

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4894 OF 2018

Vijay Narayan Thatte & Ors. Petitioners
V/s.
Indirabai Waman Thatte (Since Deceased),
Through LRs.:-
Jai Kedar Karmarkar & Ors. Respondents

Mr. Y.S. Jahagirdar, Senior Counsel, a/w. Mr. Khurjekar, Mr. Kunal Nawale and Mr. R.V. Govilkar, i/by M/s. Govilkar & Associates, for the Petitioners.

Dr. Virendra Tulzapurkar, Senior Counsel, i/by Mr. Mandar Soman, for Respondent Nos.3 to 10.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19TH APRIL, 2018.

P.C. :

1. Heard Mr. Jahagirdar, learned Senior Counsel, for the Petitioners, and Dr. Tulzapurkar, learned Senior Counsel for Respondent Nos.3 to 10.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 13th October 2017, passed by the 5th Joint Civil Judge, Senior Division, Pune, below the application at "Exhibit-428" filed in Special Civil Suit No.54 of 1998.

3. The Petitioners herein are Original Defendant Nos.1 to 12. The application at "Exhibit-428" was filed by Original Plaintiff Nos.3A to 10

with a request that they may be transposed as 'Defendant Nos.20 to 29'. The Petitioners have opposed the said application; however, the Trial Court has allowed the same and hence the instant Writ Petition.

4. Even a cursory glance to the proceedings is more than sufficient to show that the impugned order passed by the Trial Court does not call for any interference. It is pertinent to note that, originally, the Suit was filed by Plaintiff Nos.1 to 10 for partition and separate possession. In the said Suit, Plaintiff Nos.3A to 10 filed an application for impleading them as 'Plaintiffs' or as 'Defendants', as may be the case. The said application was allowed and they were impleaded as 'Plaintiff Nos.3A to 10'. Accordingly, the plaint was amended. The Petitioners-Defendants then filed the application under Order 7 Rule 11 of CPC for rejection of the plaint. At that stage, Plaintiff Nos.3A to 10 filed the application for engaging another set of Lawyers to contest the said Suit and also the application. While resisting the said application, it is the Petitioners themselves, who had submitted that the separate Advocate cannot have right to address, when the interests of Plaintiff Nos.3A to 10 are united with the remaining Plaintiffs. It was suggested that, Plaintiff Nos.3A to 10 can pray to transpose them as 'Defendants'. On their suggestion and in view of the rejection of their application to engage separate set of Lawyers, Plaintiff Nos.3A to 10 have filed this application for transposing them as 'Defendants'. It is their specific contention that, they are very keen and interested in contesting and opposing the

application filed under Order 7 Rule 11 of CPC and as they are not allowed to do so by engaging their own set of Lawyers, they may be transposed as 'Defendants'.

5. The Trial Court has, after considering the Judgment of this Court in the case of *Venkatrao A. Pai and Sons Ltd. Vs. Narayanlal Bansilal and Ors.*, AIR 1961 Bom. 94, allowed the said application.

6. Thus, in the facts of the present case, this Court fails to understand what possible grievance the Petitioners should have against the impugned order of the Trial Court, if, on their own suggestion, Plaintiff Nos.3A to 10 are permitted to be transposed as the 'Defendants'. According to learned counsel for the Petitioners, the relevant observations made by this Court in the case of *Venkatrao A. Pai (Supra)*, which are as follows, do not mandate the Court to allow such application for transposition of parties, but only empower it to do so. However, the Trial Court has treated them as mandate and allowed the application. Therefore, the impugned order suffers from illegality.

“3. It may be that at some stage or the other of the action some of the plaintiffs might feel that there is a conflict of interest between them and the other plaintiffs. Just for that reason, however, as was held by the Master of the rolls in the case cited above, such plaintiffs cannot be allowed to engage a different counsel. If they so wish, they might well apply to the Court to transpose them as Defendants.”

7. In my considered opinion, having regard to the facts of the present case and the reasons given by the Trial Court, it cannot be said that the Trial Court has, merely because there is a power, exercised that power or treated the observations referred above as mandate. Conversely, the Trial Court has considered the sequence of the stages in the litigation and the fact that the Plaintiff Nos.3A to 10 were impleaded in the Suit subsequently. They had clearly given the option either to implead them as 'Plaintiffs' or 'Defendants'. It is the Trial Court, which has impleaded them as 'Plaintiffs'. Now once Plaintiff Nos.3A to 10 found that they have to contest the Suit and the application, filed under Order 7 Rule 11 of CPC, independently, they had also filed an application to engage another set of Lawyers, which was rejected. In the facts of the present case, therefore, Plaintiff Nos.3A to 10 were very well justified and the Trial Court was well within its powers, reasons and discretion to allow their transposition as 'Defendants'. It is significant to note that, it was the suggestion of the Petitioners themselves that Plaintiff Nos.3A to 10 can seek permission to transpose them as 'Defendants'. Hence, absolutely no fault or error can be found in the impugned order of the Trial Court. The Writ Petition, therefore, does not hold merits and needs to be dismissed.

8. The only submission made by learned counsel for the Petitioners at this stage is that, the affidavit-in-evidence on behalf of the Plaintiffs is filed and now, if these Plaintiff Nos.3A to 10 are allowed to cross-examine the Original Plaintiffs, in that case, attempt will be made to fill

up the lacunae in the affidavit-in-evidence of the Original Plaintiffs and to that extent, the directions are necessary.

9. Needless to state that, as regards Plaintiff Nos.3A to 10, who are subsequently transposed as 'Defendants' as per the order of the Court, the Trial Court to ensure that they cross-examine the Plaintiffs and their witnesses first, prior to the cross-examination of the Plaintiffs and their witnesses by these Petitioners.

10. With the above-said observation, the Writ Petition stands disposed off as dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]