

(2023) 04 PAT CK 0037

Patna High Court

Case No: Civil Miscellaneous Jurisdiction No. 222 Of 2021

Kedar Yadav

APPELLANT

Vs

Bishwanath Prasad Jhun
JhunwalaRESPONDENT

Date of Decision: April 18, 2023**Acts Referred:**

- Constitution Of India, 1950 - Article 227
- Code of Civil Procedure, 1908 - Order 23, Order 23 Rule 1A, Order 1 Rule 10, Order 1 Rule 10(2)

Hon'ble Judges: Sunil Dutta Mishra, J**Bench:** Single Bench**Advocate:** Ajay Kumar Singh, Jitendra Kishore Verma, Anjani Kumar, Manoj Kumar Singh**Final Decision:** Dismissed

Judgement

1. Heard learned counsel for the parties.

2. The instant Civil Miscellaneous Application under Article 227 of the Constitution of India has been filed against the order dated 10.03.2021 passed

by learned Sub-Judge 1st, Bettiah in Title Suit No. 253 of 2011 whereby the petition dated 21.09.2019 filed by the petitioners for their transposition in

the suit as plaintiffs has been declined.

3. The brief facts of the case are that plaintiff / respondent 1st set filed Partition Suit No. 253 of 2011 in the Court of learned Sub-Judge 1st, Bettiah

seeking relief for passing preliminary and final decree for 3/10th share of the plaintiff in Schedule II land as detailed in plaint which includes four

Bighas, four Kathas, three Dhoor land of village Banuchapar and 16 Bighas, three Kathas, 17 Dhoor of lands of village Puraina and put the plaintiff

in possession of share of properties through the process of the Court. The plaintiff further sought relief for grant of permanent injunction, ad-interim

and temporary against defendant No. 5, namely, Navin Kumar Agrawal who is son of Ram Sakhi Devi, deceased sister of plaintiff from execution of

9 sale deeds and further to restrain district Sub-Registrar, Betiah from registering the document filed before him by defendant 2nd set till disposal of

the suit. The case of the plaintiff is that defendant No. 5 is legally entitled to 1/100th share only but Defendant second party (Defendant Nos. 9 to 19)

got prepared about nine sale deeds from defendant No. 5 under the influence of liquors for almost four Bighas land of village Banuchappar beyond his

share which are not liable to be registered by District Sub-Registrar, Betiah.

4. Defendant No. 5 filed his separate written statement by taking the plea that he has got right, title and share in the properties left by his maternal

grandfather, namely, Ishwar Prasad Jhun Jhunwala, who had partitioned his properties by meets and bounds and all heirs came in separate possession

of their respective shares. He further stated that he has executed sale deed in favour of defendant Nos. 9 to 19 after receiving full consideration

money and have delivered possession to respective purchaser who are enjoying peaceful possession over their purchased piece of land.

5. Defendant Nos. 9 to 19 (the petitioners and other purchaser of land from defendant no. 5) have filed their joint written statement taking plea that

they are bona fide purchaser from defendant no. 5 and they are in possession of purchased land and the sale deeds are valid documents and the suit is

liable to be dismissed. It is also stated that there is no legal hindrance for registration of the sale deeds in their favour.

6. The plaintiff / respondent 1st set had filed injunction petition which was rejected by the trial Court. However, this Court vide order dated 06.05.2019

passed in Miscellaneous Appeal No. 34 of 2012 disposed the same with direction upon the parties not to alienate, make any construction or change the

nature of suit land till decision of the suit and further direction has been issued to decide the suit within six months.

7. The case of the petitioners is that the plaintiff on 18.09.2019 filed a petition with a prayer to allow him to withdraw the suit for the reason that only

defendant No. 5 and defendant Nos. 9 to 19 have contested the suit but now defendant No. 5 compromised with the plaintiff and the documents of defendant Nos. 9 to 19 has been rejected from registration, hence no dispute is left. He has compromised with defendant No. 5 and remaining defendants 1st party i.e. defendant Nos. 1, 2, 3, 4 and 6 to 8 (against whom the partition of Schedule-II property has been claimed), have failed to appear in the suit and the suit is proceeding ex parte against them. During the pendency, the defendant Nos. 2 and 4 died and their name had been deleted as their heirs are already party to the suit.

8. District Sub-Registrar by his order dated 29.05.2012 has rejected the document for registration on the basis of application dated 30.12.2011 of the executant defendant No. 5 denying the execution of the documents and also due to lapse of four months statutory period of admission of execution and validity of stamps which was challenged by alleged transferee (defendant Nos. 9 to 19) before District Registrar-cum-Collector, West Champaran, who also dismissed their appeal on 07.09.2012. No further steps taken before any Court of competent jurisdiction by defendant Nos. 9 to 19 against the said order of District Registrar-cum-Collector, West Champaran and it is now claimed by the plaintiff that all the 9 sale deeds executed in favour of defendant Nos. 9 to 19 are not legally in existence and, therefore, they have no claim left over the properties in suit.

