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

CIVIL WRIT PETITION NO. 7123 OF 2017

RAJARAM ARJUN LIMBOLE AND ANR

....PETITIONERS

V/s.

KISAN BHANUMAL MAKHIJA AND ORS

.....RESPONDENTS

Mr. Shrishail Sakhare for the petitioners

Mr. Sachinkumar P. Rajepandhare for respondent nos. 2 to 4

CORAM : NITIN W. SAMBRE, J.

DATE: JANUARY 10, 2022.

P.C.:

1] Plaintiff to Special Suit No. 217/2000 moved an application for amendment, after the Ex-parte Judgment and Order dated 18/06/2021 was set side on 09/04/2015, which prayer is rejected vide impugned order dated 05/05/2017 on the ground that amendment changes the nature of claim in the Suit.

2] Learned counsel for respondent-defendant Mr. Rajepandhare would oppose the claim for grant of amendment on the ground that trial in the Suit has already reached at an advance stage as the

evidence of Plaintiff is already recorded. He would further claim that if the amendment is granted, same will give rise to unnecessary complications in the Suit proceedings.

3] I have considered submissions.

4] For want of presence of respondent-defendants, Suit was initially Ex-parte decreed. Vide Judgment and Order dated 09/04/2015, Appellate Court remanded the matter back to the trial court. At this stage i.e. immediately after remand, Petitioner-Plaintiff took out Application Exh. 35 under Order VI Rule 17 of the Code of Civil Procedure, 1908. When the Application Exh. 35 was taken out, Trial in the Suit has not commenced and validity of rejection order passed below Exh. 35, remained pending consideration before this Court since 2017 as this Court was unable to decide the petition since then till this date.

5] As a consequence of non-operation of interim relief in favour of the Petitioner, Suit proceeded further thereby resulting into recording

of evidence of the Plaintiff. As such, this Court is required to be sensitive to the principle of law that the act of Court shall prejudice none. In the aforesaid background, in my opinion, even though trial in the Suit has commenced, still the Court is required to consider Application Exh. 35 on the date of its filing and not on the date of decision in the present Petition.

6] If Application Exh. 35 is allowed, Respondent-Defendants will be entitled to file consequential written statement. It appears that Petitioners are sons of Defendant no. 5 who has transferred Suit property in favour of Defendant no. 1 who in turn transferred the same to defendant nos. 2 to 4. The aforesaid factual matrix has prompted present Petitioner-Plaintiffs to go for amendment thereby commenting on the status of Defendants as that of tenants etc.

7] In my opinion, if the amendment is granted, Defendants will be getting an opportunity to resist the claim. As such, Application Exh. 35 is allowed. Impugned order dated 05/05/2017 passed by 4th Jt. Civil Judge, Senior Division, Solapur is quashed and set aside.

8] Petitioner shall carry out appropriate amendment as sought below Exh. 35 within 4 weeks from from today, subject to cost of Rs. 5000/- to be deposited before the Court below. Deposit of cost shall be condition precedent. The Trial Court will be at liberty to pass appropriate order on the apportionment of the cost. If the cost is not deposited within stipulated period, the Court below shall proceed ahead with the matter thereby considering that the Application Exh. 35 is rejected.

9] If the cost is deposited within stipulated period and amendment is carried out, Defendants, as a consequences will be entitled to carry out their amendment within period of 4 weeks thereafter.

10] Petition stands allowed in the above terms.

11] Hearing of the Suit is expedited.

[NITIN W. SAMBRE, J.]