

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

WRIT PETITION NO. 6711 OF 2015

Radha Soami Satsang Beas

...Petitioner

Versus

Mr.Netra Prakash K. Bhog And Anr.

...Respondents

Mr.Vikram Vyankatesh Pai for the Petitioner.

Mr.Abhijit Maruti Patil for Respondent No.1.

Mr.Madhav Jayajirai Jamdar for Respondent No.2.

CORAM : M. S. SONAK, J.

DATE : 29th AUGUST 2017

ORAL JUDGMENT :

1. Heard Mr.V.P. Pai for the petitioner and Mr.Patil for Respondent No.1 and Mr.Madhav Jamdar for Respondent No.2.

2. By order dated 11th August 2017, the parties were put to notice that endeavor shall be made to dispose of the petition at the stage of admission.

3. Accordingly, Rule.

4. Rule is made returnable forthwith with the consent and

at the request of the learned counsel for the parties.

5. The petitioner-original defendant No.2 in (Civil Suit No.21/2009) challenges order dated 31st October 2015 made by the learned Trial Judge rejecting the petitioner's application seeking its impleadment as plaintiff in the suit. Mr.Pai has made it clear that the application was to seek impleadment as co-plaintiff i.e. plaintiff No.2 in the suit, in addition to the plaintiff No.1, who is now impleaded as Respondent No.1 in the present petition.

6. Mr.Pai submits that in the present case the original plaintiff had expressly recorded his no objection to the petitioner being impleaded as a co-plaintiff in the suit. Mr.Pai submits that under Order 1 Rule 10 of the Civil Procedure Code, there are ample powers vested in the Trial Judge to permit such impleadment. Mr.Pai submits that the learned Trial Judge failed to exercise jurisdiction vested in it by dismissing the plea for impleadment on the ground that the provision under which such relief was applied for had not been quoted. Mr.Pai submits that even otherwise that the petitioner was beneficiary of the will left behind by of C.P. Nanda and the suit has also been instituted by the executor i.e. respondent No.1. There is accordingly no conflict of interest between the petitioner and

respondent No.1 and allowing the application for impleadment would have only prevented multiplicity of proceedings. Mr.Pai submits that the evidence of the defendant i.e. Respondent No.2 is yet to commence and therefore, there was no question of any prejudice or in any case serious prejudice. Mr.Pai has relied upon the decision of the Supreme Court in the case of *Kiran Tendon V/s. Allahabad Development Authority*¹ and of the Punjab and Haryana High Court in *Dalbir Singh & Ors. V/s. Lakhi Ram & Ors.*² in support of his submissions.

7. Mr.Patil, the learned counsel for respondent No.1 has supported the petition and endorsed the submissions made by Mr.Pai in support of the petition.

8. Mr.Jamdar, the learned counsel for the respondent No.2(Original defendant) submits that the suit was originally filed by the executor and if the petitioner who claims to be beneficiary of the will left behind of late C.P. Nanda is impleaded as a plaintiff, then, the very nature of the suit will change. Mr.Jamdar submits that such a fundamental change in the nature of the suit cannot be permitted at a stage where the trial in the suit has already

1 (2004) 10 SCC 745

2 AIR-1979 P H 10

commenced. Mr.Jamdar submits that the defendant has already opened his defense by cross-examining the plaintiff. At this stage, if yet another co-plaintiff is added, this will result in prejudice to the defendant. Finally, Mr.Jamdar submits that the petitioner had earlier applied for impleadment as a party in the said suit and such application was allowed by the Trial Judge by its order dated 12th November 2014. The said order had directed the impleadment of the petitioner as a defendant in the suit and not as a co-plaintiff. Mr.Jamdar submits that principle of *res judicata* applies in two different stages in one and the same suit. In support, Mr.Jamdar relies upon decision of the Supreme Court in the case of ***Bhanu Kumar Jain V/s. Archana Kumar & Another***³ Mr.Jamdar submits that principle of *res judicata* in any case constructive *res judicata* is clearly attracted and therefore, the application of the petitioner seeking impleadment as co-plaintiff has rightly been dismissed. He submits that for these reasons there is absolutely no case made out to interfere with the impugned order.

9. Rival contentions now fall for my determination.

10. The suit in the present case was originally instituted by

³ 2005-Supreme Court Cases 787.

Netra Bhog in her capacity as the executor of the estate of late Mr.C.P. Nanda. The petitioner, claims to be the beneficiary of the will left behind by late C.P. Nanda. On this basis, the petitioner, by application dated 06-09-2014, applied for impleadment as a party to the suit. This application was allowed by the Trial Judge by order dated 12th November 2014. The petitioner was directed to be impleaded as a defendant in the suit. In the order dated 12th November 2014 the Trial Judge has observed that it was a clear and admitted position that the petitioner was a beneficiary of the will and since the suit was for mandatory injunction seeking restoration of possession, the beneficiary was a necessary party to the suit, being an ultimate beneficiary. This order, was never challenged by respondent No.2 i.e. the original defendant.

11. The petitioner, upon the recording of evidence of the original plaintiff i.e. respondent No.1 vide application dated 06-01-2015 applied for transposition as plaintiff, which is now clarified by Mr.Pai to be transposition as co-plaintiff in the suit. The original plaintiff, by writing dated 20-01-2015, specifically endorsed his no objection for transposition of the petitioner as plaintiff in the suit. The respondent No.2, however, opposed the application for transposition.

12. The learned Trial Judge by the impugned order, has rejected the application for transposition mainly on the following two grounds:-

(i) That the suit is part heard and the defendant has opened his defense by way of cross-examination of the plaintiff. Therefore, prejudice will be occasioned to the defendant if transposition is permitted;

(ii) No provision is shown under which the application is made.

