

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3257 OF 2015

Suhas Gopinath Date and Anr. Petitioners
Vs
Smt. Promodini Prabhakar
Bhadgaonkar and Anr. .. Respondents

Mr. Avinash Phatangare i/b Shaunak Satpute & Co., Advocate for
Petitioners.

Mr.Omkar M. Kulkarni, Advocate for respondents no.1 and 2.

CORAM : R.G.KETKAR,J.
DATE : 27/07/2015

PC:

1. Not on Board. At the request of Mr.Phatangare, taken up for admission. Heard Mr. Avinash Phatangare, learned counsel for the petitioners and Mr. Omkar Kulkarni, learned counsel for respondents no.1 and 2 at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners-original defendants no.1 to 6 have challenged the Judgment and order dated 17.3.2015 passed by the learned Judge, City Civil Court, Mumbai below Exhibit-12 in Suit No. 7405 of 1997. By that order, the learned trial Judge allowed the application filed by original defendant no.7 for transposing her in the array of plaintiff.
3. In support of this Petition, Mr. Phatangare strenuously contended that defendant no.7 did not file either Chamber

Summons or Notice of Motion. Defendant no.7 simply filed application on 12.3.2015 for transposition. The application filed by defendant no.7 is also not verified. He submitted that defendant no.7 has also not applied for any consequential amendment after grant of the application. He relied upon the decision of this Court in the case of Francis Esperance Vs. Calangute Don Bosco Welfare Foundation, 2013 (3) Bom. C.R. 694 and in particular paragraph 4 thereof. He further submitted that partition is effected in the year 1954 and suit is instituted for partition claiming share in uncle's property. He submitted that without any consequential amendment in the suit, the learned trial Judge was not justified in allowing the application.

4. On the other hand, Mr. Kulkarni supported the impugned order. He submitted that suit is instituted for partition and separate possession. Defendant no.7 is younger sister of the plaintiff. Defendant no.7 also claims that she has 1/9th share in the suit property and she is entitled to claim partition. He submitted that in a suit for partition, all the parties are plaintiffs. The petitioners have not shown that any prejudice is caused to them.

5. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of the prayers in the Plaint clearly shows that the plaintiff has sought declaration that the plaintiff

and defendant constitute an undivided Hindu family. She has also claimed declaration that she is entitled to 1/9th share in the suit property. It appears that defendant no. 7 is younger sister of the plaintiff. The plaintiff and defendant no.7 are daughters of late Dinkar Pandurang Date. Perusal of application Exhibit 12 filed by defendant no.7 shows that she asserted that she has 1/9th share in the suit property and is entitled to claim partition.

6. Mr. Phatangare submitted that the application is not verified. Defendant no.7 has not filed Chamber Summons or Notice of Motion. In the case of Francis Esperance (supra), the learned Single Judge of this Court noted the submissions in paragraph 4 which reads as under:

“4. The above Petition challenges the Order dated 24.02.2011, whereby the application filed by the Petitioner for transposition under Order 1 Rule [10](#) of the Civil Procedure Code came to be rejected. At the hearing of the above Petition, on perusal of the application filed by the Petitioner, I have noticed that apart from seeking transposition, the Petitioner has not sought for any consequential amendment to the plaint which would be necessary to consider the matter in controversy and taking note of the original pleadings in the plaint. When this aspect was pointed out to the learned Counsel appearing for the Petitioner, Shri Joshi, upon instructions, pointed out that he shall file an appropriate composite application seeking transposition as well as consequential amendment to the plaint. The learned Counsel appearing for the Respondents have no objections, provided their respective contentions on merits are left open.”

7. After reproducing the submissions, learned Single Judge observed in paragraph 5 that without going into the merits of the

matter, learned Single Judge found it appropriate that liberty be given to the petitioner to take out appropriate application. I, therefore, do not find that this judgment has laid down any ratio in support of the petitioners' case.

8. Apart from this, the plaintiff is the dominus litis. The suit is for partition. In a suit for partition all the parties are plaintiffs. The petitioners have not shown that any prejudice is caused to them on account of transposition of defendant as a plaintiff.

9. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India, more so when in the impugned order the learned trial Judge has observed in paragraph 3 that the plaintiff and defendant no.7 are real sisters. The plaintiff had filed suit for partition and separate possession in the property which was of their deceased uncle who died issueless. The plaintiff and defendant no.7 are claiming to be the heir of their deceased uncle and that defendant no.7 has also some interest as that of the plaintiff. Hence, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)