

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

WRIT PETITION NO.7853 OF 2016

Shri Ashok Sitaram Sakore ... Petitioner
Vs.
City Corporation Ltd.
Through Director
Anirudhdha Pradyumna Deshpande & anr. ... Respondents

Mr.V.A. Shastry for the Petitioner
Mr.D.S. Patil for Resp. No.1
Mr.Pavan Patil i/b Triyama Legal for Resp. No.2

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 1, 2017**

P.C. :

1. Rule. By consent, Rule made returnable forthwith.
2. This Writ Petition is directed against the orders dated 7.4.2016 passed below exhibit 45 and 1.4.2016 passed below exhibit 47 in Special Civil Suit No.2561 of 2010. The petitioner is original defendant No.2 and the father of the original plaintiff, who has filed the suit for recovery of money of Rs.1,30,00,000/- against respondent No.1 i.e., original defendant No.1 . Respondent No.1 is the main contesting party, who has entered into an agreement to purchase a land from the petitioner with the original plaintiff/respondent No.2 and their family members. The other

family members were the wife, son, daughter of the petitioner and daughter in law and the wife of the original plaintiff. The land is an ancestral property of the family. It was purchased for Rs.7,82,00,000/-. As per the agreement, Respondent No.1 was supposed to pay to the plaintiff Rs.1,95,65,000/- out of which Rs.1,30,00,000/- was not paid. Hence, the plaintiff filed Suit No.2567 of 2010 for recovery. During the pendency of the said suit, the petitioner/father, being a Karta, moved an application below exhibit 29 for impleading him as a party defendant in the suit and the said application was allowed on 15.12.2012. Thereafter, the original plaintiff filed a purshis for withdrawal of the suit on 6.4.2015. The original plaintiff filed application below exhibit 45 for withdrawal of the suit on 6.4.2015 and therefore, the petitioner/father moved application below exhibit 47 for transposition as a plaintiff on 27.8.2015. The trial Court rejected the said application by order dated 1.4.2016 and allowed to withdraw the suit accordingly by order dated 7.4.2016. Being aggrieved by both the orders dated 7.4.2016 and 1.4.2016, this petition is filed.

3. Mr. Shastry, the learned Counsel for the Petitioner, has argued that the petitioner is the Karta of the HUF property, which was sold to Respondent No.1. In the sale deed, 4 persons were to receive cheques in four parts, i.e., an amount of Rs.1,95,61,721/- each, which made good of the total amount of Rs.7,82,46,883/- out of which, Vishal, the original plaintiff, has received an amount of Rs.65,20,573/- by cheque dated 30.5.2008. He did not receive the balance amount of Rs.1,30,41,148/-. Therefore, he filed a suit for money recovery in 2010 and the petitioner being the Karta of the HUF family, moved application for his impleadment in the suit, which was allowed by the trial Court. The learned Counsel for the petitioner further submitted that neither the plaintiff nor the original defendant No.1 have stated anywhere in the compromise purshis that the remaining amount was paid to the plaintiff by defendant No.1 and, therefore, the petitioner/father has no source to know whether the entire amount towards the transaction as a consideration amount was paid to him by defendant No.1 and received by the family of the plaintiff and the petitioner or not. He submitted that it was an undivided ancestral property and, therefore, he has right to recover the portion of the consideration amount from defendant No.1. He submitted that the learned trial

Judge ought to have allowed the original plaintiff to withdraw the suit unconditionally. The trial Court has passed grossly illegal orders and are to be set aside.

