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

WRIT PETITION NO.12645 OF 2017

Shri. Rajgonda Bhimgonda Patil	...	Petitioner
V/s.		
Sambhaji Bapuso Mali and		
ors	...	Respondents

Mr. Manoj A. Patil, for the Petitioner.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 20th MARCH, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner.
- 2] By this petition, filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 31.08.2017, passed by the 4th Joint Civil Judge Senior Division, Kolhapur, below Exh.93 in Special Civil Suit No.192 of 2008.
- 3] Application at Exh.93 was filed by the respondent-plaintiff to delete the name of defendant Nos. 1 to 8 from the plaint under Order I Rule 10 of the Code of Civil Procedure.
- 4] Respondent has filed the present suit for specific performance of the contract, in which defendant Nos 1 to 8 were joined as legal heirs of deceased Bhimgonda Ramgonda Patil, who was

the original owner of the property and who has executed agreement of sale. Thereafter deceased Bhimgonda Ramgonda Patil had executed a Will dated 16.12.2002, in favour of defendant No.9. It is admitted fact that on the basis of the said Will, defendant No.9 has obtained the probate. In view thereof, plaintiff is now seeking relief of specific performance of contract against defendant No.9.

5] The trial Court has, after considering the definition of “legal representative” as given in section 2(11) of the Code of Civil Procedure, held that, if according to the plaintiff, defendant No.9, being the executor of the Will of the deceased, can properly represent the interest of the deceased in the suit property, the plaintiff need not continue his suit against defendant Nos. 1 to 8, who are the legal heirs of the deceased. It was held that, it is entirely the choice of the plaintiff as to against whom he should seek relief. He, being the dominus litus, he has right to decide which party is necessary or proper party to the suit, and therefore, if the plaintiff is deleting the names of defendant Nos. 1 to 8, at his own risk and peril, then petitioners should have no grievance about the same.

6] While challenging this order of the trial Court, the submission of learned counsel for the petitioners is that the petitioners can be proper party, if not necessary party. In support of this submission, learned counsel for the petitioners has relied upon

the judgment of this Court in the case of *Adam A. Sorathia and another -vs- Municipal Corporation of Greater Bombay and another* [2001 (3) Mh. L.J. 288] and the judgment of Hon'ble Apex Court in the case of *State of Assam -vs- Union of India & Ors* [2011 ALL SCR 1754], to point out the distinction between the necessary party and proper party. According to him, the presence of proper party may assist the Court for complete and effectual adjudication of the dispute, as held in both these judgments. Therefore, according to him as the presence of the petitioners may be necessary for complete and effectual adjudication of the suit, in this case the deletion of their names should not have been permitted by the trial Court.

7] However, as already held by the trial Court, it is the plaintiff, who being the dominus litus, has right to decide, which party is necessary or proper party to the suit. Plaintiff is doing this at his own risk. Whether the presence of these petitioners is necessary for complete and effectual adjudication of the dispute as plaintiff is not claiming any relief against them, is for the trial Court to decide.

8] Here the plaintiff has joined present defendant Nos 1 to 8 being the legal heirs of deceased Bhimgonda Patil and now defendant No.9 having obtained the probate of the Will, plaintiff has considered it proper to claim relief against defendant No.9 only, and therefore, petitioners should not have any grievance.

9] In my considered opinion, if for non joinder of proper party, the suit is not barred, it is for the trial Court to decide whether the presence of the petitioners is necessary as proper party. The trial Court has already considered this aspect. In my considered opinion, therefore, no interference is warranted in the impugned order passed by the trial Court.

10] The Writ Petition being without merit, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]