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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

WRIT PETITION NO.5504 OF 2018

1. Shri Prabhakar s/o Domaji Shastri,
Aged about 65 years,
Occupation : agriculturist.

2. Shri Gangadhar s/o Domaji Shastri,
Aged about 59 years,
Occupation : agriculturist.

3. Shri Manohar s/o Domaji Shastri,
Aged about 53 years,
Occupation : agriculturist,
All r/o Village Fetri, taluka and district
Nagpur.

..... **Petitioners.**

:: VERSUS ::

Sau.Shakuntala w/o Devendra
Mire, aged about 78 years,
Occupation : household,
Represented by power of
Attorney Holder Shri Yogendra
s/o Devendra Mire,
R/o plot No.212, Near Gandhi
Statue, old Shukrawari, Sakkardara
Road, Hanuman Nagar, Nagpur-09.

..... **Respondent.**

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Shri N.D.Khamborkar, Counsel for Petitioners.
Shri K.P.Mahalle, Counsel for the Respondent.

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CORAM : **V.M.DESHPANDE, J.**
DATE : **JANUARY 21, 2021**

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ORAL JUDGMENT

1. Heard learned counsel Shri N.D.Khamborkar for petitioners and learned counsel Shri K.P.Mahalle for the respondent. **Rule.** Rule is made returnable forthwith. Heard finally by consent of learned counsel for parties.

2. Challenge set up in this writ petition under Article 227 of the Constitution of India is to order dated 22.3.2018 passed by learned 16th Joint Civil Judge Senior Division, Nagpur below Exhibit 59 in Special Civil Suit No.56/2015 whereby learned Judge below dismissed the application for amendment of the plaint.

Facts giving rise to the writ petition are as under:

3. Domaji Balaji Shastri who died on 21.8.1992 was having three wives. All his wives are now no more. First wife Gayabai pre-deceased him. Domaji was not having any issue from wedlock of Gayabai. Second wife Sonabai, is mother of present respondent Shakuntala Mire. Petitioners are sons begotten to deceased Domaji through his third wife Sakhubai. At the time of

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death of Domaji, he left behind him Sonabai and Sakhubai as his widows.

4. Petitioners (hereinafter referred to as, 'plaintiffs') filed a suit against their stepsister Shakuntala for declaration and permanent injunction. For decision of this writ petition, paragraph No.2 of the plaint has its own importance and, therefore, it is reproduced herein under:

“That Late Shri. Domaji Balaji Shastri during his life time owned many ancestral agricultural fields at different villages within Nagpur District including Agricultural field at village Fetri, Tah. & Dist. Nagpur bearing S. No.89, P.H. No.4 which admeasures 3.20 hecets. The plaintiffs No.1 to 3 being sons of Late Shri Domaji Balaji Shastri were coparceners with their father Late Shri Domaji Balaji Shastri of the Ancestral Agricultural fields owned by Late Shri Domaji Balaji Shastri.”

The case of plaintiffs is that Domaji executed registered partition amongst themselves on 18.2.1972 which is duly registered with the Sub Registrar Nagpur and ancestral agricultural fields owned by late Domaji were partitioned amongst himself and plaintiffs. In the said partition, Domaji received his

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share in agricultural field survey No.89, PH.No.4 admeasuring 3.20 hecters situated at mouza Petri, tahsil and district Nagpur amongst others. According to the plaint, the said agricultural field is the suit property. According to plaintiffs, Domaji, before his death, executed a Will on 17.5.1992 and bequeathed the suit property in favour of plaintiffs.

5. It appears from the plaint that after mutating names of plaintiffs, the respondent (hereinafter referred to as, 'the defendant') raised an objection with revenue authorities and, therefore, a suit was filed seeking declaration that they became owners by virtue of Will dated 17.5.1992. The said suit was registered as Regular Civil Suit No.291/2014 (New No.56/2015).

6. On being summoned, the defendant appeared and filed her reply to the application for grant of temporary injunction since application under Order XXXIX Rules 1 and 2 was also filed by plaintiffs along with the plaint. The reply was treated as written statement and in that she also filed a counter claim for

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declaration, permanent injunction, partition, and separate possession.

7. During course of hearing of this writ petition, across the Bar, it was stated that application filed on behalf of plaintiffs for grant of injunction was rejected and the same could be seen from order dated 23.3.2015 which is filed by the respondent along with her submissions. No appeal was carried. There is nothing on record to show that plaintiffs questioned correctness of the order passed by learned Judge below who rejected the application for temporary injunction.