4. Mr.Patil, learned Counsel for Respondent No.1, supported the order passed by the learned trial Judge. He argued that under Order 23, Rule 1, the plaintiff can withdraw the suit and the Court cannot refuse permission to withdraw. In support of his submissions, he relied on the judgment in the case of **Bijayananda patnaik vs. Satrughna Sahu & Ors.**¹ He submits that in the present matter, the plaintiff does not seek any liberty to file another proceedings and, therefore, there is no question of refusing leave to withdraw the suit and the trial Court has rightly granted permission to withdraw the suit. He further submitted that the suit is filed by the plaintiff i.e., the son of the present petitioner, for recovery of money which has fallen to his share. He further argued that the petitioner has come before the Court with unclean hands. He is claiming that he is a Karta and the property was sold to the defendant, then, all his sisters have also right in the said property. However, the present petitioner has not acknowledged their rights and therefore, the sisters have filed a suit for their

¹ (1964) 2 SCR 538

rightful claim in the ancestral property against the present respondent No.1 and it is still pending. The learned Counsel has further submitted that the original plaintiff, the son of the petitioner, had received Rs.65 lakhs, out of which he had purchased some shops and the petitioner has filed another suit against his son for declaration that the shops purchased by the son are out of nucleus of HUF. The said suit is also pending.

5. The learned Counsel for Respondent No.1 further raised a point of limitation and has submitted that the transaction has taken place in the year 2008. Thereafter, the plaintiff filed suit in the year 2010. The petitioner has no right to claim money against the respondent. Though the petitioner was allowed to come on record in 2012 by the trial Court, he did not file written statement till 2015 and without making out any case of his right or interest in the plaintiff's right, he moved application for transposition as plaintiff. If at all, he has any claim now, it is barred under the law of limitation.

6. Mr.Patil, in support of his submissions on the point of withdrawal of the suit, relied on the judgments of the Supreme Court in **Hulas Rai Baij Nath v. Firm K.B. Bass & Co.**²;

² AIR 1968 SC 111

Bijayananda Patnaik vs. Satrughna Sahu & Ors.³ and of the Andhra Pradesh High Court in **Madaka Anjaneyhulu vs. Madaka Balaiah & Ors.**⁴.

7. Heard submissions, perused all the documents and orders. It is an admitted fact that the land which was sold to respondent No.1, was a joint family property of the original plaintiff and the petitioner. It was also agreed that the mode of payment to four persons out of total six land owners in equal amount i.e., Rs.1,95,61,721/- is also not disputed. It is also not disputed that the original plaintiff has received Rs.65 lakhs out of Rs.1,95,61,721/- and therefore, he filed suit for remaining amount.

8. A statement is made at the bar by the learned Counsel for the original defendant that the defendant i.e., the respondent purchaser, admits that amount of Rs.1,30,00,000/- is due and payable to the plaintiff. It is further submitted at the bar that the sisters have filed a suit against the purchaser i.e., the respondent No.1 and the present petitioner has given undertaking to the said defendant that he would satisfy the claim of all his sisters if at all

3 AIR 1963 SC 1566

4 2001(1) ALD 312

they are successful in proving their right and share in the ancestral property.

9. The learned Counsel for the original defendant has given a fair proposal that he admits his liability to pay the balance amount to the plaintiff and the plaintiff has acknowledged that if his paternal aunts establish their claim in the ancestral property, then, due amount can be paid to them and thus, it can be adjusted to satisfy their shares and hence, the plaintiff wanted to withdraw the suit.

10. On this background and with a view to put an end to at least one litigation, the present respondent gave a very fair proposal that he would deposit his balance amount in the trial Court where the suit filed by the sisters is pending against the present petitioner and the defendants and the said amount can be withdrawn by either the petitioner or his sister depending on the final decision in the said suit. However, unfortunately, it is not acceptable to the petitioner as he wants to give serious challenge to the right of his sisters in his ancestral property.

