

HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
HON'BLE SMT. JUSTICE ANJULI PALO

CIVIL REVISION NO. 273 OF 2021

Between:-

Siddharth Patel
S/o Late Shri Parmanand Bhai Patel
aged about 68 years, occupation – Business
R/o 933, Gol Bazar, Jabalpur (M.P.)

.....**Applicant/Defendant No. 2**

(By Shri Gaurav Bhatia, Senior Counsel assisted by Shri
Devendra Chouhan, Shri Abhinav Deshwal, Shri Chaitanya
Dhruv and Shri Anurag Tiwari, Advocates)

AND

Smt. Jyotsna Devi
Widow of Late Shri Parmanand Bhai Patel
aged about 90 years at demise,
Resided at 30 Shreyas, 5th Floor,
Opposite AIR, India, Nariman Point, Mumbai
(Deceased)

.....**Respondent/Plaintiff**
(Since deceased)

1. Shri Shravan Bhai Patel,
S/o Late Shri Parmanand Bhai Patel,
aged about 75 years, R/o 933, Gol Bazar,
Jabalpur (M.P.)

.....**Defendant No. 1**

2. Dr. Neena Patel
Wife of Dr. vinay Bhai Patel,

aged about 76 years,
R/o 31, Gemdiya Road, Pedar Road
Mumbai (Maharashtra)

.....**Defendant No. 3.**

3. Dr. Rupa Patel
D/o Late Shri Parmanand Bhai Patel
aged about 66 years,
R/o 30, Shreyas, 5th Floor,
Opposite Air, India, Nariman Point,
Mumbai (Maharashtra)

.....**Defendant No. 4.**

4. Dr. Sonal K. Amin
Wife of Shri Kiran Bhai Amin
aged about 71 years,
R/o 7/11, University Road
Pachpedhi, Jabalpur (M.P.)

.....**Defendant No. 5.**

5. Shri Pranav Patel
S/o Shri Shravan Bhai Patel
aged about 48 years,
R/o 933, Gol Bazar
Jabalpur (M.P.)

.....**Defendant No. 6.**

6. Kohinoor Tobacco Private Limited,
903, Mohan Lal Hargovind Das Bhawan
Gol Bazarm, Through its Directors
Shri Lalit Patel, Office-903, M.H. House,
Gol Bazar, Jabalpur (M.P.)

.....**Defendant No. 7.**

7. State of Madhya Pradesh
Through Collector, District Jabalpur
Jabalpur (M.P.)

.....**Defendant No. 8.**

(Respondent No. 1 by Shri Sudhir Kumar Sharma, Advocate)

(Respondent No. 2 by Shri Kunal Vajani with Shri Devashish Sakalkar and Shri Shubhang Tondon, Advocates)

(Respondent No. 6 by Shri Bhanu Pratap singh with Shri Ankur Shrivastava, Advocate)

Order reserved on : 22.06.2022

Order passed on : 05.07.2022

This revision coming on for admission this day, the Court passed the following judgment:-

ORDER

1. The applicant/defendant No. 2 has filed this revision being aggrieved by order (Annexure A-20) dated 3.8.2021 passed by the District Judge (28th), Jabalpur in R.C.S. No. 800023/2015 whereby the applications filed by defendant No. 3 under Order 23 Rule 1A of Code of Civil Procedure and under Order 1 Rule 10 CPC read with Section 151 CPC have been allowed permitting her to be transposed as plaintiff; the application filed by defendant No. 7 Kohinoor Tobacco Private Limited for dismissing the suit as abated has been dismissed and the application

filed by defendant No. 1 under Order 22 Rule 4A read with Order 22 Rule 5 CPC has been dismissed.

