

MHKO130003732003



Review Order Below Exh.138 in R.C.S. No.158/2003.
(Babu Hirugade & Ors. Vs. Anil Kulkarni & Ors.)

01. This application is filed by applicant namely Maruti Shamrao Mhatugade, who previously was defendant No. 5, for adding him as plaintiff as well as for dismissal of suit on the ground of non joinder of necessary party.

02. It is submitted by the applicant that he is in possession of 5 Ana share out of suit property initially as tenant and thereafter, as owner. He is necessary party in the present suit. However, plaintiff withdraw his suit against him vide application below Exh. 95. Defendant Nos. 4 to 11 admitted his interest in the suit property. The plaintiff and remaining defendants filed compromise purshis vide Exh. 88 after deletion of his name as defendant No. 5. The said compromise is unlawful. It is taken place in order to grab the share of present applicant out of suit property. Therefore, he filed the present application for adding him as plaintiff and also for dismissal of suit on the ground of non joinder of necessary party.

03. Plaintiff filed his say vide Exh. 141 and resisted the contents of this application. It is submitted by the plaintiff that the applicant is not concerned with the suit property. The cause of action is different. The applicant has already filed separate suit i.e.

RCS No. 183/2012 in respect of suit property. It is pending. This application is not tenable under Order 23 of the Civil Procedure Code. Therefore, the prayer of transposition is liable to be rejected.

04. Perused the application and say filed thereon. Heard learned Advocate for both sides. I have also gone through the written notes of argument filed by the applicant vide Exh. 149. Studied Order 23 Rule 1(A) and Section 151 of Civil Procedure Code. As per Order 23 Rule 1(A) :- *“Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order I, the Court shall, in considering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.”* It is seen from the said Rule that the defendant can apply for transpose him as plaintiff but at the time of considering this application, Court has to see whether substantial question required to be decided as against any other defendants. However, it is pertinent to note here that this suit is for simplicitor injunction. The prayer of injunction is based upon personal cause of action i.e. cause of obstruction. In the simplicitor suit for injunction, the cause of action arose when defendant obstructed to the plaintiff. It is personal cause between parties. The plaintiff already withdrawn his claim against the present applicant vide application below Exh. 95. There is no cause in the plaint for present applicant to claim injunction against remaining defendants in the capacity of plaintiff. Therefore, the cause as well as substantial question is not seen to be decided in respect of present applicant in the present simplicitor suit for injunction. Therefore,

the application is not seen to be covered within the ambit of Order 23 Rule 1(A) of the Code of Civil Procedure. As there is specific provision in respect of transposition in the Code of Civil Procedure, there is no question of using inherent power given under section 151 of the Code of Civil Procedure.

05. Learned Advocate for applicant submitted that presence of present applicant is necessary for adjudication of real question in controversy and so, he be transposed as plaintiff. He also submitted that the substantial question has to be decided against the remaining defendants. In support of this submission, he relied upon the following cases.

1) Amit Kumar Shaw and other Vs. Farida Khatoon reported in 2005 (3) Mh.L.J. Wherein, the Hon'ble Bombay High Court held that :- *“10. The power of Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.”*

2) Anil Dinmani Shankar Joshi and other Vs. Chief Officer Panvel Municipal Council, Panvel and other reported in AIR 2003 Bombay 238. Wherein, the Hon'ble Bombay High Court held that :- *“Every plaintiff has an unconditional right to withdraw his suit unconditionally. The withdrawal would be complete as soon as the plaintiff files a pursis of withdrawal. The Court may pass a formal order recording the withdrawal and also make an order regarding costs, but the withdrawal is not dependent on the order of Court. This could apply also whether the plaintiff seek*

withdrawal of the suit against one or more of the defendants and the withdrawal would be complete against those defendants as soon as the plaintiff files an application/purshis for withdrawal. The Court may then consider whether the suit survives against the order defendants against whom suit is not withdrawn. It if comes to the conclusion that the defendant or defendants against whom the suit is withdrawn was or were necessary parties, the Court would then be entitled to dismiss the suit against all on the ground of non-joinder of the necessary parties. But, the Court cannot refuse to allow the withdrawal on the ground that the person against whom the suit is sought to be withdrawn is a necessary party.”

