



Sunanda Sampat urf Balasaheb
Bankhele tarfe Attorney Sampat
urf Balasaheb Vitthal Bankhele
Vs
Ankush Bhau Harke

ORDER BELOW EXH. 33

The defendant No.9 has filed an application at Exh.33 to implead him as a plaintiff in the suit.

2. The defendant No.9 submitted that the suit is instituted for the specific performance of the agreement to sell dated 16/06/1994. It is also submitted that the said disputed agreement was executed in his and the plaintiff's favour. He further submitted that his claim is identical to the plaintiff's claim. In addition, defendant submitted that the plaintiff impleaded him as defendant No.9 because he was not available to sign at the time of institution of the suit. Hence, he has prayed filed the present application and prayed transposed as a plaintiff.

3. The defendant No.1 to 8 have filed their say overleaf and given their no objection. The plaintiff has filed his say at Exh.44 and resisted the present application. He submitted that since he has instituted the present suit, he is master of it. He also submitted that defendant No.9 who has filed the present application has already placed his written statement on record. If the present application is allowed it would prejudice him. Furthermore, it is submitted that defendant No.9 has neither contributed a single amount for payment of sale consideration nor fulfilled conditions of the disputed agreement to sell. Defendant No.9 is a member of the family and therefore, his name was added to the agreement to sell. Hence, prayed to reject the application.

4. On perusal of the disputed agreement to sell dated 16/06/1994, it appears that ancestral of defendant No.1 to 7 has executed the said disputed

agreement in favour of the plaintiff and defendant No.9. It is not a disputed fact that defendant No.9 is one of the parties to the said disputed agreement. Further, during the argument, the Ld. Advocate for defendant No.9 relied on Order I Rule 1 of C.P.C. He argued that the claim of defendant No.9 is identical to the plaintiff. Further, he argued that right to relief for the plaintiff as well as defendant No.9 arose out of the said disputed agreement. Therefore, defendant No.9 may be permitted to be joined as a plaintiff.

5. Though the Ld. Advocate for defendant No.9 has argued that since the right to relief for the plaintiff and defendant No.9 arose out of the said disputed agreement and therefore, he is entitled to be joined as a plaintiff but here it can not be ignored that the Order I Rule 1 of C.P.C. specifically mentioned word may and not shall. The plaintiff in a suit being *dominus litis*, may choose the person against whom he wishes to litigate.

6. The proviso of Order VII Rule 14 specifically takes care of parties who are unable to sign the pleading because of absence or for other good cause. Therefore, mere defendant No.9 was not present to sign the pleading at the time of the institution of suit can not be justifiable ground to implead him as a plaintiff. The plaintiff instituted the suit and sought specific performance of the agreement to sell against all defendants including defendant No.9. In such circumstances allowing the present application would affect principle of *dominus litis*.

7. Through the present application defendant No.9 is trying to implead him to be a plaintiff. When one of the defendant is desire to implead himself as a plaintiff or vice versa, it called transposition of party. Therefore, the provision relating to transposition need to be seen. The Order XXIII Rule 1A of C.P.C. deal with the issue of transposition. It is reproduced as under;

“Where a suit is withdrawn or abandoned by a plaintiff under rule 1 of this Order, and a defendant applies to be

transposed as a plaintiff under Order 1, rule 10, 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".

8. The Order XXIII Rule 1A by amendment Act 1976, was inserted as the right of the plaintiff to abandon or withdraw the suit had been left unfettered. Therefore, Order XXIII Rule 1A was introduced with an object to curtail the plaintiff's right to walk out from the suit by abandoning or withdrawing it and to allow the Court to transpose the any defendant as a plaintiff if a substantial question is to be decided against any other defendant.

9. On perusal of order Order XXIII Rule 1A of CPC reveals that an application for transposition can be filed in two contingencies firstly, when the plaintiff withdraw the suit or secondly, when the plaintiff abandons the suit. In another word, there is no question of transposition in the eventuality the suit is neither withdrawn nor abandoned.

10. In the present case, the defendant No.9 neither contended that the plaintiff has withdrawn or abandoned the suit. Moreover, on perusal of record it also does not appear so. In such circumstances and considering the above discussed reasons allowing the present application specially when primary essential condition of Order XXIII Rule 1A of C.P.C. is not satisfied would not be just and proper. Hence, I pass the following order.

ORDER

The application at Exh. 33 is rejected.

(Sagar S. Mohite)

2nd Jt. Civil Judge Junior Division,
Ghodegaon, Dist. Pune.

Date : 22/07/2023.
Ghodegaon.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file are the same word for word as per the original Judgment/order.

Name of the Court : Shri. Sagar. S. Mohite,
2nd Jt. C.J.J.D. and J.M.F.C.,
Ghodegaon, Dist. Pune.

Name of the Steno : J. S. Kaite, Steno Grade - III.

Judgment/Order date : 22/03/2024

Judgment/Order signed by P.O. on : 23/03/2024

Judgment/Order uploaded on : 23/03/2024.