

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7236 OF 2013**

Anusaya Gomaji Shevale and
Ors

Petitioners

Vs

Shri Kiran Ramchandra Pachpute
and Ors

.. Respondents

Mr.Mandar Limaye, Advocate for Petitioners.

Mr. Nilesh M. Wable, Advocate for Respondents no. 1, 2, 4 to 7.

CORAM : R.G.KETKAR,J.

DATE : 11/02/2016

PC:

1. Heard Mr. Mandar Limaye, learned counsel for the petitioners and Mr. Nilesh Wable, learned counsel for respondents no. 1, 2 , 4 to 7 at length.

2. Rule. On the oral application made by Mr. Limaye, respondents no. 3 and 8 are deleted, as respondent no.3 has died and respondent no. 1 being the original plaintiff is the only contesting respondent. Mr. Wable waives service on behalf of respondents no. 1, 2, 4 to 7. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 22.7.2013 passed by the learned 5th Jt. Civil Judge, Jr. Dn, Pune. below Exhibits 122 and 126 in Regular Civil Suit No. 506 of 1993. By that order, the learned trial Judge rejected the

application Exhibit 126 made by defendants no. 3 to 7 for transposing them as plaintiffs and allowed application Exhibit-122 made by the plaintiff and disposed of the suit as withdrawn. Parties shall, hereinafter, be referred to as per their status in the trial Court.

4. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit, inter-alia, praying for declaration, partition as also for setting aside Partition Deed dated 25.7.1990 among other prayers. The plaintiff asserted that Maruti Laxman Pachpute was his ancestor. He died leaving behind Krishna @ Kisan Maruti Pachpute. Krishna died on 2.8.1992 leaving behind (1) widow Jaibai, (2) Son Ramchandra, (3) daughter Anusaya, (4) daughter Gangubai, (5) daughter Satyabhama, (6) daughter Sulochana and (7) daughter Mukta. Plaintiff is the son of Ramchandra and defendant no.1 is his father Ramchandra. Defendant no.2 is mother of Ramchandra. Defendants no. 3 to 7 are daughters of Ramchandra. The plaintiff asserted that defendant no.1 Ramchandra had effected partition on 25.7.1990 illegally which has resulted into wrongful loss to the plaintiff and defendants no. 2 to 7. The plaintiff has also claimed declaration and partition and separate possession of share of plaintiff and defendants no. 2 to 7. Defendant no.3 filed written statement substantially supporting the plaintiff and contending, inter alia, that as per Hindu Succession act, 1956 the plaintiff and defendants no. 1 to

7 have rights in the suit properties and also share therein. Defendants no. 4 to 7 filed written statement also substantially supporting the plaintiff.

5. During the pendency of the suit, the plaintiff filed application Exh.122 on 7.12.2011 seeking permission to withdraw the suit unconditionally. In paragraph 2 of that application, the plaintiff asserted that he instituted suit when he was 19 years old. Suit was instituted at the behest of defendants no.2 to 7. During pendency of the suit, there was partition between the plaintiff one one hand and defendants 1, 11 and 12 on the other out of court and, therefore, he does not desire to proceed with the suit. The plaintiff further asserted that he is not claiming any relief against the defendants and, therefore, permission may be given to withdraw the suit unconditionally. Defendants no. 3 to 7 filed reply dated 20.12.2011 at Exh.128 opposing that application. On the same day, defendants no. 3 to 7 filed application Exh.126 under Order 23, Rule 1A read with Order 1, Rule 10 of C.P.C. praying for transposing them as plaintiffs. The plaintiff filed reply dated 1.2.2013 opposing the application. By the impugned order, the learned trial Judge allowed the application Exh. 122 filed by the plaintiff and permitted him to withdraw the suit. The learned trial Judge rejected the application Exh.126 filed by defendants no. 3 to 7 thereby rejecting their prayer for transposing them as plaintiffs.

6. Mr. Limaye strenuously contended that perusal of prayers clause (a) and (b) as also pleadings will clearly show that the defendants have identical interest with the interest of the plaintiffs. Provision of Order 23, Rule 1A is made so that proforma 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. The defendants have a substantial question to be decided as against any of the the remaining defendants. He therefore submitted that the learned trial Judge committed error in allowing the application Exh.122 made by the plaintiffs and rejecting application Exh.126 made by defendants no. 3 to 7.

