

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

**WRIT PETITION NO. 4578 OF 2016**

Siddiqui Bhai Ahmad Bhai Modi,  
Age 56 years, Occupation Business,  
R/o Near S.T. Stand, Sailu Tal. Sailu  
Dist. Parbhani.

...Petitioner

VERSUS

1. Raviraj Ashokrao Deshmukh,  
Age 30 years, Occupation Agriculture,  
R/o Parbhani Tal. Dist. Parbhani.
2. Rajesh Limbajirao Dudhgaonkar,  
Age 38 years, Occupation Business,  
R/o Parbhani Tal. Dist. Parbhani.
3. Pratap Kishanrao Kachave,  
Age 22 years, Occupation Agriculture,  
R/o Daithana Tal. Dist. Parbhani.
4. Panjabrao Uttamrao Shinde,  
Age 42 years, Occupation Agriculture  
and Business, R/o Sanpuri Tal. Dist.  
Parbhani.
5. Khamisa Gulam Mohd. S. Hussain,  
Age 50 years, Occupation Business,  
R/o Hotel Madani, Grand Corner,  
Parbhani Tal. Dist. Parbhani.

...Respondents

Mr. P. P. Mandlik, Advocate for petitioner.  
Mr. M. P. Kale, Advocate for respondents No.1 to 4.  
Mr. N. S. Tekale, Advocate for respondent No.5.

**CORAM : SUNIL P. DESHMUKH, J.**

**DATE : 1<sup>st</sup> SEPTEMBER, 2017**

**ORAL JUDGMENT :**

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

2. Present writ petition is moved against an order passed by trial court dated 23-2-2016 upon an application exh.45 filed by present petitioner/ defendant No.1 in Special Civil Suit No. 2 of 2015 pending before Joint Civil Judge, Senior Division, Parbhani.

3. Special Civil Suit No. 2 of 2015 has been filed by present respondents No.1 to 4 as plaintiffs for specific performance of contract or in the alternate to refund of earnest amount along with interest in respect of contended transaction. It appears that in paragraph No.11 reference has been made to position about respondents No.1 to 4 and present respondent No.5/ defendant No.2 having entered into an agreement referred to as partnership

which is claimed to have been a notarized transaction. Pursuant to the same it appears that, the persons concerned had acted in furtherance of the same and have purportedly entered into transaction with present petitioner/ defendant No.1 in the suit in respect of purchase of land. It appears that, however it is contended, petitioner did not appear to keep up the transaction and as such an occasion had arisen to initiate proceedings against present petitioner by the persons who had entered into contended notarized transaction. While it is being referred to that present respondent No.5/ defendant No.2 had not been responding and since the partnership firm had not been registered one, the suit had been instituted in the individual capacities of the persons as plaintiffs and respondent No.5 had been arrayed as defendant No.2 therein. This has been dealt with and resisted by present petitioner under his written statement and say to Special Civil Suit No.2 of 2015 as in paragraph No.2 at page No.23.

4. It is contended in the same that since partnership firm is not registered, a suit pursuant to Section 69 of Partnership Act by plaintiffs has been precluded and suit is not maintainable. While the issues were framed, it appears that pursuant to the pleadings as appearing, issue with respect of aforesaid did not figure in the

list of issues dated 10-4-2015. An application exh.45 had been moved by defendant No.1/ present petitioner for said purpose. Said application had been resisted by plaintiffs referring to that plaintiffs had already adduced evidence and that petitioner/ defendant No.1 does not have *locus standi* to file such an objection as he is not party to transaction of so called partnership. The terms of agreement are not touching to the business of partnership and as such the same had been dealt with.

5. While considering the application exh.45, learned judge has in fact referred to in paragraph No.5 of the order, the requirements for framing issues under Order XIV, Rule-1 of Civil Procedure Code and till then had been aware of the requirements for framing issues are that each material proposition of fact or law when affirmed by one party and denied by other would give rise to issue. However, subsequently it appears that the court had fallen apart from such consideration as it went on to consider that the plaintiffs had not come to the court as partners of the partnership firm and have come in their individual capacity, as parties to the agreement with defendant No.1 and had claimed alternate relief and since defendant No.2/ respondent No.5 had not been available for filing the suit, he has been made as a party defendant.

6. Learned judge then purportedly considered that plaintiffs had referred to about the partnership of plaintiffs and defendant No.2 *interse* and had not pleaded that they are partners of the firm. It appears to have been considered by the court that it is not pleading of the plaintiff that they are partners of the firm and the suit filed by partnership firm. From agreement, it appeared to the court that the plaintiffs and defendant No.2 / present respondent No.5 had entered into agreement of purchase of suit land with defendant No.1 describing their shares in said land. It had further being referred to that after purchase of the property partnership would come to an end.

7. Learned judge further purportedly considered that a single transaction would not amount to business and a continuous business is expected. Thereafter, court considered Section 69 of the Partnership Act and purported to reject Exhibit 45. The considerations which apparently had weighed with the court while dealing with application exh.45 appear to have been digressed with the consideration which are required to be taken into account while framing issues.

8. Perusal of the order also shows that the court has been

oblivious of the resistance to the maintainability of the suit by defendant No.1/ present petitioner on the ground that the plaintiffs have pleaded about partnership and the partnership has not been registered, a suit by such partners of the plaintiff is not maintainable. It is rather otiose to refer to that for framing of issues what is germane to be considered requirements under Order XIV, Rule-1 of Civil Procedure Code, however, considerations which have overwhelmed the learned judge while deciding application Exhibit 45 appear to be apart from the ones referable to Order XIV, Rule-1 of Civil Procedure Code.

9. In the circumstances, it appears to be expedient to refer the matter back for reconsideration of Exhibit 45 afresh by letting opportunity to the parties concerned to address properly on the the request made under exh.45. As such the writ petition succeeds and stands allowed. The impugned order dated 23-2-2016 is set aside. Exhibit 45 stands restored for reconsideration afresh by giving opportunity to the parties concerned.

10. It is made clear that observations made under this order and under the order on exh.45 by learned trial judge are observations in interlocutory proceedings and those shall not influence decision

making on Exhibit 45 and even while deciding the suit. After decision on Exhibit 45, it is expected that suit would be proceeded with expeditiously.

**( SUNIL P. DESHMUKH, J.)**

vjg/-