17 for amending the plaint in Special Civil Suit No. 57 of 2007 by adding petitioners as defendants and also additional prayer clause for setting aside decree passed by Civil Judge, Junior Division, Alibag Dist. Raigad in Regular Civil Suit No. 39 of 2008. He submits that the original suit was for specific performance of agreement for sale. By carrying out amendment, plaintiff wants to set aside the decree in

Regular Civil Suit No. 39 of 2008 on the ground of fraud. He submits that issue in Regular Civil Suit as well as proposed amendment is altogether different. He submits that if plaintiff is allowed to carry out amendment as per impugned order dated 08.07.2010 passed by the Trial Court, irreparable loss and injury will be caused to the petitioners/proposed defendants. He submits that for setting aside the judgment and decree on the account of fraud, plaintiff has to make out a case of fraud. He submits that in the present proceeding the original suit was for specific performance of agreement and by way of amendment, the plaintiff wants to convert the same for setting aside the decree in Regular Civil Suit No. 39 of 2008. He submits that proposed amendment would change the nature of the suit and it would convert the suit into the one under the suit for title. He submits that these facts were not considered by the Trial Court and hence, impugned order dated 08.07.2010 is required to be set aside.

5 I heard learned counsel for the petitioners/proposed defendants at length. Though the respondents are duly served, no one appeared on behalf of them when the matter was called out.

6 There is no dispute that in the present proceeding the plaintiff filed Special Civil Suit No. 57 of 2007 for specific performance of agreement for sale dated 21.12.2006 executed by the Defendant no.2 in her favour in respect of suit property i.e. for enforcement contract between the plaintiff and defendant. By way of amendment, plaintiff seeks to challenge the judgment and decree in Regular Civil Suit No. 39 of 2008 by which HUF property was divided between coparceners. In

any case, that judgment and decree cannot be set aside in the suit which was originally filed by the plaintiff for specific performance by allowing the amendment. Trial Court permitted the plaintiff to convert the suit into one under the suit for title.

7 Considering this fact, I am of the opinion that impugned order is required to be set aside.

8 Hence, following order is passed:

i) Writ Petition is allowed in terms of prayer clause (a), which reads thus:

“a) This Hon'ble Court be pleased to issue writ certiorari and/or any other writ, order or direction in the nature of certiorari and thereby be pleased to quash and set aside the Judgment and Order dated 08.07.2010 passed by the learned Civil Judge, Senior Division, Alibaug, below Exh.39 in Special Civil Suit No. 57 of 2007 being Order at Exh. “G” to this Petition.”

ii) The hearing of Special Civil Suit No. 57 of 2007 is expedited.

iii) No order as to costs.

(K.K.TATED, J.)