7. On the other Mr Wable supported the impugned order. He relied upon the decision of Gujarat High Court in the case of Jethiben Vs Maniben, AIR 1983 Gujarat 194 to contend that court cannot permit transposition just to give a chance to a defendant 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.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has

instituted suit for declaration and partition. Perusal of prayer clause (a) shows that the plaintiff has claimed declaration that the plaintiff and defendants no.2 to 7 have shares as per Hindu law and for partition and separate possession of the share of the plaintiff and defendants no. 2 to 7. In prayer clause (b) the plaintiff has prayed for declaration that the partition deed dated 25.7.1990 executed by defendant no.1 is ultra vires and is effected with a view to causing wrongful loss to the plaintiff and defendants no. 2 to 7. As noted earlier, defendants no. 2 and 4 to 7 have filed written statement substantially supporting plaintiff's case. In other words, defendants no. 3 to 7 who claim to be transposed have interest identical with the interest of the plaintiff. The plaintiff has filed application Exh.122 for withdrawal of the suit unconditionally on the ground that there was written partition between him and defendants no. 1, 11 and 12 and, therefore, he does not wish to proceed with the suit. In fact, the decision in Jethiben case (supra) clearly supports the case of defendants no.3 to 7. In that case, it was observed that "there are cases where 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 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 C.P.C. 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”.

9. By the impugned order, the learned trial Judge has rejected the application on the ground that Krishna (father of the plaintiff and defendants no. 3 to 7) died on 2.8.1992 and succession opened on account of his death. As such Defendants no. 3 to 7 had cause of action to sue his brother Ramchandra, defendant no.1 soon after death of father Krishna presuming that their right was denied. Even after execution of partition deed on 25.7.1990 denying their right in the properties could have been sufficient for them to seek their share in the interest of their father soon after his death. Defendants no. 3 to 7 could have agitated their cause within 12 years thereof. However, for the first time they agitated their cause on 2.7.2008 by filing written statement and obviously it was after 16 years from death of their father. In short, defendants no. 3 to 7 shall be subjected to point of limitation which may not adjudicate effectively in the present case as number of alienations were made in pursuance of the partition dated 25.7.1990.

10. The learned trial Judge further observed that cause of action available for the plaintiff to seek partition and separate possession is not available to defendants 3 to 7 as right of the

plaintiff and defendants 3 to 7 to seek partition and separate possession is quite independent and separate.

11. In my opinion, the learned trial Judge failed to notice that suit is instituted in the year 1993. Since the suit is for partition, all the defendants are also plaintiffs. That apart, while rejecting the application, the learned trial Judge observed that defendants no.3 to 7 did not agitate their case for partition. The said reason, to say the least, is perverse. Defendants no.3 to 7 have substantially supported the case of the plaintiff and have sought separate possession of their share. It is nobody's case that they have been excluded from their share as contemplated by Article 110 of the Limitation Act. In view thereof, it cannot be said that there is bar of limitation. The impugned order cannot be sustained. Application Exh.122 made by the plaintiff for withdrawal of the suit therefore has to be dismissed and application Exh.126 made by defendants 3 to 7 deserves to be allowed.

12. As the plaintiff does not wish to continue the suit, in my opinion, interest of justice would be served by transposing him as defendant. Hence, Petition is allowed in the following terms:

(1) Application Exh.122 filed by the plaintiff is dismissed. Order dated 22.7.2013 below Exhibit 1 is set aside. R.C.S.No.506 of 1993 is restored.

(2) Exh.126 filed by defendants no.3 to 7 is allowed and they

are transposed as plaintiffs. Original plaintiff Kiran is now transposed as defendant. Defendants no. 3 to 7 shall carry out necessary amendment in the trial Court within 4 weeks from today.

13. Rule is made absolute in the aforesaid terms with no order as to costs. All contentions of the parties on merits are expressly kept open. Liberty is reserved to the parties to apply for disposal of the suit in a time bound manner. If such application is made, learned trial Judge will pass appropriate order.

(R.G.KETKAR, J.)