2. The facts giving rise to this revision are that plaintiff Jyotsna Devi Patel filed a suit bearing R.C.S. No. 23A/2015 on 16.4.2015 for partition and separate possession of House No. 933, New No. 908, Gol Bazar, Jabalpur and 1/5th share in respect of the agricultural land bearing Survey No. 55, 64, 68, 79, 84, 118, 117/3, 119/2, 165, 167, 173/1, 172/1, 189/3, 189/1, 203/5 and 86/3 total area 60.52 hectare i.e. 149.56 acres situated at village Baderakala, P.C. 27, Tahsil Panagar, District Jabalpur including the houses constructed thereon against the defendants, who are her sons, daughters and grand son. The applicant/defendant No. 1 and defendant No. 2 are the sons, defendant Nos. 3, 4 and 5 are the daughters of the plaintiff and defendant No. 7 is a registered company which is in physical possession of a portion of the suit House No. 933 as bonafide purchaser as per registered sale-deed dated 14.4.1972 executed by Parmanand Bhai Patel and plaintiff Smt. Jyotsna Devi Patel.

3. In the aforesaid civil suit, defendant No. 6 filed his written statement on 28.4.2017. Defendant No. 7 filed its written statement on 3.10.2017, the applicant/defendant No. 2 and defendant No. 1 filed their separate written statements on 24.10.2017 and defendant Nos. 4 and 5 proceeded

ex parte in the year 2017. Defendant Nos. 1, 2, 6 and 7 in their written statements have denied the claim of the plaintiff. Defendant No. 3 in her written statement filed on 15.11.2017 denied the claim of the plaintiff and raised some preliminary objections.

4. During the pendency of the aforesaid civil suit, the plaintiff died on 11.4.2019. Defendant No. 3 Dr. Neena Patel filed an application on 17.5.2019 under Order 23 Rule 1A read with Order 1 Rule 10 and Section 151 of CPC through her power of attorney Gautam Patel for transposing her as the plaintiff in the civil suit contending that after death of the plaintiff, a substantial question has arisen for consideration and adjudication among the four co-defendants in respect of their respective share in the suit property.

5. Defendant No. 1 opposed the application by filing his reply on 12.12.2019 and additional reply on 4.2.2020. Defendant No. 4 filed his reply to the transposition application on 13.1.2020. Defendant No. 5 filed his reply to the transposition application on 20.1.2020. Defendant No. 7 filed its reply for transposition application on 21.8.2020.

6. On 14.2.2020, defendant No. 1 filed an application under Order 22 Rule 4A read with Order 22 Rule 5 CPC contending that the sole plaintiff has died on 14.4.2019 and no application was filed by any of the parties

for substitution of legal representatives and as the interest of the plaintiff and defendants was adverse to each other, the Court may pass order under Order 22 Rule 4A and determine the question as to the legal representatives of deceased plaintiff under Order 22 Rule 5 CPC.

7. The applicant/defendant No. 2 filed his reply opposing the application for transposition filed by defendant No. 3 contending that the suit had abated automatically by operation of law after 90 days of 14.4.2019 as no application was filed for substitution of legal representatives of the deceased sole plaintiff. It was also contended that the interest of defendant No. 3 was adverse to the plaintiff as she filed a false criminal case against the plaintiff. On 17.8.2020, the applicant/defendant No. 2 filed his additional reply to the application for transposition contending that transposition can be permitted only to a proforma defendant and defendant No. 3 is not a proforma defendant in the suit in view of criminal complaint and written statement filed by defendant No. 3 in which she had made serious allegation against the plaintiff.

8. On 26.8.2020, the applicant/defendant No. 2 filed reply to the application filed by defendant No. 1 for enquiry under Order 22 Rule 4 and 5 on the ground that the suit had already abated as none of the legal

representatives of the deceased plaintiff had applied for being substituted as her legal representative within time.

9. On 9.3.2021, defendant No. 7 filed an application under Order 22 Rule 3 read with Section 151 CPC praying for dismissal of the suit contending that suit had automatically stood abated by operation of law on 14.7.2019. It was also contended that the transposition as prayed by defendant No. 3 cannot be allowed as the deceased plaintiff, during her lifetime, had neither withdrawn the suit nor abandoned any part of her claim.

10. Learned trial Court vide impugned order dated 3.8.2021 allowed the application filed by defendant No. 3 for transposing her as plaintiff on the ground that the sole plaintiff died on 11.4.2019 and the application filed by defendant No. 3 for transposing her as plaintiff was taken on record on 4.7.2019 i.e. within 90 days of death of plaintiff. It has been observed that the suit is for partition and as all the legal heirs of the plaintiff are already on record, therefore, it does not appear that the suit has been abated. It has also been observed that in a partition suit, all the parties have same interest, if plaintiff dies, the suit stands abated in respect of plaintiff only and the entire suit does not abate, therefore, defendant No. 3 can be transposed as plaintiff in the suit.

