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

**WRIT PETITION NO.603 OF 2010
WITH
CIVIL APPLICATION NO.1397 of 2011
AND
CIVIL APPLICATION NO.4653 of 2017
IN
WRIT PETITION NO.603 OF 2010**

Muniroddin Sharifoddin Kavijang
alias Jahagirdar, Age : 65 years,
Occu: Agril and Business,
R/o Mangal-gate Haveli,
Ahmednagar, Dist. Ahmednagar

..PETITIONER

VERSUS

1. Karimoddin Ajimoddin Jahagirdar
alias Kavijang, Age: Major,
Occu: Agril.
2. Ajimoddin Karimoddin Jahagirdar
alias Kavijang, Age: Major,
Occu: Agril.
3. Rafiyoddin Karimoddin Jahagirdar,
alias Kavijang, Age: Major,
Occu: Agri.
4. Shamshodin Karimoddin Jahagirdar,
alias Kavijang, Age: Major,
Occu: Agri.
5. Farida Begum Shafiyoddin Jahagirdar,
Age: Major, Occu: Household
6. Smt. Ajagari Begum Sayyed Rasul,
Age: Major, Occu: Household
7. Sau. Rashida Begum Shaikh Sadik,
Age: Major, Occu: Household

R.Nos.1 to 7 R/o. Savedi, Ahmednagar,
Dist. Ahmednagar

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8. Shri Satish Mohanrao Patil,
Age: Major, Occu: Service,
R/o Kurdu-wadi, Tal. Mandha,
Dist. Solapur
9. Smt. Mahajbin Inayatkhan,
Age: Major, Occu: Household,
R/o Gulmohar Road, Savedi,
Ahmednagar
10. Nisar Ahmed-Fakhroddin Shaikh,
Age: Major, Occu: Business,
R/o Gulmohor Road,
Savedi, Ahmednagar
11. Shri Revnath Sarangdhar Shete,
Age: Major, Occu: Agril.
12. Smt. Pratibha Revnath Shete,
Age: Major, Occu: Household,

Nos.11 and 12 R/o Machhi Building,
Maliwada, Ahmednagar
13. Shaikh Juber Nisar Ahmed,
Age: Major, Occu: Business,
R/o Sarjepura, Ahmednagar
14. Darshanlal Hargovind Oberoi,
Age: Major, Occu: Business,
No.14 R/o Vasant-Tekadi,
Gulmohor Road, Ahmednagar
15. Santosh Darshanlal Oberoi,
Age: Major, Occu: Business,
R/o Vasant Tekdi, Gulmohor Rd.,
Ahmednagar
16. Mrs. Sultana Liyakat Kazi,
Age: Major, Occu: Household,
R/o Karjat, Tal. Karjat,
Dist. Ahmednagar
17. Altaf Ibrahim Shaikh,
Age: Major, Occu: Zendi-gate,
Ahmednagar

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18. Captain K.K.V.Warren,
Age: Major, Occu: Business,
R/o Near Military Dairy,
Farm, Bhingar,
Tal. & Dist. Ahmednagar
19. Yamunabai Bhimraj Wakale,
Age: Major, Occu: Agril.
20. Shankar Bhimraj Wakale,
Age: Major, Occu: Agril.
21. Suresh Bhimraj Wakale,
Age: Major, Occu: Agril.
22. Satabhama Marutrao Sherkar,
Age: Major, Occu: Agril.
23. Shards Ganpatrao Kardile,
Age: Major, Occu: Agril.
24. Meera Banshi Lande,
Age: Major, Occu: Agril.
25. Kalpana Narayan Bhalsing,
Age: Major, Occu: Agril.
26. Kisan Baburao Wakle,
Age: Major, Occu: Agril.
27. Ambadas Baburao Wakle,
Age: Major, Occu: Agril.,
19 to 27 R/o Savedi,
Ahmendagar
28. Mir Shafiyoddin Mir Karimoddin,
Kavijang @ Jahagirdar,
Age: Major, Occu: Agril.,
R/o Mangal Gate Haveli,
Ahmednagar
29. Syed Husen Amir,
Age: Major, Occu: Business,
R/o Sarjepura, Ahmednagar
30. Syed Shafi Husen,
Age: Major, Occu: Business,
Sarjepura, Ahmednagar

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31. Shaikh Sham Mohammad Gulabbhai,
Age: Major, Occu: Business,
R/o Gulmohar Road, Ahmednagar
32. Gulmohammad Umarkhan,
Age: 65 years, Occu: Agril.,
R/o Mangal Gate Haveli,
Ahmednagar
33. Pashamiya Nasiruddin Shaikh,
Age: 72 years, Occu: Business & Agril.,
R/o 180 Bhavani Peth, Pune