3) ***Madhukar Venkatesh Ullal Vs. Anita Hermy D'Souza and others, reported in 2006(2) Mh.L.J. 483.*** Wherein, the Hon'ble Bombay High Court held that :- “23. The question of impleadment of the party has to be decided on the touchstone of the Order 1 Rule 10 of the Code of Civil Procedure which provides that only a necessary or proper party may be added. Rule 10(2) confers a discretion upon the Court to meet every case of defective parties. The necessary party is one without whom no order can be made effectively. In the absence of necessary party, the suit must fail. On the other hand, a proper party is a party in whose absence an effective order can be made but whose presence enables the Court to decide the question involved in the proceeding finally and effectually.”

4) ***Jethiben Vs. Maniben and other, reported in AIR 1983 Gujarat 194.*** Wherein the Hon'ble Bombay High Court held that :- “To be transposed as a plaintiff, the defendant who claims to be transposed must have interest identical with the interest of the

plaintiff. There are cases whether plaintiff filed a suit who has interest in common to the person whom he makes pro forma defendant. In collusion with the contesting defendant, such a plaintiff may sometime decide to withdraw the suit. In order not to defeat the claim of pro forma defendant who has an identical interest with the plaintiff by such a withdrawal, provision of O. 23 R. 1-A of the Code is made so that pro forma defendant or the defendant can be transposed as a plaintiff and the suit as filed by the plaintiff can be effectively proceeded against the defendant who has remained on the record as defendant. This is what the spirit of O. 23 R. 1-A of the Code shows, because in such cases, the applicant (defendant applying to be transposed as plaintiff) has a substantial question to be decided as against any of the remaining defendants. Though Courts lean against multiplicity of suits and, therefore, this provision of transposition is made only to avoid another suit, Courts would not permit such transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by the original plaintiff. It is true that the provision O. 23 R. 1-A is new, but that would not change the character and requirement of transposition. It merely permits that if the plaintiff withdraws the suit, the defendant can request the Court to transpose him as plaintiff if the substantial question has to be decided against the remaining defendant. But that is circumscribed by the position under O. 1 R. 10 of the Code, meaning thereby, under what circumstances transposition can be permitted. This

provision is added in order to facilitate a pro forma defendant who has identical interest from being denied his right if he rested on the success of the plaintiff's suit and the plaintiff wanted to withdraw the suit. So, in that case if such a defendant is transposed as plaintiff, he can effectively get adjudication of his right. Courts even without this provision have considered as to what would be the position when a plaintiff attempts to withdraw the suit on the rights of all other pro forma plaintiffs or pro forma defendants or defendants who have a cause of action identical to that of the plaintiff. In order to make a clear provision, this provision was added, though it was also considered on the same lines earlier irrespective of this provision. So, the normal consideration for transposition that interest of the person to be transposed as plaintiff must be identical to the interest of the plaintiff who tries to withdraw, would not go away.

5) ***Md. Muzahid Vs. John Wilson Zedak and other, reported in AIR 1989 Patna 2 (Ranchi Bench).*** Wherein, the Hon'ble Patna High Court held that :- “Rule 1 of O. 23 was substituted by Act 104 of 1976. In the old rule, both the words 'withdraw' and 'abandon' were used. In the new R. 1 in sub-rule (1) of R. 1, the word used is “abandon” and sub- rule (3) of R. 1, the word used is 'withdraw'. Rule 1-A applies to both cases of abandonment and withdrawal. The right of plaintiff to abandon the suit under R. 1(1) has been left unfettered, but in case whether Court is of opinion that substantial question is to be decided as against any of the other defendants, the defendant who may apply for transposition ought to be transposed as plaintiff and the original plaintiff ought to be transposed as a defendant. The right of plaintiff to walk out of a

suit by abandoning it or withdrawing from suit has been curtailed. Before insertion of R. 1-A, there was no question of transporting a defendant as plaintiff, if the dispute was inter se defendants. But now it is specifically provided that Court shall take into consideration whether there is substantial question to be decided between the defendants inter se.”