11. As the suit was not dismissed as abated on account of death of the plaintiff, the trial Court dismissed the application filed by defendant No. 7 under Order 22 Rule 3 read with Section 151 CPC for dismissing the suit and also dismissed the application filed by defendant No. 1 under Order 22 Rule 4A read with Order 22 Rule 5 CPC.

12. Being aggrieved by the aforesaid order dated 3.8.2021, this revision has been filed by the applicant/defendant No. 2.

13. Learned Senior Counsel appearing on behalf of the applicant/defendant No. 2 has submitted that no application was filed by anyone including defendant No. 3 to come on record as plaintiff as the legal representative of the plaintiff within 90 days of her death. The application for transposition by defendant No. 3 was filed on 4.7.2019, which remained pending without any order having been passed thereon as apparent from order dated 4.7.2019, therefore, the suit automatically stood abated under Order 22 Rule 3(2) of CPC.

14. It is further submitted that the trial Court has erred in allowing the transposition application, inasmuch as, the transposition application cannot be treated as an application for bringing LRs on record and hence, if such application was filed within 90 days of the death of the sole plaintiff, it did not serve any purpose and such application was totally

irrelevant. It is further submitted that there was no common interest of deceased plaintiff and defendant No. 3, therefore, the transposition application could not have been allowed.

15. Learned Senior Counsel has further submitted that the trial Court has committed error in holding that as all the legal representatives of deceased plaintiff are already on record, the suit for partition does not abate. In this regard, it is submitted that there is no legal provision or principle that a suit for partition does not abate when the sole plaintiff expires and application under Order 22 Rule 3 is not filed. If such construction permitted, it would render Order 22 Rule 3 CPC otiose in a partition suit, which is not expressly provided by the CPC. It is further submitted that the plaintiff was contesting the suit till her death. She neither withdrew the suit or abandoned a part of her claim, which is pre required condition for filing an application under Order 23 Rule 1A of CPC, therefore, the application was not maintainable and liable to be rejected.

16. It is further submitted that only proforma defendant can be transposed as plaintiff in a suit, however, trial Court has failed to appreciate that defendant No. 3 was not a proforma defendant. Defendant No. 3 in her written statement had vehemently opposed the claim of the

plaintiff and questioned the maintainability of the suit, which shows that she was a contesting defendant and her interest was adverse to the plaintiff.

17. It is further submitted that the trial Court has committed grave error in holding that the plaintiff and the defendants have same interest in the suit property because all the defendants have denied the averments made by the plaintiff in the plaint by filing their respective written statements. Learned trial Court has also not adverted to the stand taken by defendant No. 3 in her written statement before recording a finding that she is a co-owner as was the erstwhile plaintiff. Learned Senior Counsel has placed reliance on the decisions of the Supreme Court in the case of **Sulemanji Sanibhai and others Vs. Abde Ali and others reported in 1995 J LJ 338; Dhurandhar Prasad Singh Vs. Jai Prakash University reported in (2001) 6 SCC 534; Mithailal Dalsangar Singh Vs. Annabai Devram Kini reported in (2003) 10 SCC 691; Budh Ram Vs. Bansi reported in (2010) 11 SCC 476; R. Dhanasundari Vs. A.N. Umakanth & others reported in (2020) 14 SCC 1;**

18. Learned counsel for respondent No. 6 has supported the contentions raised on behalf of the applicant and prayed to set aside the impugned order.

19. Learned counsel appearing for respondent No. 2/defendant No.3 has supported the impugned order and has submitted that since it's a partition suit and interest of the parties are same, the trial Court has rightly allowed the application filed by defendant No.3 for her transposition as plaintiff in the suit. He has placed reliance on the decisions of **Bhagwan Swaroop and others Vs. Mool Chand and others reported in (1983) 2 SCC 132; Ramakrishnan Vs. Thanka reported in 2000 SCC OnLine Ker 501; S. Anjaneyulu and Soorampally Venkata Ramana Gupta & another reported in 1993 (2) APLJ 435 (HC) and R. Dhanasundari @ R. Rajeswari Vs. A.N. Umakanth and others reported in (2020) 14 SCC 1.**

20. I have heard learned counsel for the parties at length and gone through the impugned order. In the instant case, the sole question for consideration is “whether trial Court has committed an error in allowing the application filed by defendant No. 3 under Order 23 Rule 1A read with Order 1 Rule 10 and Section 151 of CPC to be transposed as the plaintiff in the suit?”