11. Be that as it may, this order is to be tested legally. It is a fact that while making payment, the respondent made it in 4 parts to 4 persons out of 6 persons, who are signatories to the sale deed. The possession of the suit property is also handed to the respondents. The suit property was not partitioned at the time of sale deed and, therefore, the sale proceeds which were received out of this transaction is out of sale of the joint family property. The petitioner is a Karta of the family and, therefore, he is entitled to recover the balance amount and which is not paid as a full and final satisfaction of the consideration amount. Thus, his right to sue exists and is alive against the respondents. He has earlier taken steps that he be impleaded as a party defendant in the said suit and it was allowed as his status is that of Karta and his interest in the suit was recognised by the Court. However, the plaintiff moved application that he wanted to withdraw the suit which shows that the original plaintiff has relinquished his right to recover the balance amount against the respondent. If the balance amount would have been received by the original plaintiff, then, the present petitioner had no claim and his right to sue would have extinguished against the respondents as the entire consideration amount was paid and the petitioner would have been required to

file a separate suit for recovery of the said balance amount from his son. However, it is not the case. The plaintiff has simply relinquished his right to recover the balance amount and therefore, the petitioner has every right to pursue the said suit as his right to sue against the respondent and recover the amount which was accrued earlier continued.

12. Read the rulings in **Hulas Rai Baij Nath v. Firm K.B. Bass & Co. (supra)**; **Bijayananda Patnaik vs. Satrughna Sahu & Ors. (supra)** and of the Andhra Pradesh High Court in **Madaka Anjaneyhulu vs. Madaka Balaiah & Ors. (supra)** cited by the learned Counsel for the parties. In the said cases, the hon'ble Supreme Court and the learned judge of the Andhra Pradesh High Court had an opportunity to deal with the issue of withdrawal of the suit i.e., under Order 13 Rule 1 of the Civil Procedure Code. There is a discussion in respect of the right of the parties to withdraw the suit and also when the liberty can be granted to withdraw the suit. The Supreme Court in the case of **Hulas Rai Baij Nath v. Firm K.B. Bass & Co. (supra)** and also in the case of **Bijayananda Patnaik vs. Satrughna Sahu & Ors. (supra)**, has held that there is no provision in the Civil Procedure Code which requires the

Court to refuse permission to withdraw the suit and compels the plaintiff to proceed. However, when the right to sue survives with any of the defendants, then, the order may not be passed under Order 23 Rule 1. The facts of the present case are totally different and the ratio laid down in the said suit is not helpful to the learned Counsel. On the contrary, in the case of **Madaka Anjaneyhulu vs. Madaka Balaiah & Ors.** (supra), the learned Judge of the Andhra Pradesh High Court has held that while considering the application filed by the defendant “to be transposed as plaintiff”, the Court shall have due regard to the question whether the defendant has a substantial question to be decided against any of the other defendants and thus, explained the Rule 1A of Order 23 of the Civil Procedure Code. In the present case, as discussed above, the defendant/father being a Karta of the family and the property being an ancestral property, has right to sue and there is a substantial right to be decided against defendant No.1.

13. The learned Counsel on the point of transposition under Order 1 Rule 10 relied on the judgment in **Mukesh Kumar & Ors. vs. Col. Harbans Waraich & Ors.**⁵ wherein the issue was raised in respect of application of deeming provision u/s 21(1) of the

⁵ (1999) 9SCC 380

Limitation Act and whether such benefit can be given to the transposed party. The Supreme Court held that subsection (2) of section 21 of the Limitation Act only applies to where the claim of a person transposed as a plaintiff can be sustained on the plaint as originally filed or where the person remaining as a plaintiff after transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. In the circumstances of the present case, considering the nature of transaction between the parties and the relief claimed by the original plaintiff, transposition of the defendant as plaintiff cannot be disallowed at this stage, on the ground of limitation. The defendant is allowed to raise the issue of limitation at the time of hearing of the suit and that issue is kept open.

14. Under such circumstances, the impugned order dated 7.4.2016 is required to be set aside and is hereby set aside accordingly. The petitioner is transposed as a party plaintiff in place of the original plaintiff as the original plaintiff wants to withdraw from the said suit. Thus, the suit continues. Rule made absolute in terms of prayer clauses (a) and (b).

(MRIDULA BHATKAR, J.)