As discussed earlier, there is no substantial question has to be decided between inter se in the present simplicitor suit for injunction. Therefore, there is no question of transposition of present applicant as plaintiff. This is the simplicitor suit for injunction and cause survives against the person who obstructed. The claim against present applicant was withdrawn, therefore, cause is not seen to be survived against present applicant. The present applicant himself contended in his written statement (Exh. 28) that since 12/12/2003 he is not concerned with the suit property. Therefore, so far as, prayer of simplicitor injunction is concerned the presence of present applicant is not seen necessary. So far as, compromise is concerned if it will affect on the right of present applicant in his absence, then the Court may refuse or declare unlawful. Apart from it, if at the time of conclusion of trial, the Court finds that the suit is barred by the non joinder of necessary parties then Court will pass necessary order to that effect. Therefore, at this stage, it is not proper to hold that the presence of present applicant is necessary in the present simplicitor suit of injunction. Therefore, the facts and circumstances of aforesaid cases and case in hand are seen different. So, aforesaid rulings are not helpful to the applicant.

06. Learned Advocate for present applicant also submitted that the Court is not bound to grant permission to withdraw the suit. In support of this submission, he placed reliance upon the case of ***R. Remamurthi Aiyar (dead) by LR's Vs. Raja V. Rajeshwararao, reported in AIR 1973 Supreme Court 643.*** Wherein, the Hon'ble Apex Court held that :- *“(A) If any vested right comes into existence before the prayer for withdrawal is made under Order 23, Rule 1 the Court is not bound to allow withdrawal. As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the Court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. The plaintiff can not be allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1).”*

However, it is seen that the fact of present case and aforesaid case are different. Further, the condition of withdrawal is already granted, therefore, aforesaid ruling is not applicable to the matter in hand.

07. Learned Advocate for applicant further submitted that the plaintiff and remaining defendants are going to compromise this suit and it is affected on their right. He further submitted that the said compromise is not lawful in his absence. Therefore also his presence is necessary. In support of this submission, he relied upon the case of ***Dwarka Prasad Agarwal Vs. B.D. Agarwal, reported***

in AIR 2003 Supreme Court 2686. Wherein, the Hon'ble Apex Court held that :- *“Even if the provisions of Order 23. R. 3 of the C.P.C. and/ or principles analogous thereto are held to be applicable in a writ proceeding, the Court cannot be permitted to record a purported compromise in a casual manner. It was suo motu required to address itself to the issue as to whether the compromise was a lawful one and, thus, had any jurisdiction to entertain the same.”*

8) **Arjan Singh Vs. Punit Ahluwalia and others, reported in 2009(2) Mh.L.J. 13.** Wherein, the Hon'ble Bombay High Court held that :- *“Appellant 'A' and 'S' the respondent No. 3 filed civil suits against 'B' respondent No. 2 for specific performance of contract for sale. In the suit filed by 'S' a consent decree was passed in terms of the compromise entered into between “S” and “B”. The appellant “A” had a rival claim and the suit filed by him vis-a-vis the one filed by “S” was required to be considered together. The Court could exercise its discretionary jurisdiction in one of the suits or the other, having regard to section 20 of the Specific Relief Act, 1963. By reason of a compromise or otherwise, the claim of the appellant could not have been defeated. When a compromise is entered into, the Court has a duty to see as to whether the same meets the requirements of law. A compromise decree which does not satisfy the requirements of law is not legal. It would be unlawful. It, therefore, cannot be recorded. The settlement entered into between “S” and “B” proceeded on the assumption that no decree for specific performance would be passed in the case of appellant. As the appellant was not a party to the settlement, the same was not binding on him. The compromise*

was unlawful.”

In the matter in hand, the present applicant was already deleted. Whether the compromise is lawful or whether it is going to affect on the affect of third party, it required to be considered at the time of accepting the terms and conditions of compromise. If it is found that the compromise is not lawful, then Court can refuse it. Therefore, on the ground that compromise will affect on the right of present applicant, it is not proper to permit him to appear in the capacity of plaintiff in the present simplicitor suit for injunction. Therefore, aforesaid rulings are not helpful to the applicant. It becomes clear from earlier discussion that there is no cause to the present applicant in the shoes of plaintiff. It also becomes clear that presence of present applicant is not seen necessary for adjudication question of granting injunction. Therefore, the application deserves to be rejected. Hence, following order is passed.

ORDER

- 1 . Application is rejected.
2. No order as to costs.

Date- 02/11/2019.
Place-Kagal

(V. H. Khedkar)
Jt. Civil Judge Jr.Dn., Kagal