21. Rule 1(A) of Order 23 of CPC, which reads thus:-

1A. When transposition of defendants as plaintiffs 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 I, 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

22. A bare reading of Order 23 Rule 1(A) makes it clear that Rule 1A of Order 23 provides for transposition of the defendant as the plaintiff but in a case where the suit is withdrawn or abandoned by the plaintiff under Rule 1 and one of the defendants applies for his transposition as a plaintiff. The Court in that case has to consider such application and if there is any substantial question to be decided as against any of the other defendants then in that case transposition can be allowed to continue with the suit. Rule 1A envisages transposition of a defendant to proceed with the suit against one or the other defendant(s) if there is any substantial question to be decided as between the defendants and not against the original plaintiff.

23. In the present case, the plaintiff neither withdrew the suit nor abandoned any part of her claim. She contested the suit till her death and after her death, an application has been filed by defendant No. 3 for her transposition as the plaintiff on the ground that there is a substantial question of law to be decided between the co-defendants. To ascertain, if

there is any substantial question of law to be decided between the co-defendants in the suit, the nature of the relief claimed in the suit is required to be seen. The plaintiff filed the civil suit mainly claiming the following relief:-

I. Pass a decree for partition and separate possession of the House No. 933 (Nine Hundred Thirty Three), New No. 908 (Nine Hundred Eight), Gole Bazar, Jabalpur as stated in para 3 (three) and 4 (four) of the plaint and $1/5^{\text{th}}$ (one/fifth) share in respect of the agricultural land bearing Survey No. 55 (fifty five), 64 (sixty four), 68 (sixty eight), 79 (seventy nine), 84 (eighty four), 118 (one hundred eighteen), 117/3 (one hundred seventeen/3), 119/2 (one hundred nineteen/two), 165 (one hundred sixty five), 167 (one hundred sixty seven), 173/1 (one hundred seventy three/one), 172/1 (one hundred seventy two/one), 189/3 (one hundred eighty nine/three), 189/1 (one hundred eighty nine/one), 203/5 (two hundred three/five) and 86/3 (eighty six/three) total area 60.52 (sixty point five two) hectare i.e. 149.56 (one hundred forty nine point five six) acres situated at village Baderakala, P.C. 27 (twenty seven), Tahsil Panagar, District Jabalpur including the houses constructed thereon.

24. From the perusal of the relief clause of the civil suit, it is clear that the plaintiff claimed the relief of partition and separate possession of the properties mentioned therein. All the defendants, except defendant No. 7, in their written statements have not disputed the fact that they are the co-owners in the aforesaid properties.

25. Defendant No. 3 filed an elaborate written statement denying all the averments made in the plaint by the plaintiff. It was *inter alia* contended that there is no cause of action for seeking partition of the suit property and the plaint in the captioned suit ought to be rejected. It was further contended by her that the captioned suit is a collusive suit and has been filed by the plaintiff in collusion and in connivance with defendant Nos. 1,2,4,5 and 6. It was further contended that the plaintiff has deliberately concealed/suppressed the original will dated 28.10.1986 and codicil dated 7.11.1986 of the deceased, wherein major share in the deceased's estate, which includes the suit property, was bequeathed to defendant No. 3. It was further contended that the plaintiff has only sought for partial partition of the properties of the coparceners including that of the deceased and thus, as held by the Supreme Court in the case of Mahalakshmi Vs. A.v. Anatharaman (2000) 9 SCC 52, the suit is bad as partial partition cannot be effected. The plaintiff and defendant Nos.

