

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 3143 OF 2010

Anil R Agarwal ...Plaintiff
Versus
Swatantrakumar Agarwal & Anr ...Defendants

Mr Ketan Parekh, i/b KR Parekh & Co., for the Plaintiff.
Mr Mannadiar, i/b Mannadiar & Co., for Defendant No. 1.
Mr RS Tripathi, for Defendant No. 2.

CORAM: G.S. PATEL, J
DATED: 25th March 2019

PC:-

1. The Plaintiff's application for withdrawal of the suit is opposed by Mr Tripathi for the 2nd Defendant. He submits that the Court has the power to transpose the 2nd Defendant as the Plaintiff under Order XXIII Rule 1-A of the Code of Civil Procedure 1908. There is indeed such a power but that does not mean that it must be exercised in each and every case. The suit is not for partition nor for administration, regardless of how Mr Tripathi may choose to view it. It is a suit for a declaration that the Plaintiff has a one-third right, title and interest in the property described in Exhibit "B" to the Plaint. This is a plot of land and building at Andheri (East), Mumbai 400093. The Plaintiff seems to have settled with the 1st Defendant and therefore states that he has no surviving cause of action against

the 2nd Defendant, nor does he wish to pursue the suit against the 2nd Defendant. That is always the prerogative of the Plaintiff.

2. The 2nd Defendant filed a Written Statement supporting the Plaintiff. This would not, in my view, satisfy the ingredients of Order XXIII Rule 1-A as to whether there is a substantial question to be decided as between the 2nd Defendant and the 1st Defendant. The 2nd Defendant is of course at liberty to adopt an independent proceeding and if he chooses to do so all contentions necessarily be kept open.

3. The Suit is dismissed as withdrawn.

4. Refund of Court fees, if any, in accordance with the Rules.

5. Mr Tripathi undertakes to file his appearance for the 2nd Defendant within one week.

(G. S. PATEL, J)