9. On 21.09.2019, a petition under Order 23 Rule 1 A read with Order 1 Rule 10 of the Code of Civil Procedure, 1908 was filed by the petitioners and other purchasers defendant 2nd party (defendant Nos. 9 to 19) for making prayer to transpose them in the suit as plaintiffs as they have interest in Schedule-II property which has been dismissed by the impugned order in view of the petition filed by the original plaintiffs for withdrawal of the suit.

10. Learned counsel for the petitioners has submitted that the learned trial Court has dismissed the application of the petitioners and observed that defendant 2nd set have got no substantial right in the suit property as such they are not entitled to be transposed in the suit as plaintiffs which is against the mandate of law as provided under Order 23 Rule 1 A of the Code of Civil Procedure, 1908. Further, he has submitted that in given facts of the

case a substantial question is already in existence to be decided by the Court with respect to defendant no. 5, who has executed the sale deed and

defendant 2nd set, in whose favour the deeds in question have been executed and issue number 11 had already been framed with regard to validity of

9 sale deeds executed by defendant No. 5 in favour of defendant Nos. 9 to 19 and thus the trial Court ought to have held that now title has passed to

the petitioners as non-registration of sale deed had remained mere a formality.

11. The Honâ€™ble Supreme Court in R. Dhanasundari Alias R. Rajeswari Vs. A.N. Umakanth and Others reported in (2020) 14 SCC 1 has

considered the legal provisions with respect to transposing some defendants as plaintiffs after existing plaintiffs sought permission to withdraw the suit.

Paragraphs 8 to 10 are as follows :-

8. â€œThe law of procedure relating to the parties to a civil suit is essentially contained in Order 1 of the Code of Civil Procedure, dealing

with various aspects concerning joinder, non-joinder and misjoinder of parties. Rule 10 of Order 1 specifically provides for addition,

deletion and substitution of parties; and the proposition for transposition of a party from one status to another, by its very nature, inheres

in sub-rule (2) of Rule 10 of Order I CPC that reads as under:-

(2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either

party, and on such terms as may appeared to the Court to be just, order that the name of any party improperly joined, whether as plaintiff

or defendant, be struck out, and that the name of any person who or to have been joined, whether as plaintiff or defendant, or whose

presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the

questions involved in the suit be added.

8.1. On the other hand, the law of procedure in relation to withdrawal and adjustment of suits is contained in Order 23 of Code of Civil

Procedure. As per Rule 1 thereof, a plaintiff may seek permission for withdrawal of suit or abandonment of a part of claim. Rule 1-A thereof

deals with an eventuality where the plaintiff withdraws his suit or abandons his claim but a pro forma defendant has a substantial question

to be decided against the co-defendant. This Rule 1-A of Order 23 CPC reads as under:-

“R.1-A. When transposition of defendants as plaintiff may be permitted.-Where a suit is withdrawn or abandoned by a plaintiff under

Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order 1, the Court, shall, in considering such application,

have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.”

9. It remains trite that the object of Rule 10 of Order I CPC is essentially to bring on record all the persons who are parties to the dispute

relating to the subject matter of the suit so that the dispute may be determined in their presence and the multiplicity of proceedings could be

avoided. This Court explained the principles, albeit in a different context, in the case of Anil Kumar Singh v. Shivnath Mishra: (1995) 3

SCC 147 in the following:-

“7.... The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject- matter so that the

dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings.

10. As per Rule 1-A *ibid.*, in the eventuality of plaintiff withdrawing the suit or abandoning his claim, a pro forma defendant, who has a

substantial question to be decided against the co-defendant, is entitled to seek his transposition as plaintiff for determination of such a

question against the said co-defendant in the given suit itself. The very nature of the provisions contained in Rule 1-A *ibid.* leaves nothing to

doubt that the powers of the Court to grant such a prayer for transposition are very wide and could be exercised for effectual and

comprehensive adjudication of all the matters in controversy in the suit. The basic requirement for exercise of powers under Rule 1-A *ibid.*

would be to examine if the plaintiff is seeking to withdraw or to abandon his claim under Rule 1 of Order 23 and the defendant seeking

transposition is having an interest in the subject-matter of the suit and thereby, a substantial question to be adjudicated against the other

defendant. In such a situation, the pro forma defendant is to be allowed to continue with the same suit as plaintiff, thereby averting the likelihood of his right being defeated and also obviating the unnecessary multiplicity of proceedings.â€

12. Order 23 Rule 1-A CPC was inserted by the CPC (Amendment) Act 104 of 1976 with effect from 01.02.1977. The said Rule was inserted in order to provide for the circumstances where the defendant may be allowed to transpose as a plaintiff, where the suit is withdrawn or abandoned by the plaintiff. The statement of objects and reasons for the said amendment makes it clear that the defendant may be allowed to be transposed as a plaintiff where either the suit is withdrawn or it is abandoned by the plaintiff.

13. Transposition can be made to do complete justice between the parties and with a view to avoid multiplicity of proceedings.