1,2,4 and 5 ought to be called upon to disclose all the properties that formed a part of the estate of the deceased that have been meddled with and/or have been illegally siphoned off and which they have acquired in their or their family members' names since 1994 till date. Defendant No. 3 in her written statement claimed the relief that the reliefs sought by the plaintiff in the prayers are denied. In light of the averments in the Plaint itself, it is denied that the plaintiff is entitled to one fifth share out of agricultural land, as prayed for. The plaintiff is not entitled to any reliefs whatsoever in the captioned suit and the captioned suit is bereft of any merit and is therefore, liable to be dismissed by this Court.

26. A bare reading of the written statement filed by defendant No. 3 makes it clear that defendant No. 3 denied all the averments made in the plaint by the plaintiff and prayed that the plaintiff is not entitled for any relief whatsoever, therefore, although it appears to be partition suit, however, it is crystal clear that the interest of the plaintiff and defendant No. 3 are not same in the suit.

27. In **Thakur Chaudhry and others Vs. Brahmdeo Chaudhry and others** reported in **1978 SCC OnLine Pat 39**, it has been observed by the Patna High Court as under:-

7.....It is, however, well settled that such a transposition is generally not allowed if the nature

of the suit is likely to be altered. A person can be added as a co-plaintiff with another only when he can adopt the plaintiff's case. Persons having conflicting cases cannot be made co-plaintiffs and if the plaintiff and the defendant have conflicting case, the question of making the defendant a plaintiff and the plaintiff's defendants does not arise until such a contingency occurs when, for instance, the plaintiff is withdrawing from the suit. It is not necessary to cite authorities on these propositions, for they are so obvious. I would however, mention them, for counsel for the petitioners has placed reliance thereon.

28. Learned Senior Counsel has further submitted that only proforma defendant can be transposed as plaintiff in a suit, however, trial Court has failed to appreciate that defendant No. 3 was not a proforma defendant. Defendant No. 3 in her written statement had vehemently opposed the claim of the plaintiff and questioned the maintainability of the suit, which shows that she was a contesting defendant and her interest was adverse to the plaintiff.

29. The Supreme Court in the case of **R. Dhanasundari (Supra)** has observed that 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 basis 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.

30. In **Jethiben Vs. Maniben and another** reported in **AIR 1983 Guj 194** it has been held that transposition is normally permissible and necessary in suits between partners for accounts, possession of partnership property or for partition, where there are some pro forma defendants and the defendants has a cause of action and interest identical

to that of the plaintiff.

31. In the decision rendered in case of Solemanji Sanibhai and others Vs. Abde Ali and others (C.R. No. 182 of 1993) decided on 27.3.1995), has held that law does not countenance a defendant who is not a proforma defendant or a defendant whose interest is not common to that of the plaintiff to be transposed as a plaintiff to continue the suit against erstwhile plaintiff.

32. In the present case, though, it is a partition suit and in a partition suit, however, defendant No. 3 is not a proforma defendant. She is a contesting defendant and she has filed her written statement strongly denying the averments of the plaint, therefore, as discussed hereinabove, the interest of defendant No. 3 and plaintiff are not same and she is not a proforma defendant, hence in view of the aforesaid discussion and in the light of the aforesaid decisions, she cannot be transposed as plaintiff in the suit.

33. It is well settled law that the Court has power under Order 1 Rule 10(2) of the C.P.C. to transpose a defendant to the category of plaintiffs. The Court can by suo-motu or on the application of any of the defendants may transpose a defendant as plaintiff. Transposition can be made under Section 151 of CPC to do complete justice between the parties and with a

view to avoid multiplicity of proceedings. But in the present case, neither the interest of defendant No. 3 and plaintiff are similar nor the defendant No. 3 is a pro forma party, therefore, only to avoid the multiplicity of proceedings she cannot be allowed to be transposed as plaintiff in the suit, as it may create further complications and chaos, therefore, in my considered opinion, the trial Court has committed error in allowing the application filed by defendant No. 3 for transposition as plaintiff.

34. In view of the aforesaid discussion, this revision is allowed. order (Annexure A-20) dated 3.8.2021 passed by the District Judge (28th), Jabalpur in R.C.S. No. 800023/2015 allowing the application of defendant No. 3 for transposition is hereby set aside. As a consequence of dismissal of application of defendant No. 3 for transposition, the suit stands abated.

(Smt. Anjali Palo)
Judge

PB