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

WRIT PETITION NO. 2992 OF 2024

Ravindra Kalappa Shivsharan

Petitioner

.. (Orig. Plaintiff)

Versus

Prabhakar Kalappa Shivsharan and Ors.

Respondents

.. (Orig. Defendants)

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- Mr. Sushil A. Inamdar, Advocate for Petitioner.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 05, 2024.

P.C.:

- 1.** Heard Mr. Inamdar, learned Advocate for Petitioner.
- 2.** Present Writ Petition takes exception to the order dated 18.08.2023 passed by the learned Trial Court in Application below Exhibit “23” in Regular Civil Appeal No.93 of 2017 which is at Exhibit “F” - page No.61 of the Writ Petition.
- 3.** Application was filed for the first time seeking amendment to the Suit plaint for claiming a declaratory relief in respect of the Suit property. Application is filed before the Appellate Court in Regular Civil Appeal No.93 of 2017. Suit originally filed by the Petitioner / Plaintiff was for injunction. It was filed in the year 2011 and dismissed in the year 2017 after a trial. When the Regular Civil Appeal was ripe for final hearing, at that stage the Plaintiff being Appellant before the Appellate Court filed Application below Exhibit “23” contending that

Plaintiff's witness No.3 at the time of witness action before the learned Trial Court had testified that there was a Will prepared by Smt. Hirabai and as per her instructions in the said Will, Plaintiff would be entitled to a share in the Suit property.

4. Mr. Inamdar would submit that while dismissing the Suit, the learned Trial Court did not take into account the oral evidence of Plaintiff's witness No.3 and dismissed the Suit against the Plaintiff. If that be the case, I have impressed upon Mr. Inamdar that the same be pointed out to the learned Appeal Court at the time of hearing the Appeal and the learned Appeal Court shall consider the same in accordance with law.

5. However, by virtue of the Application filed below Exhibit "23" the first and foremost reason for dismissal of the said Application is due diligence and the due diligence is writ large on the face of record in the present case. If at all the Plaintiff was concerned, such an Application for conversion of the Suit from a Suit for injunction into a declaratory Suit ought to have been filed in the first instance itself. Plaintiff did not do so. The second reason for rejection of the Application is that the Plaintiff has given no reason whatsoever as to why such Application could not be filed before the Trial Court itself. That apart, no reason has been assigned for not raising the issue before commencement of the trial. Application seeking amendment to raise the aforesaid issue that the Plaintiff has become the owner of the

property by virtue of the Will of Smt. Hirabai is nothing but an afterthought on the part of the Appellant at the stage of final hearing of the Appeal only to either fill up the lacunae in evidence or to delay the inevitable.

6. The impugned order dated 18.08.2023 gives as many as six reasons for dismissing the Application filed below Exhibit “23”. One of the submission made by the learned Advocate is that the Plaintiff was not aware about his rights and it was for his Advocate to deal with his case. Such a reason cannot be countenanced.

7. Though it is submitted that no prejudice would be caused, the said submission is rejected outrightly since allowing such an Application would be a travesty of justice in the facts and circumstances of the present case when the Defendants have succeeded after a full-fledged the trial on merits in the Trial Court and are now before the Appellate Court.

8. Be that as it may, the Writ Petitioner who is the original Plaintiff can argue his case in the pending Civil Appeal before the Appeal Court.

9. Application below Exhibit “23” is completely devoid of merits and cannot be allowed. It is nothing, but a measure to protract the inevitable and delay hearing of the Appeal proceedings. The order dated 18.08.2023 is upheld and sustained.

10. With the above observations and findings, Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

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