

**R.C.S.No. 43/2013****COMMON ORDER BELOW EXH.41 AND 45**

1. The application at exh.41 is filed by plaintiff under order 23 Rule 1 for withdrawal of suit, on the contrary at exh.45 defendant No.3 filed application under Order 1 Rule 10 and Order 23 Rule 1A of Code of Civil Procedure, 1908 to transpose herself as plaintiff.

2. Defendant No.3 submitted that, the present suit is filed by plaintiff for partition and defendant No.2 and 3 are sisters of plaintiff and defendant No.1. Defendant No.3 further submits that, she has filed written statement at exh.19 and raised the contention that, plaintiff did not include common property i.e. Gat No.266/3. She further submits that, the plaintiff filed application at exh.41 and pursis at exh.44 to withdraw the suit only to deny the rights of defendant No.3. Therefore, to avoid multiplicity of the proceeding, defendant No.3 filed application at exh.45 to transpose herself as a plaintiff.

3. Plaintiff filed say to the application at exh.46 and denied the contents of the application. It is the contention of the plaintiff that, as per the mutation entry No.818 and 1137 the partition between plaintiff and defendant already took place and defendant No.3 did not filed any complaint against it. He

further contended that, defendant No.3 has right to file separate suit. As per the contention of plaintiff the application filed by defendant No.3 is not tenable in the eye of law. Hence he prayed for rejection of application. He further contended that, he has filed application at exh.41 to withdraw the suit. He further contended that, as per order 23 Rule 1 he has right to withdraw the suit and if the suit is withdrawn, no prejudice will cause to the defendant. hence he prayed for allowing the application at exh.41.

4. As per the case of plaintiff the partition was already took place by mutation entry no.818 and 1137. Ld. Adv. For plaintiff argued that, defendant No.3 has no rights to file objection to the exh.41 i.e. application to withdraw the suit. He further argued that, as defendant No.3 did not claiming against other defendants therefore as per order 23 Rule 1A application at exh.45 is not tenable. He further argued that, defendant No.3 did not filed counter claim to the present suit. As per the plaintiff, property situated at Baramati is not part of this present suit, only defendant No.3 contested the suit therefore Order 1 Rule 10 and Order 23 Rule 1A not applicable to the application at exh.45. He further argued that, defendant No.3 admitted the partition at para 4 of her written statement which at exh.19 therefore he prayed for allowing the application at exh.41 and rejecting the application which at exh.45.

5. On the other hand Ld. Adv. For the defendant No.3 argued that, the present suit is for partition and separate possession. He further argued that, plaintiff deliberately did not included suit property situated at Baramati i.e. Gat No.266/3. As per the defendant contention the said property was purchased by joint family income. He further argued that, silver and gold ornaments are in the possession of defendant No.5. He further argued that, defendant No.3 claiming her share in the properties which are not partitioned. He further argued that, defendant No.3 specifically claim her partition in the properties which are yet to be partitioned and to avoid multiplicity of proceeding it is necessary to allow the application. He further argued that, if application at exh.45 is allowed no harm will cause to the plaintiff. Therefore he prayed for allowing the application at exh.45 and the rejecting the application which is at exh.41.

6. After the perusal of the record it is seen that, issues were framed at exh.26 on 23/03/2015. some of those issues are as under :-

Issue No.2 Does the plaintiff prove that defendant No.2 and 3 have relinquished their share in favour of plaintiff and defendant No.1 ?

Issue No.6 Does defendant No.3 prove that, the survey No.266/3 situated in Kasbe Baramati is joint family property?

Issue No.7 Does defendant No.3 prove that, the gold ornaments and silver wares of deceased Ganubai are in the possession of defendant No.5 and they are join family property and liable for partition.

7. Now in light of above issues it is necessary to go through the contents of both the applications which at exh.41 and 45. Application at exh.41 is for withdrawal of the suit and on the contrary application at exh.45 is for transposition of the party.

While arguing plaintiff relied upon observation made by ***Hon'ble Bombay High Court in Anil Dinmani Shankar Joshi & ors. V.S Chief Officer, Panvel Municipal Council & ors. AIR 2003 Bombay 238*** as the plaintiff has unconditional right to withdraw the suit. But with due respect to the observation made by Hon'ble High Court in Supra case is not helpful for the plaintiff the because the fact of supra case is different from the facts of case in hand.

Plaintiff also relied upon observation made by ***Hon'ble Patna High Court in Jaya Shankar Singh V.S. Champa Devi & ors. 2005 (1) BL JR 223*** the supra case is only for declaration as to the deeds are null and void and the present case in hand is for partition and separate possession. Therefore with due respect to the observation made by Hon'ble High Court in Supra case is not helpful for the plaintiff because the fact of supra case is different from the facts of case in hand.

8. On the other hand defendant No.3 relied on observation made by Hon'ble Karnataka High Court in Smt. Gowramma v.s Nanjappa & ors. AIR 2002 KARNATAKA 76 and observation made by Hon'ble Rajasthan High Court in Manohar Singh V.S Mst. Sardar Bail & Ors. AIR 1987 RAJASTHAN 177. In both these cases Hon'ble Court observed that, “the position in a suit for partition of immovable property filed by a joint coparcener stands on different footing altogether. In such suit for partition of immovable property even the defendants have the same rights to claim partition and it is not material as to in what manner the parties are arrayed as plaintiffs or defendant in the suit. Even the defendant can be transposed as plaintiffs and can continue the suit if they feel that the plaintiff is not continuing the suit in their interest. Thus in such kind of suits no absolute right can be held in favour of plaintiff of withdrawing a suit under order 23 Rule 1 CPC.

9. Admittedly the suit is for partition and separate possession. Therefore defendant No.3, to avoid multiplicity of proceeding, can also ask for partition without instituting separate suit. The application at exh.41 is filed on 27/06/2016 I.e. almost more than 1 year after framing of issues at exh.26. Prima facie shows that, plaintiff has filed this application only to defeat the rights of defendant No.3. And as per the plaintiff, if partition was already took place, then why he filed he has filed the present suit. This question

remain unanswered at this moment. Therefore if defendant No.3 transposed as plaintiff, no harm would cause to the present plaintiff. On the other hand if application at exh.41 i.e. permission to withdraw the suit is allowed then defendant No.3 has to file separate suit. Hence to avoid multiplicity of proceeding it is necessary to transposed defendant No.3 as a plaintiff in present suit. In light of observation made by Hon'ble Karnataka High Court And Hon'ble Rajasthan High Court in supra cases and also after provision of Order 1 Rule 10, application at exh.45 needs to be allowed. Hence the following order.

**ORDER**

1. Application at exh.41 stands rejected.
2. Application at exh.45 is allowed. Defendant No.3 is transposed as plaintiff.
3. Plaintiff to take necessary steps within stipulated time.
4. Copy of this order be annexed to both exh.41 and 45.
5. Parties to bear their own costs.

Daund  
Date : 11/03/2019.

**(A. A. Kalamkar)**  
3<sup>rd</sup> Jt. CJJD and JMFC, Daund

**CERTIFICATE**

I affirm that the contents of this P. D. F. file Judgment are same, word to word, as per the original Judgment.

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|------------------------------------------------|---|-------------------------------------------|
| Name of the Stenographer                       | : | T.R.Bagwan                                |
| Court                                          | : | A.A.Kalamkar CJJD<br>(Court No.4), Daund. |
| Date                                           | : | 11.03.2019.                               |
| Judgment signed by the<br>presiding officer on | : | 11.03.2019.                               |
| Judgment uploaded on                           | : | 11.03.2019.                               |