8. Be that as it may, according to learned counsel for plaintiffs, when affidavit on behalf of plaintiffs in lieu of examination-in-chief was under preparation, it was noticed that pleadings require amendment and, therefore, plaintiffs filed application (Exhibit 59) for amendment. Paragraph No.1 of the said application for amendment is as under:

That, the matter is fixed for filing of affidavit today and while drafting an affidavit it was

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noticed that in page no.2 of the plaint it is wrongly mentioned that property situated at Fetri S.No.89 P.H.No.4 admeasuring 3.20 Hectors is an ancestral property but further it is his self acquired property and not the ancestral property and hence plaintiffs pray that word 'many ancestral agricultural fields of different villages within Nagpur district including agricultural field of village Fetri Tq. and Distt.Nagpur' be deleted and it be replaced by "Late Domaji was owing single ancestral agricultural property of Borgaon and property situated at mouza Fetri S.No.89, P.H.No.4 is his self acquired property."

Thus, according to the amendment application, the suit property is self acquired property of Domaji.

9. The application for amendment was contested. Thereafter, learned 16th Joint Civil Judge Senior Division, Nagpur passed order impugned on 22.3.2018.

10. According to submissions of learned counsel Shri N.D.Khamborkar for plaintiffs, the Court has erred in rejecting the application inasmuch as according to him, the Court committed a mistake in reaching to conclusion that proposed amendment is not necessary for determining the question and controversy between

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parties. It is also his submission that pleadings, which are sought to be amended, if allowed, the amended pleadings will not change nature of the suit. He, therefore, prays that the writ petition be allowed by setting aside the impugned order.

11. *Per contra*, learned counsel for the defendant supported the impugned order. It is his submission that if amendment is permitted to be allowed, in fact it will be the permission to plaintiffs to reconcile from admission given in unamended pleadings and the said will cause serious prejudice to the defendant. He relied upon decisions in cases of :

(1) Revajeetu Builders & Developers vs. Narayanaswamy & Sons & Ors, reported at 2009(6) ALL MR 986 (S.C.),

(2) Gautam Sarup vs. Leela Jetly & Ors, reported at 2008 ALL SCR 1678.

Learned counsel, therefore, submitted that the writ petition is required to be dismissed.

12. I have already reproduced original pleadings in this judgment as found in paragraph No.2 of the plaint. From the

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same, it is clear that plaintiffs approached to the Court claiming that the suit property originally was ancestral property of their predecessor in title deceased Domaji whereas in the application for amendment, plaintiffs submitted that the suit property is self acquired property of deceased Domaji. Thus, plaintiffs is changing the nature of the suit property.

13. The defendant filed a counter claim in which amongst others she has demanded decree of partition. The course to decide the suit will be altogether different. If the suit property is self acquired, as sought to be pleaded in the amendment application, then it was open for Domaji to execute Will bequeathing entire share to plaintiffs. Of course, it will be always open for the defendant to set up a challenge to the said Will and since plaintiffs alone are beneficiaries of the Will especially when at the time of death of Domaji his two wives were also alive and nothing is given to them. Therefore, burden will be always on plaintiffs to dispel all circumstances which can be set up against the same Will.

14. I have no doubt in my mind that plaintiffs approached to the Court with a specific case that the suit property is ancestral property and in amendment application they say that it is self acquired property. Thus, in fact, plaintiffs want to resile from the admission given in their pleadings about nature of the suit property. Thus, altogether a new case is sought to be introduced by the amendment.

15. The jurisdiction of this Court under Article 227 of the Constitution of India can be exercised only if it is pointed out to the Court that the Court below has exceeded jurisdiction vested in it and/or there is a miscarriage of justice which is apparent on the face of record.

16. After examining the impugned order, it is clear that before determining the issue as to whether the amendment should be granted or not, learned Judge formulated a point also and then reached to conclusion that that the application requires rejection.

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17. Upshot of the above discussion, leads me to pass following order:

ORDER

(1) The writ petition is dismissed.

(2) The Order dated 22.3.2018 passed by learned 16th Joint Civil Judge Senior Division, Nagpur below Exhibit 59 in Special Civil Suit No.56/2015 is upheld.

(3) Needless to mention that observations made in this writ petition are only for decision of the present writ petition.

Rule is discharged.

JUDGE

!! BRW !!

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