

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1656 of 2017**

Devendra Kumar Son of Late Deonandan Sinha, Resident of Village-
Bhagwanpur, P.S.- Masaurhi, District- Patna at present residing at Hadasar,
Pune.

... .. Petitioner/s

Versus

Amrendra Kumar Son of Late Deo Nandan Sinha, Resident of 108, Rajendra
Nagar, Road No. 2, Police Station- Kadamkuan, in the Town and District of
Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Adv. Mr. Manoj Kumar, Adv. Mr. Rakesh Kumar, Adv.
For the Respondent/s	:	Dr. Indira Lakshmi, Adv.

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date : 07-03-2025

The instant civil miscellaneous petition has been filed by the petitioner for quashing the order dated 18.07.2017 passed in Title Suit No. 37 of 1994 by learned Additional District and Sessions Judge-III, Patna whereby and whereunder while allowing the withdrawal of the suit by the plaintiff, the prayer of the defendant to be transposed in the category of plaintiff has been rejected.

2. Facts of the case, as culled out from the record, are that respondent filed a suit for partition bearing Title Partition Suit No. 37 of 1994 seeking 1/5th share in the property as mentioned in Schedule-I and II of the plaint. The said suit was filed by the plaintiff/respondent against his two brothers, father and two wives of his father, respectively. Petitioner is brother of the respondents and was one of the defendants. The parties



entered into a compromise and a compromise petition was filed and the suit was disposed of by passing a compromise decree. However, the compromise decree was challenged by the father of the petitioner and the respondent on the ground that before passing the compromise decree he was not heard. With the said contention First Appeal No. 190 of 1996 was preferred before this Court. The said First Appeal was heard and disposed of vide judgment dated 05.01.2011 by allowing the appeal and the matter was remanded to the learned trial court for proceeding ahead in accordance with law, albeit, with certain observations. Thus, the matter was transferred back to the learned trial court. Meanwhile, another development took place in the case as plaintiff-respondent filed a Probate Case bearing number 55 of 1998 for probate of Will said to have been executed by the father Deonandan Sinha. On contest, probate case was numbered as Title Suit No. 13 of 1999. Subsequently, in the light of the decisions of Hon'ble Supreme Court partition suit was transferred to the Court where the Probate Case has been pending. In the meantime, the defendant/petitioner also filed another partition suit with regard to the left out properties of Title Suit No. 37 of 1994 and the suit of the petitioner was numbered as Title Partition Suit No. 63 of 2013. The third suit



has also been ordered to be transferred to the Court of learned Additional District Judge-III, Patna and thus, all the three suits came in the same Court for hearing and trial together. It further appears that the respondent filed a petition in Partition Suit No. 37 of 1994 on 11.07.2016 under Order XXIII Rule 1 of the Code of Civil Procedure (in short “the Code”) seeking permission to withdraw the said suit, taking a plea that matter of partition had already been decided. The petitioner joined the issue and filed a petition on 18.07.2016 praying therein that if the plaintiff/respondent was interested in withdrawal of the suit, then instead of allowing withdrawal of the suit by the respondent, the petitioner be permitted to be transposed in the category of plaintiff in the suit and the original plaintiff be transposed in the category of defendant and thus, the petitioner be allowed to continue with the said suit. The parties were heard and vide order dated 18.07.2017, the petition of the petitioner was rejected and withdrawal of the suit was allowed. The said order is under challenge before this Court.

3. Mr. J.S.Arora, learned senior counsel appearing on behalf of the petitioner submitted that the impugned order is illegal and not sustainable in the eye of law. The said order has been passed in contravention to the expressed provisions of the



