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

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 10343 OF 2019**

**SHRI GAUTAM BABAJI KALE & ORS.**

**.... PETITIONERS.**

**V/s.**

**1. SHRI KHANDU KONDAJI BORGE, SINCE  
DECEASED – HIS L.Rs. :-**

**.....RESPONDENTS.**

**(1a) ROHIDAS KHANDU BORGE & ORS.**

**Mr. Pramod J. Pawar, Advocate for the Petitioners.**

**Mr. Uday B. Nighot, Advocate for the Respondents.**

**CORAM : NITIN W. SAMBRE, J.**

**DATE: MARCH 02, 2022.**

**P.C.:**

1. Order impugned is passed below Exh. 23 by the court below; whereby prayer of the respondent / plaintiff for grant of amendment under Order VI, Rule 17 of the Civil Procedure Code, thereby incorporating plea of pre-emption is permitted to incorporated vide impugned order dated 16<sup>th</sup> July, 2019 passed by the court of Civil Judge, Junior Division, Junnar at Junnar.

2. The contentions of the learned counsel for the Petitioners are, in view of the provisions of Order II, Rule 2(3) of the CPC, it is not open for the Respondent-plaintiff to amend the suit, thereby incorporating the plea of pre-emption, as said plea was very much available at the time of initiation of the suit. He would further claim that the courts below have failed to appreciate failure on the part of the Respondent-Plaintiff to observe due diligence as amendment changes entire nature of suit.

3. My attention is invited to the provisions of Order II, Rule 2(3) of the C.P.C. so as to substantiate the aforesaid claim.

4. Counsel for the Respondent supports the order impugned and urged that trial in the suit is yet to commence.

5. Parties are in agreement that issues are yet to be framed as trial in the suit has not yet commenced.

6. Suit initially is for declaration and injunction in relation to the property over which by way of amendment, incorporation is permitted by raising challenge to the sale deed inter-se between the defendants on the principle right of pre-emption. Such right to claim have been

accrued on the Respondent-plaintiff on the date when the defendants, inter-se transferred the property by executing the sale deed. In support of plea of pre-emption, separate cause of action pleaded. Law permits two cause of actions that can be united in a suit provided subject matter is same which appears to be satisfied in the present case.

7. In the aforesaid background, it cannot be said that there is failure on the part of the Respondent-plaintiff to observe due diligence, as amendment sought is prior to commencement of the trial.

8. That being so, no case for interference is made out.

9. Petition stands dismissed.

**[NITIN W. SAMBRE, J.]**