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

WRIT PETITION NO.1748 OF 2020

Rizwana Siraz Kureshi and Ors.Petitioners

V/s.

Vimal Sakahari Dukale and Ors.Respondents

Mr. Rupesh Geete, with Mr. Amit Patil, i/by Parinam Law Associates,
for the Petitioners.

Mr. Milind M. Sathaye for Respondent No.1.

CORAM : NITIN W. SAMBRE, J.

DATE : MARCH 22, 2022.

P.C.:-

1] Based on title to the suit property, Petitioners/Plaintiffs initiated Regular Civil Suit No.221 of 2005 on the file of Civil Judge, Junior Division, Malegaon, seeking declaration and permanent injunction which came to be dismissed on 31/12/2012. Feeling aggrieved, Regular Civil Appeal No.16 of 2013 is pending on the file of learned District Judge, Malegaon.

2] Petitioners/Plaintiffs invoked provisions of Order 6 Rule 17 in pending appeal, seeking amendment to the suit property vide

Application-Exhibit-24, which is rejected by the order impugned.

3] Submissions of learned Counsel for the Petitioners are, before the suit was dismissed, Application-Exhibit-120 was taken out, seeking correction in the description of the suit property, which was rejected by the Trial Court vide its order dated 7/9/2011. The order passed below Exhibit-120, thereby rejecting prayer for amendment was subject matter of challenge in Writ Petition No.9350 of 2012. Before the said Petition could be decided, suit itself was decided on merit and as such, said Petition was disposed of as infructuous on 25/6/2013. In the aforesaid backdrop, he would urge that *lis* between the parties continues but for correction in the description of the suit property. He would claim that wrong description of the suit property was discovered at the time when written notes of arguments were tendered before the Trial Court which has prompted the Petitioners to take out Application-Exhibit-24. As such, according to him, the nature of suit claim continues the same, whereas there will be only change in description of the suit property which will not take the Respondents/Defendants by surprise. He would urge that Petitioners

can be to put to reasonable condition and amendment as prayed be allowed.

4] Prayer is strongly resisted by learned Counsel appearing for Respondent No.1/Defendant. According to him, suit in question was brought into action in relation to the property mentioned in the suit and accordingly the claim in the suit was adjudicated upon after appreciating pleadings, documentary and oral evidence. He would further claim that correction in the description of the suit property if granted by way of amendment, there will be change in the nature of claim, as evidence and pleadings were pertaining to the property which was described in the Plaint when it was tendered and adjudicated upon. His further contention is, from the pleadings of the Petitioners/Plaintiffs, it can be inferred that Petitioners have moved for amendment at much belated stage i.e. after trial in the suit has advanced. As such, according to him, Petition is liable to be rejected.

5] Considered submissions.

6] This Court is required to be sensitive to the order passed below Exhibit-120 by the Trial Court during pendency of the suit, whereby prayer for amendment came to be rejected on 7/9/2011 before the suit in question was dismissed. Petitioners had every intention to pursue the same, as such they have questioned the said order in Writ Petition. Before their rights could be adjudicated by this Court under Article 227, suit itself was decided, which has rendered the said Petition as infructuous.

7] Principle of law *actus curiae neminem gravabit* i.e. act of court shall prejudice none is required to be appreciated in the backdrop of fact that though the Petitioners have questioned the order of rejection of amendment during pendency of the suit, the said Petition has rendered infructuous as same was not decided before the suit was decided.

In the backdrop of nature of amendment claimed i.e. correction in the description of the property, it cannot be said that nature of claim in the suit was not within the knowledge of the Respondents/Defendants. The suit was dismissed on the ground that

the Petitioners have failed to establish ownership over the suit property. In the aforesaid backdrop, it was expected of the Court below to allow the amendment application, which it has failed to, thereby causing substantial prejudice to the Petitioners.

8] Apart from above, it is required to be noted that in response to court's query, Counsel for the Petitioners has specifically undertaken that if appeal proceeds as it is, without any further objection by the Respondents, Petitioners shall not be seeking permission to lead additional evidence in support of the amendment to the suit property. However, in case if Respondents/Defendants intend to lead any additional evidence then Petitioners cannot be put to limitation of placing on record additional evidence. As such, in such an eventuality, keeping the option open to the lower Appellate Court to pass an appropriate order in the matter, in my opinion, order impugned passed below Exhibit-24 needs to be quashed and set aside and is accordingly quashed and set aside. Application-Exhibit-24 stands allowed, subject to payment of costs of Rs 50,000/- to be deposited in the lower Appellate Court within Ten weeks in the pending appeal. The lower Appellate Court may pass appropriate

order of apportionment of costs.

9] Hearing of the appeal is expedited as jointly prayed.

10] If costs is not deposited as undertaken within six weeks, lower Appellate Court shall proceed ahead with hearing of the appeal by considering that the order impugned is maintained.

11] Petition is disposed of in the above terms.

(NITIN W. SAMBRE, J.)