14. The presence in the suit as plaintiffs would be for effective and complete adjudication of the settlement of all questions involved in the suit. They do not have any conflicting interest, the nature and character of the suit would not undergo any metamorphic change, and the defendants would not suffer any prejudice by transposition.

15. In the present case, the suit is sought to be withdrawn by the plaintiff and hence the contingency for the defendant to seek transposition as plaintiff has arisen. Once it is seen that the contingency for a defendant to seek transposition as a plaintiff has arisen, then it is to be seen under what circumstances, such transposition could be ordered. The circumstances under which such transposition could be ordered is clearly spelt out in the second limb of the Rule, which directs the Court to have due regard to the question â€œWhether the applicant has a substantial question to be decided as against any of the other defendants.â€

16. This new rule has been enacted in order to enable a defendant, who has identical interest, from being denied interest if he rested on the success of the plaintiffâ€™s suit and the plaintiff wanted to withdraw the suit. Before a defendant could invoke this provision, it must be shown that the plaintiff is seeking to withdraw or abandon his claim under Rule of Order 23 CPC. It is a condition precedent to enable a defendant to get himself transposed.

17. The principle that follows this rule is that there must be identity of interest between the plaintiff and such a defendant who wants to transpose as a plaintiff. It must be a suit where defendant is entitled to succeed automatically on the success of the plaintiff in the suit. Such a defendant is usually called a proforma defendant. To put it in other words, both the parties are projecting the same claim against the other defendants, and therefore, the success of one is the success of the other. In such cases, the law comes to the rescue of such a defendant so that the plaintiff, who is having a similar right, cannot defeat the rights of the defendant by colluding with the other contesting defendants.

18. On the question of transposition of parties, the powers of the Court, are wide enough to confer a discretion on it to transpose the necessary party, if that is required for an effective and comprehensive adjudication of the controversy in lis. The use of discretion will depend upon the facts and circumstances of the case. This discretion is not an unbridled one, but is circumscribed by two broad limitations. One is, where rights valuable have accrued to the other side. The other is, where there is lack of bona fide on the part of party seeking transposition, in that he has no plausible case to agitate, having a genuine interest in the lis.

19. The law as to transposition of a defendant to the category of plaintiff is well settled. Where it is necessary for a complete adjudication of the questions involved in the suit, parties may be added or transposed. But where character of the suit may be altered by the addition or transposition of the intervenor defendant and the party sought to be transposed does not wish to adopt the plaintiff's case transposition can never be permitted.

Similarly, if the claims are inconsistent it would not be fair for the original defendant to be asked to fight the newly added plaintiff.

Where there is an affinity or identity of interests between the plaintiff and any one of the defendants the plaintiff has no absolute right to withdraw or compromise the suit with one of the defendants if an application on behalf of other defendants having an interest in the suit is made for their transposition to the category of plaintiffs.

20. The following tests appear to hold the field, in deciding the right of a defendant to transpose himself as a plaintiff:

- (a) Whether the defendant who seeks transposition has substantial question to be decided?
- (b) Whether such substantial questions has to be decided against any of the other defendants?
- (c) Whether the defendant seeking transposition has an identity of interest along with the plaintiff as against the other defendants?
- (d) Whether the success of the plaintiff would result in the automatic success of the defendant who seeks transposition?
- (e) Whether the withdrawal or abandonment by the plaintiff, of the suit, results in some vested right of the defendant getting defeated?

The above tests are only illustrative but not exhaustive.

21. The learned trial Court in the impugned order observed that the plaintiff wants disposal of the case on the basis of withdrawal of suit while

defendants 9 to 19 want to contest the suit because sale deeds executed in their favour are not registered and unless they are registered they will have

no title and therefore they want to be transposed in this case so they could seek relief for registration of 9 sale deeds and could seek partition of their

share in property or could claim title on the property but for same defendants have no counter claim in this case. They have just opposed the statement

and prayer of the plaintiffs. The suit is filed to pass preliminary decree for 3/10th share of plaintiffs and to put them in possession over their share.

Further relief of plaintiffs is to restrain temporary and permanently defendants from admitting execution of 9 sale deeds. On these reliefs and on facts

in plaint it will be very difficult for defendants 9 to 19 to seek their relief. If defendants are permitted to be transposed and if they are permitted to

bring amendment in plaint and relief according to their claim it will require almost everything of the plaint to be amended which is not possible. It will

change the nature of the suit. Transposition of defendant as plaintiff can be made only when the defendant has some common interest with plaintiff. A

person whose interest is adverse to the plaintiff cannot be permitted to be transposed as plaintiff.

22. The learned Court below in its judicial discretion, by reasoned order, dismissed the petition for transposition of petitioners as plaintiffs in the suit

and there is no reason or ground made out to interfere in exercise of this Court's power under Article 227 of the Constitution of India, with the impugned order passed by the learned Court below.

23. I found that the case of the plaintiff and the petitioners/defendants is opposed and inconsistent with each other and they have no identity of interest in the suit.

24. This Civil Miscellaneous Application is, accordingly, dismissed.