law. The learned trial court did not take into consideration the fact that in a partition suit every plaintiff is a defendant and every defendant is a plaintiff and status of both are the same. The learned trial court further failed to take into consideration that the partition suit was sought to be withdrawn after 22 years of its filing and it was prudent to consider the prayer of the petitioner for his transposition as plaintiff. Mr. Arora further submitted that the learned trial court has committed gross jurisdictional error by ignoring the provision of Order 23 Rule 1A of the Code which specifically provides for transposition of defendants as plaintiffs when a suit is withdrawn or abandoned by the plaintiffs under Order 23 Rule 1 of the Code and the defendants applies to be transposed as plaintiff. The learned trial court also ignored the fact that the suit was transferred to the Court of learned Additional District Judge-II to be clubbed, heard and tried together with other title suits. Thus, the learned senior counsel submitted that the impugned order is not only illegal and erroneous, it is against the law. Mr. Arora further pointed out that while remanding the matter to the learned trial court, the compromise petition filed in the suit was still pending and after the order of remand it was obligatory on the part of learned trial court to dispose of the same first and till the same



was disposed of, there was no occasion for it to allow the withdrawal of the suit. Thus, Mr. Arora submitted that the learned trial court committed the error of jurisdiction in passing the impugned order and the same be set aside and the prayer of the petitioner for transposition as a plaintiff be allowed.

4. Dr. Indira Lakshmi, learned counsel appearing on behalf of the respondent vehemently contended that there is no infirmity in the impugned order and the same does not need any interference by this Court. Learned counsel submitted that the petitioner has not placed all the facts before this Court. There was already a compromise decree in Title Partition Suit No. 277 of 1976 passed by learned Sub Judge-I, Patna on 13.06.1978 and *takthabandi* was done and the parties came in possession of the property in the suit. As partition had already taken place, the plaintiff/respondent moved before the learned trial court submitting that the suit was filed due to mistake on part of the plaintiff as record of previous suit for partition was not available with the plaintiff. Therefore, the suit of the plaintiff was not maintainable under the provisions of Section 40 of the Evidence Act as well as Section 11 of the Code. Since the suit property already stood partitioned, there was not ground to further proceed in the matter. There cannot be any further partition of



the same property between the same parties which has already taken place about 40 years back. The learned counsel further submitted that the petitioner even approached the Hon'ble Supreme Court by filing Special Leave Petition (SLP) No. 39806 of 2013 against the impugned judgment and order dated 05.01.2011 passed in F.A. No. 190 of 1996 but the said SLP was dismissed on 04.08.2017. Therefore, the petitioner cannot now claim that the compromise is still alive and the learned trial court ought to have considered this fact and should have taken the compromise petition for disposal before allowing withdrawal by the respondent. Learned counsel further submitted that the petitioner has already filed Title Partition Suit No. 63 of 2013 which is pending before the Court of learned Additional District Judge-XIV, Patna and the petitioner can raise all grievances in his Title Partition Suit. In the said suit by the petitioner, issues have been framed and two witnesses have been examined. Learned counsel further submitted that the petitioner has concealed the fact that a number of transfer of properties have been made by the petitioner, one Nirmala Sinha who is wife of Nirmal Kumar and Chandra Kanta Sinha, mother of the petitioner by executing sale deeds as well as gift deeds wherein they have mentioned that there has been a partition between the



shareholders and the vendors came into the possession of the property through this partition. Thus, learned counsel submitted that the learned trial court has not committed any error rather it has considered the fact that some compromise has already taken place between the parties with respect to suit properties and the fact has not been disputed on behalf of the defendant and in the light of decree of Title Partition Suit No. 277 of 1976, there remains no ground to proceed further in the matter and the petitioner was rightly allowed to withdraw his suit. Learned counsel referred to a decision of Hon'ble Supreme Court in the case of ***Hulas Rai Baij Nath vs. Firm K.B. Bass & Co.*** reported in ***AIR 1968 SC 111*** wherein the Hon'ble Supreme Court held that at the stage of withdrawal of the suit, no vested right in favour of the defendant had come into existence and there was no ground on which the Court could refuse to allow withdrawal of the suit. The Hon'ble Supreme Court further held that the right of the plaintiff to withdraw the suit is not affected by any vested right existing in favour of the appellant. Thus, the learned counsel submitted that the impugned order is proper and valid and the same needs to be sustained.

5. By way of reply, the learned senior counsel for the petitioner submitted the suit properties of Title Partition Suit No.



277 of 1976, