

HON'BLE SRI JUSTICE S.V. BHATT

C.R.P.No.6185 OF 2009

ORDER:

Heard Mr.H.Venugopal for revision petitioners and Mr.D.Jagan Mohan Reddy for respondents.

Defendant Nos.19 and 20 in O.S.No.133 of 2001 in the Court of the I-Additional District Judge, Ranga Reddy, are the revision petitioners. The revision is directed against the order dated 13.10.2009 in I.A.No.3440 of 2008.

Revision petitioners filed I.A.No.3440 of 2008 praying to transpose revision petitioners/defendants 19 and 20 as plaintiff Nos.2 and 3 in the suit. The trial Court through the order impugned in the revision rejected the prayer. Hence, the revision.

The circumstances relevant for disposal of the revision are as follows:

One Syed Kareem/respondent No.1 herein filed O.S.No.133 of 2001 against respondents 2 to 19 herein for partition and separate possession of 1/11th share of suit schedule property and allot the share to him. The suit schedule property consists of landed property admeasuring Acs.37.16 gts in Sy.Nos.51, 52 and 53 of Gachibowli Village, Serilingampally Mandal, Ranga Reddy District. On 07.08.2001, the plaintiff executed registered sale deed in respect of 1/11th undivided share in the suit schedule property in favour of revision petitioners. The revision petitioners filed I.A.No.2716 of 2003 under order XXII Rule 10 CPC to implead them as defendants 19 and 20 in O.S.No.133 of 2001. On 06.11.2003, the application was allowed and the revision petitioners were brought

on record as defendants 19 and 20 in the suit. It is alleged in the application filed for transposition that the revision petitioners had come to know of the demise of sole plaintiff. The legal representatives of deceased-plaintiff have not evinced interest to come on record and prosecute the suit, for the suit schedule property had already been sold in favour of revision petitioners, and GPA was executed in their favour. The revision petitioners being assignees of undivided interest in suit schedule property have substantial rights to work out, by stepping into the shoes of deceased-plaintiff, and have been advised to get themselves transposed as plaintiff Nos.2 and 3 in the suit and continue the proceedings. It is further stated that if the prayer for transposition is accepted, the parties to the *lis* are not subjected to prejudice.

Respondents 2 to 19 filed counter-affidavit and opposed the prayer of revision petitioners for transposition as plaintiffs 2 and 3. Firstly, it is objected that except the legal representatives of deceased-plaintiff, no other person can come on record as plaintiff in the suit. On the allegations on the knowledge of the demise of plaintiff, it is replied are improbable and the petitioners, being the GPAs of deceased-plaintiff, are expected to know the demise of the principal. It is further denied that sale deed dated 07.08.2001 was executed by deceased-plaintiff in favour of revision petitioners. The instant suit, with the demise of plaintiff, is abated. The counter refers to a few circumstances on claim to property being GPA of defendants 2 to 19 under various transactions and the value of the property etc. This Court is of the view that reference to these

averments stated in the counter-affidavit is unnecessary for the disposal of the instant revision and hence not considered.

The trial Court, on these averments, framed the following point for consideration:

“Whether the petitioners/defendants 19 and 20 are entitled to transpose themselves as plaintiffs 2 and 3 due to the death of the sole plaintiff?”

The trial Court had accepted the objections raised in the counter-affidavit and held that as seen from the defence taken by respondents/defendants, they have not admitted that the deceased-plaintiff is a shareholder in the suit schedule property. On the other hand, the defendants have set up that even by the date of filing of the suit, the deceased-plaintiff sold away the suit schedule property and thereby denied the share of deceased-plaintiff for claiming partition of suit schedule property. Therefore, having regard to the denial of title of deceased-plaintiff, it has been held that the revision petitioners have to file separate suit for declaration of their title to the suit schedule property and for recovery of possession. The other reason given by the trial Court is that the plaint is silent with regard to purchase of suit schedule property by the revision petitioners. Therefore, the prayer for transposition is unavailable and accordingly rejected.

Mr. Venugopal, appearing for petitioners, contends that the findings recorded by the trial Court on the merits of the claim of either revision petitioners or their predecessor-in-interest viz., deceased-plaintiff is beyond the scope of instant application, untenable and illegal. The consideration of merits of case for

whatever purpose by the trial Court virtually amounts to entering into merits of the issues in suit and such consideration by trial Court is impermissible in law. He further contends that the suit was filed in July, 2001 and the deceased-plaintiff executed a registered sale deed on 07.08.2001. The revision petitioners have been under Order XXII Rule 10 of CPC impleaded as defendants 19 and 20. With the impleadment of revision petitioners as defendants 19 and 20 under order XXII Rule 10, the objections raised by respondents herein are not available while considering the prayer for transposition and having regard to the nature of relief prayed in the suit, the prayer for transposition should have been accepted. He relies upon Section 2(11) of CPC, Order I Rule 10 CPC and Order XXII Rules 1, 3, 9 and 10 CPC. He prays for setting aside the order impugned and transposing the revision petitioners as plaintiffs 2 and 3.

Mr. Jagan Mohan Reddy, having regard to the nature of prayer in I.A.No.3440 of 2008 and the fact that the revision petitioners herein have come on record as defendants 19 and 20 under Order XXII Rule 10 CPC, fairly submits that the consideration of instant prayer on merits by trial Court, is unsustainable and does not justify the findings. Learned counsel, however, submits that since the suit was abated, there is no question of transposing a party from one rank to another in an abated suit. These belated prayers without details of date of demise of plaintiff should be examined from the perspective of limitation as well. He further contends that during the pendency of the revision, the claim of plaintiff under the A.P. (Telangana Area) Abolition of Inams Act, 1955 was not accepted by the tribunal and, therefore, the basis of suit is lost and

legal right and title of revision petitioners have to be worked out in a separate proceeding, and prays to sustain the order impugned in the revision on these additional contentions.

It is further contended that the failure to take proper steps on the demise of plaintiff, the suit is abated and in an abated suit, the prayer for transposition does not arise. In reply to this contention, it is argued by Mr.H.Venugopal that the revision petitioners since are on record as defendants 19 and 20, the very objection on the ground of abatement of suit is against the provisions referred to above. He has placed reliance upon a few decisions and to the extent required, the decisions are referred in the following paragraphs. Counsel submits that the period of limitation in a situation like the present, is not stipulated and the prayer to transpose does not have limitation under the Limitation Act.

I have taken note of the rival submissions and perused the material available on record.

Now, the following point is framed for consideration:

“Whether the prayer of revision petitioners for transposition as plaintiffs 2 and 3 is factually tenable and legally valid; whether the order impugned in the revision suffers from illegalities and irregularities warranting interference by this Court under Section 115 CPC read with Article 227 of the Constitution of India?”

This Court finds it convenient to first decide the legality of findings recorded in the order impugned in the revision. The trial Court *prima facie* has considered the very prayer for transposition on an erroneous view of the matter. The trial Court has advantage

of verifying various dates and events in the matter, including the earlier order passed for impleading revision petitioners as defendants 19 and 20 in the suit. The provision of law under which the said prayer was accepted, the reasons stated and accepted by the Court cannot and could not be ignored while deciding the instant application for transposition. Further, the consideration of merits of issues settled for trial of the suit is impermissible. The counsel appearing for respondents has fairly conceded that the trial Court committed illegality in examining merits of the issues settled for trial of the suit. Therefore, these findings recorded in the order impugned, without further discussion, are set aside.

Now, the further point for consideration in the fact situation of this case is - whether the revision petitioners have made out the prayer for transposition as plaintiffs 2 and 3.

The admitted circumstances are as follows:

The suit is one for partition and separate possession of plaintiff's 1/11th share in the suit schedule property. The deceased-plaintiff after filing the suit under registered sale deed dated 07.08.2001 alienated his undivided share of in the suit schedule property in favour of revision petitioners. The revision petitioners have been impleaded under Order XXII Rule 10 CPC.

Order XXII Rule 10 CPC reads thus:

Procedure in case of assignment before final order in suit-

- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be

continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

Under Order XXII Rule 10 CPC, the procedure for bringing on record on assignment, creation or devolution to continue the suit by or against the person on whom the interest has come to vest or devolved. The application can be by the parties already on record or can be at the instance of assignee etc. The object of Rule 10 of Order XXII ought to be construed and appreciated in the light of Section 2(11) of CPC, for the object is to decide a *lis* in the presence of parties having interest or competent to represent the estate of deceased.

In a suit for partition, the position of plaintiffs and defendants is interchangeable and stands on a distinct footing. In a partition suit, a party can claim transposition from the category of defendant to the category of plaintiff and vice versa. Therefore, *per se*, transposition is not prohibited and, on the other hand, in a suit for partition, the transposition of a party from one rank to a different rank is easier for the frame of suit and the cause of action etc., are not substantially altered. Therefore, from the point of view of frame of suit, the transposition of a party in a suit for partition does not present difficulty.

Section 2(11) CPC defines legal representative as:

- (i) a person who in law represents the estate of a deceased person;

- (ii) includes in a person who intermeddles with the estate of deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

The definition of legal representative is wide and at the same time succinctly encompasses variety of situations. Therefore, it is for the Court to examine and decide whether the status claimed by a person as legal representative of deceased party satisfies the definition or not. The definition of legal representative does not exclude a purchaser from the deceased party to represent the estate. The words used are legal representative means - one who can legally represent the estate of the deceased. In a given case, a purchaser of interest of deceased party to a *lis* can be recognized on the ground that he represents the estate of a deceased party. In the case on hand, having allowed revision petitioners to come on record, the objection to transpose them as plaintiffs is untenable. Therefore, the purchaser of property pending suit can by reference to Section 2(11), Order XXII Rule 10 can come on record as legal representative or to continue the *lis* on behalf of assignor.

One of the objects of Order I Rule 10 is to prevent multiplicity of actions. Order I Rule 10 CPC provides for addition, substitution and transposition of parties. In the case on hand, had the request for transposition been made during the life time of plaintiff, the Court would have considered the effect of Order I Rule 10 CPC, the objections of plaintiff, if any, and passed appropriate orders.

Now, the objection for transposition is raised under Order XXII Rule 9 CPC by contending that the suit is abated and transposition is impermissible.

Let me examine the scheme under Order XXII of CPC. Order XXII deals with the creation, assignment or devolution of interest during pendency of the suits. These exigencies arise by the death, marriage or insolvency; other circumstances such as transfer *inter vivos* by a party. Order XXII Rule 1 CPC declares that the death of plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The procedure for bringing the legal representatives on record on the demise of a party is provided under Rules 2 to 6 of Order XXII. Rule 10 of Order XXII provides for procedure in case of assignment of interest before final order in suit is made, the suit is continued by or against the person or upon whom such interest acquired or devolved.

Now, the next point for consideration is - whether the suit is abated as contended by respondents. The answer to this point is arrived by summarizing the admitted circumstances viz., the sale of deceased-plaintiff's share in favour of revision petitioners herein, and revision petitioners are on record under Order XXII Rule 10 CPC. Now, let me refer to a few decisions on this aspect of the matter.

In *P.MANI v. P.VISHWANATHAN & ANR*¹, on the question of abatement in the presence of some of the legal representatives, it was held as follows:-

¹ 1990(1) Law Weekly 623

“In this case, some of the legal representatives of the deceased plaintiff were already parties to the suit, though in the capacity of defendants. In the event of death of a party in a proceeding in which one or more of the legal representatives are already on record in another capacity, all that would be necessary is that by an application made, the person already on record in a different capacity should also be recorded as heir and legal representatives of deceased person. This would be so even if there are other legal representatives and an application for impleading them is not taken out within the period of limitation and the proceedings will not abate.

“.....The same conclusion would also follow viewing the position of the appellant as a party to a suit for partition wherein every defendant will also occupy the position of a plaintiff in relation to the relief of partition. It would all the more be so in this case where the appellant claims to have secured under the will of his mother her entire interest, the right to partition which she had agitated in the suit and under these circumstances the refusal to transpose the appellant as the plaintiff in the suit cannot be sustained.....”

In *SANJANEYULU v. SOORAMPALLY VENKATA RAMANA GUPTA & ANOTHER²*, this Court on the question of abatement with failure to bring on record the legal representatives, held as follows:

“...But the principle laid in *Mir Sardar Ali Khan's* case (1 supra) cannot be applied to the present case because it cannot be said that the present suit abated in toto on the death of the sole plaintiff. There is no doubt that where the whole suit abates there is no suit which can be continued and the suit is terminated. This much was said by

² 1993(3) ALT607

R.S. Bachawat, J., and was agreed to by Chief Justice K.C. Das Gupta of the Calcutta High Court, as they were then, in *Kedarnath v. Khaitan Sons & Company*. But the present suit is a partition suit. Such a suit does not abate in its entirety because of the death of one of the parties; and when a sole plaintiff dies it abates only so far as the sole plaintiff is concerned. There is no reason why it cannot be continued by the transposition of a willing defendant as plaintiff. D.A. Desai, J., of the Supreme Court in *Bhagwan Swaroop v. Mool Chand*, said:

".....In a suit for partition the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties."

Amerendranath Sen, J., agreed with him observing:

".....A partition suit stands on a peculiar footing. In a partition suit any other party can claim transposition from the category of defendant to the category of plaintiff and vice-versa".

I.D. Dua, J., of the Punjab High Court as he then was, observed in *Jagat Dhish Bhargava v. Shri Javaharlal Bhargava* (2 supra) as follows:-

".....The question which falls for determination before me is: has the suit on the facts and circumstances of this case abated in toto and, therefore, should not be revived? From what has been argued on behalf of the petitioner I have not been able to persuade myself to hold that the suit in the present case has abated in toto. A suit for partition can be filed by any co-sharer and on a decree for partition being granted every co-sharer is entitled to his share. As a matter of fact the decree has to declare the rights of the several parties interested in the property. From this point of view every party interested in the property may be considered to be a plaintiff even though not so arrayed".

VASANTHA AMMAL v. V.P.DHANARAJ³ (DB) lays down the following proposition of law:

“On the question of transposition of parties, the powers of Court, are wide enough to confer a discretion on it to transpose the necessary and proper party, if that is required for an effective and a comprehensive adjudication of the controversy in the lis. The use of the discretion will depend upon the facts and circumstances of the case. This discretion is not an unbridled one, but is circumscribed by two broad limitations. One is, where rights valuable have accrued to the other side. The other is, where there is a lack of bona fides on the part of the party seeking transposition, in that he has no plausible case to agitate, having a genuine interest in the lis. In these circumstances, the Court will fetter its hands and will not exercise its discretion. But, the question, as already noted, has to be decided depending on the facts of each case and by bare recapitulation of the principles, the Court should not abdicate its discretionary power for ordering transposition, when, in fact, that application needs to be countenanced in the interests of justice and on the facts of the case.

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With regard to the aspect of limitation, strictly speaking, in a case of transposition of parties, the question of limitation may not arise. Ramesam, J. in Ponnammal v. Pichai Thevan¹ opined that where a party is transposed, no question of limitation arises. Though the question of limitation may not strictly arise in the case of transposition of parties, yet that may be a relevant factor in appropriate cases to be taken note of to

³ 1990(1) Law Weekly 209 (DB)

find out how far it will cause prejudice to the other side.....”

In *R.DHANASUNDARI @ R.RAJESWARI v. A.N.UMAKANTH AND 10 OTHERS*⁴, my learned brother Justice V.Ramasubramanian has summarized the tests in deciding the right of defendant to transpose as plaintiff as follows:

- (a) Whether the defendant who seeks transposition has substantial question to be decided?
- (b) Whether such substantial question has to be decided against any of the other defendants?
- (c) Whether the defendant seeking transposition has an identity of interest along with the plaintiff as against other defendants?
- (d) Whether the success of the plaintiff would result in the automatic success of the defendant who seeks transposition?
- e) Whether the withdrawal or abandonment by the plaintiff, of the suit, results in some vested right of the defendant getting defeated?

The above tests are only illustrative and not exhaustive.

The question of limitations on the discretion of the Court to transpose a party is considered by the Division Bench in *RAMESWARA DAS BAJAJI & OTHERS v. VUPPULURI PURNACHANDRA RAO AND ANOTHER*⁵. The Division Bench observed as follows:

“There are, however, two limitations on the free and unfettered application of the power under O.1 R.10. One is, as already observed, that the

⁴ 2007(3) Law Weekly 188

⁵ AIR 1958 AP 494

institution by the wrong plaintiff should have been under a genuine mistake. The other is illustrated by *Santuram Hari v. Trust of India Assurance Co.*, AIR 1945 Bom 11(1). It engrafts on the general power of courts an exception that a valuable right acquired by the other defendants should not be defeated. The expression 'valuable right' of course, means a right other than a claim for rejection of the suit itself on the ground of institution by a wrong plaintiff."

In *A.JAYARAJ v A.KUMARAVEL AND OTHERS*⁶, it is held that the power of Court to transpose a party from one rank to another is traceable both to Order I Rule 10 CPC and under Section 151.

The object of transposition of parties is to facilitate determination of *lis* between the parties and such power is exercised to further the cause of administration of justice, avoid multiplicity of proceedings and dismissing the suits on technical grounds. The refusal of prayer for transposition on technical grounds in the considered view of this Court defeats the object and scheme of Section 2(11), Order I Rule 10 and Order XXII Rules 1 and 10 of CPC. The principles of law laid down in the decision referred to above are to the effect that in a suit for partition, the position of parties is interchangeable. Order XXII Rule 10 provides for impleading a purchaser to come on record and continue or defend the suit. Once a purchaser is on record, the demise of purchaser's vendor does not automatically result in abatement, because the purchaser fits into the definition of an LR under Section 2(11) of CPC and is already on record.

⁶ AIR 1986 MADRAS 367

The objection as regards abatement is completely untenable, for the legal representatives of the deceased-plaintiff are already on record. Once the legal representatives are already on record, the consequence under Rule 9 of Order XXII CPC is not attracted. Further, the period of limitation is not involved in the transposition of a party from one rank to another or to recognize him as LR of a deceased party. The period of limitation is to bring on record the legal representatives of a deceased party. Therefore, having considered the principles laid down in the decisions referred above, the two limitations on the free and unfettered application of transposition of power is that the institution by the wrong plaintiff should have been under a genuine mistake. The other is valuable right accrued by other defendants should not be defeated. The test referred to in *R.DHANASUNDARI's* case (4 supra) and the limitations provided in *RAMESWARA DAS BAVAJI's* case (5 supra) are illustrative and not exhaustive. The Court exercises its discretion in the particular fact and circumstances of a given case and orders transposition of parties. Applying the ratio of the decisions referred above and having regard to the consideration of circumstances in the case on hand, the refusal of prayer to transpose revision petitioners is unsustainable. The point is answered accordingly.

The revision is, accordingly, allowed. There shall be no order as to costs.

Consequently, pending miscellaneous petitions, if any, also stand closed.

The Court places on record appreciation on the dispassionate assistance of Mr.D.Jagan Mohan Reddy on the question of law involved in this revision.

S.V.BHATT, J

Date: 01.09.2016
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