..RESPONDENTS

Mr R. R. Mantri, Advocate for petitioner;
Mr A. V. Hon, Advocate for respondent Nos.2 & 28
Mr R. F. Totala, Advocate holding for Mr B. M. Kate, Advocate for
respondent No.32

CORAM : NITIN W. SAMBRE, J.**DATE : 16th November, 2017****ORAL ORDER:**

By the present petition, petitioner-plaintiff questions the order passed by 5th Joint Civil Judge, Senior Division, Ahmednagar, below Exh.283 in Regular Civil Suit No.748 of 2000, for partition and separate possession/separation of shares, whereby prayer for transposition of defendant Nos.32 and 33 as plaintiffs came to be allowed and original plaintiff is ordered to be transposed as defendant.

2. So far as hearing of the petition on merits is concerned, it is to be noted that the petition is pending admission since 2010, which prompted this Court to take up the matter at this stage for final disposal, as the suit is stayed for last seven years.

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3. Heard Mr Mantri, learned Counsel appearing on behalf of petitioner-plaintiff. According to him, petitioner being original plaintiff is the master of the suit. It always lies with him how to pursue the suit in a manner, to his comfort. Terms on which plaintiff to conduct the suit is not at the direction of the respondent, but in accordance with legal provisions. He would urge that, just because there is delay in paying the deficit Court fees cannot be inferred to mean that the petitioner-plaintiff has no genuine desire to pursue the suit on merits. He submits that the petitioner has every desire and intention to pursue the suit on merits. He would then urge that the transposition of the plaintiff as a defendant as ordered was neither a prayer made by the petitioner nor by the defendants. However, the Court on its own allowed such relief.

4. Mr Mantri would then invite attention of this Court to the family tree in which Ajimoddin was common ancestor and various litigations between the legal representatives of said Ajimoddin, who have instituted various suits which are decided/withdrawn, etc. He would also urge that the said proceedings would act as *res judicata qua* the claim put-forth by defendant no.32.

5. According to Mr Mantri, the said aspect is not examined by the Trial Court on merits and the fact remains that defendants no.32 and 33 have denied the claim of the petitioner in the plaint and as such they cannot be transposed as plaintiffs. He submits that the order impugned, therefore, is not sustainable.

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6. Per contra, learned Counsel appearing on behalf of legal heirs of original defendant no.32 Gul Mohammad would urge that the present defendants have every right to raise contradictory plea in defence, which are required to be ascertained and evaluated at the time of deciding the suit. He would then urge that the same will not be an impediment in the right of the defendants to get themselves transposed as plaintiffs, as in the suit, no relief in favour of the present respondents concerning their right was claimed to be awarded. He submits that the consequence of the litigation inter se between the legal representatives of Ajimoddin will be gone into and decided at an appropriate stage. He submits that once the Trial Court before whom the original record is available has derived therefrom that the petitioner-plaintiff is not seriously pursuing the matter, the same weighed before the Trial Court for permitting transposition. He sought dismissal of the petition.

7. It is informed that original defendant no.33 has died but his legal representatives are not brought on record. As such, the petition abates against him.

8. If the submissions of the rival parties are evaluated, it is required to be noted that a specific plea is raised by original defendants who sought their transposition, that the plaintiff has sold property which is more than the share that he sought. Apart from above, according to them, for a considerable time and though repeatedly opportunity was given, the plaintiff has failed to pay deficit court fees, which circumstances weighed

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before the Trial Court for ordering transposition.

9. Just because the pleadings in defence were raised denying the claim in the plaint, that *ipso facto* would not come in the way of the present respondents to seek transposition as ordered, for the reason that it is always open for the defendants to explain their position while pursuing the suit in question.

10. So far as the effect of dispute *inter se* between the legal representatives of Ajimoddin is concerned, the effect thereof on merits of the suit, particularly tenability, would be gone into and decided by the Trial Court at appropriate stage.

11. In view thereof, no fault could be noticed in transposition of original defendants no.32 and 33 as plaintiffs as ordered.

12. So far as order of transposition of plaintiff as defendant is concerned, considering the fact that there was no prayer on the part of the plaintiff or the defendant to that effect. Instead of deciding the said issue here, liberty is granted to the original plaintiff to take out appropriate proceedings before the learned Trial Court claiming liberty to continue the suit at his behest as plaintiff. If such application is moved by the petitioner-plaintiff, the Trial Court shall deal with the same, having regard to the fact that there was no prayer for his transposition as defendant and upon consideration of his *bona fides* to pursue the suit.

(8)

With above observations, writ petition stands dismissed.

In view of dismissal of petition, Civil Application No.1397 of 2011 does not survive and accordingly stands disposed of.

(NITIN W. SAMBRE, J.)

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