13. The second reason, i.e. the failure to indicate the legal provision under which transposition is applied for, is untenable. Applications cannot be dismissed merely on the ground of failure to quote the appropriate provision. Even otherwise, it is well settled that such transposition is permissible in terms of Order 1 Rule 10 of the Civil Procedure Code. Further, application for such transposition as co-plaintiff can always be granted where interest of justice so require and where the original plaintiff supports or does not object the transposition.

14. In *Kiran Tandon* (Supra) the Supreme Court has held that it is well settled that the Court has power under Order 1 Rule

10(2) of Civil Procedure Code to the transpose a defendant to the category of plaintiffs, and where the plaintiff agrees such transposition should rightly be made. The Supreme Court has quoted the principle laid down by the Privy Council in ***Bhupendra Narayan Sinha Bahadur V/s. Rajeshwar Prosad Bhakat***⁴ and observed that this principle has been consistently followed by all the Courts.

15. In ***R.S.Maddanappa V/s. Chandramma***⁵, their lordships of the Supreme Court at page 1816 observed thus :-

"Now regarding the second point (i. e. no decree can be passed in favour of a defendant who has not asked for transposition as plaintiff in a suit); this objection is purely technical. The plaintiff sued for partition of the suit properties upon the ground that they were inherited jointly by her and by the first defendant and claimed possession of her share from the other defendants who were wrongfully in possession of the properties. She also alleged that the first defendant did not co-operate in the matter and so she had to institute the suit. The first defendant admitted the plaintiff's title to half share in the properties and claimed a decree also in her own favour to the extent of the remaining half share in the properties.

⁴ AIR 1931 Privy Council 162

⁵ AIR 1965 SC 1812

She could also have prayed for her transposition as a co-plaintiff and under O. 1, R. 10(2), C.P.C. the Court could have transposed her as a co-plaintiff. The power under this provision is exercisable by the Court even suo moto. As pointed out by the Privy Council in [Bhupendra v. Rajeswar](#), 58 Ind App 228: (AIR 1931 PC 162) the power ought to be exercised by a court for doing complete justice between the parties.”

(emphasis supplied)

16. In *Bhupendra N. Singh* (Supra), their lordships of the Privy Council have observed thus :-

“If there was a technical objection to this, the Court clearly had power at any stage of the proceedings to remedy the defect under O.1 R.10, C.P.C. by adding the pro forma defendants as co-plaintiffs with the appellant. Such a course should, in their Lordships' opinion always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.”

17. Similarly, in *Monghi Bai V/s. Cooverji Umersey*⁶, their lordships of the Privy Council observed thus :-

"One or more of several persons jointly interested

⁶ AIR 1939 Privy Council 170

can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants.

A person executed mortgage in favour of a firm. Subsequently some of the partners retired assigning their interest in favour of the remaining partners by unregistered deed. The remaining partners brought a suit on the mortgage and as an objection was brought to the maintainability of the suit, the plaint was amended bringing on record the retiring partners as defendants.

Held that it would have been more satisfactory that the retiring partners should have been made as co-plaintiffs instead of co-defendants, but even otherwise as whole of the necessary parties were before the Court, appropriate relief could be granted."

(emphasis supplied)

18. In *Dalbir Singh* (Supra) during the pendency of the suit an application was made to transpose some of the defendants as co-plaintiffs. The original plaintiff did not raise any objection to the

proposed transposition. In these circumstances, the Court observed that it is settled law that where the plaintiff does not oppose the application of any of the defendant for transposition as plaintiff, Court can allow the application for transposition. Even otherwise to avoid multiplicity of the litigations the Courts can *suo motu* allow such transposition. In a case where the defendant can file a similar suit, it is always advisable that the Courts transpose him as a co-plaintiff even if no application for transposition is filed.

19. In view of the aforesaid legal position, it is clear that this is a case where the learned Trial Judge has failed to exercise jurisdiction which he was duty bound to exercise in the facts and circumstances of the present case.

20. The first reason given by the learned Trial Judge based upon the aspect of the prejudice is also untenable in the facts and circumstances of the present case. The evidence of the defendant is yet to commence. Merely, because some questions may have been posed to the original plaintiff in the course of cross-examination, that by itself, was by no mean sufficient to decline the petitioner leave to be transposed as a co-plaintiff. There is no question of any

prejudice or serious prejudice to the original defendant.

21. This is also not a case where the transposition would introduce some fundamental change in the nature of the suit. The petitioner was only seeking impleadment as a co-plaintiff. The learned Trial Judge, in the earlier order, had noted that the petitioner is a beneficiary under the will left behind by C.P. Nanda. Accordingly, it is not possible to accept Mr.Jamdar's submissions as regards any fundamental change in the nature of the suit.

22. Though, the principle of *res judicata* does apply for two different stages in the same suit as held by the Hon'ble Supreme Court in the case of *Bhanu Kumar Jain* (Supra), the said principle is not at all attracted to the present situation. By the previous order, the petitioner was impleaded as a defendant in the suit. The petitioner now seeks transposition as a plaintiff, which plea was not even opposed by the original plaintiff. In such a situation, there is no question of the principle of *res judicata* and for that matter constructive of *res judicata* being applicable.

23. The impugned order warrants interference because there is failure to exercise jurisdiction. The approach of the learned Trial Judge is contrary to the position settled by decision of the Hon'ble Supreme Court and by the Privy Council.

24. Accordingly, the impugned order dated 31st March 2015 is hereby set aside. The petitioner is directed to be transposed as co-plaintiff in the suit. The necessary amendment to be carried out within two weeks.

25. Rule is made absolute to the aforesaid extent. However, there shall be no order as to costs.

(M. S. SONAK, J.)