

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14608 OF 2017

**ANIL DIGAMBERRAO BUDRUKKAR
VERSUS
DIGAMBERRAO BHUJANGRAO KULKARNI AND OTHERS**

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Smt. S. A. Budrukhar : G.P.A. Holder for the petitioner.
Shri M. M. Patil (Beedkar): Advocate for Respondent Nos. 1 to
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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 6th AUGUST, 2018.**

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PER COURT :

1. The petitioner, who has appeared through the General Power of Attorney Holder is aggrieved by the order dated 04/09/2017 passed by the Trial Court in RCS No. 90/2012, by which, application Exhibit 184 filed by the plaintiff and defendant Nos. 2 and 3 has been allowed and defendant Nos. 2 and 3 have been permitted to be transposed as plaintiff Nos. 2 and 3 under Order 1 Rule 10 read with Section 151 of the Code of Civil Procedure.

2. The contentions of the petitioner, which have been summarized in the written notes of submissions, are as under :

(a) The original plaintiff, though may be about 79 to 80 years of age, claims in an application recently filed for seeking injunction under Order 39 Rule 1 of the Code of Civil Procedure, to be fit and contends that he has been cultivating the suit land

(b) The same plaintiff contends that he is suffering from various age related ailments and is failing health.

(c) Unless the plaintiff abandons or withdraws from the suit, the transposition under Order 23 Rule 1 and Rule 1-A cannot be permitted.

(d) Defendant Nos. 2 and 3, on the one hand, approached the revenue authorities and sought revenue entries in their favour and on the other hand, they are before the Civil Court contending that they do not desire any benefit out of the suit and the suit may be decreed only in favour of the original plaintiff.

(e) A shifting stand is being taken by the transposed plaintiffs only to misguide the Court and to draw an advantage from the pending suit.

(f) The compromise decree arrived at between the parties in 1970 has now been sought to be declared as being not binding.

(g) The compromise decree was acquired by the original plaintiff and his wife contending they are at loggerheads and not on good terms.

(h) Today, the same wife alongwith other defendant son seeks to be transposed alongwith the original plaintiff.

(i) A fraud has been played by these defendants on the Court.

(j) These petitioners are litigating in the suit for protecting their rights to the suit property.

(k) The suit is at the stage of recording of evidence.

(l) Such defendants should not be permitted to be transposed.

(m) Reliance is placed upon the following judgments :-

1) Madaka Anjaneyulu Vs. Madaka Balaih and others,

2001 (1) ALD 312, 2001 (1) ALT 172

2) Ahmed Abdul Saleem and Ors. Vs.

Ahmed Abdul Sameer and Ors., 2002 AIHC 2310.

3) Jethiben vs. Maniben and another,

AIR1983Guj194,

4) Manikanchan alias Chennapan Vs. Munuswamy,

Second Appeal Sr.No.4004 of 2012 and M.PNo.1

of 2005, dated 27/07/2016 (Madras High Court).

3. The learned Advocate appearing on behalf of the respondents submits that when the earlier suit was subjected to a compromise in RCS No. 455/1970 by the decree dated 22/04/1970, the petitioner herein as well as respondent No.2 were minor sons of the original plaintiff Digambarrao. Whether, the said decree will have a binding effect or whether, it can be termed as being null and void, would be a subject of the present suit.

4. It is submitted that even when the plaintiff preferred this suit, these respondents had entered their written statement contending that the suit may be decreed in favour of the plaintiff. They hold their interests identical to the interests of the plaintiff. It was when the plaintiff realized that he was in failing health that he agreed to have these defendants transposed as co-plaintiffs so that the suit could be prosecuted. As these defendants do not have any adverse interests as against the plaintiff, there would not be a conflict of interest, which is the requirement of law, while considering an application for transposition.

5. He turns to the impugned order as well as the affidavit in reply tendered and contends that the plaintiff who is almost 80 years of age and since the suit is at the stage of recording of his evidence, deems it proper to have these defendants transposed so that the suit could be properly conducted and would not be given up merely because the original plaintiff is in failing health.

6. I have considered the above recorded submissions of the learned Advocates. The Honourable Apex Court, in the matters of *Syed Yakoob Vs. K. S. Radhakrishnan, AIR 1964 AX 477* and *Surya Dev Rai Vs. Ramchandra Rai, AIR 2003 SC 3004* has laid down the law that the High Court can exercise its supervisory jurisdiction when the impugned order appears to be grossly perverse, erroneous and against the crystalised position of law. Merely because a second view is possible, cannot be a ground for interfering with an impugned order.

7. The record reveals that the written statement of

defendant Nos. 2 and 3 supports the pleadings of the plaintiffs. It is specifically averred and prayed that the suit be decreed in favour of the plaintiff. Application Exhibit 184 preferred by these defendants indicates that the plaintiff was 78 years of age when the said application was filed before the Trial Court. He is physically weak and has suffered a brain stroke by which his part of the body has been affected by paralysis. His eye sight of the affected part is practically lost. Dementia seems to be setting in. As the interest of the plaintiff and these defendants were not adverse to each other, they decided to move the Trial Court seeking leave to transpose these defendants as plaintiff Nos. 2 and 3.

8. In the case of Madaka Anjaneyulu vs. Madaka Balaiah and others (supra), the Andhra Pradesh High Court has concluded in paragraph No. 16 as under :-

"In the light of the decisions of Calcutta, Gujarat and Madras High Courts, the principle may be taken as well settled that if the interest of a defendant is not adverse to the interest of a pro forma defendant, he can be transposed as plaintiff in the event of withdrawal or abandonment by the

original plaintiff. The same is not true when a defendant who seeks transposition as plaintiff is not able to show that his interest is similar to the interest of the plaintiff. In any event, in my considered opinion, in a suit for partition by brothers, where one of the brothers sets up a claim for the entire property absolutely denying the right of other brothers for a share in the property, such claimant cannot be transposed as appellant at the stage of appeal having regard to the peculiar nature of suit for partition."

9. In the light of the decisions of Calcutta, Gujrath and Madras High Court, the principle may be taken as well settled that if the interest of the defendant is not adverse to the interest of a pro forma defendant, he can be transposed as a plaintiff in the event of a withdrawal by the original plaintiff. Such a transposition is not being possible if the plaintiff can indicate that his interest is different than the interest carried by the defendant.

10. Considering the above and keeping in view that the original plaintiff finds himself to be not in a good state of health, that these defendants have been permitted by the Trial

Court to be transposed as plaintiffs. I do not find that the impugned order could be termed as being grossly perverse or likely to cause gross injustice to these petitioners.

11. In view of the above, this petition being devoid of merit is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

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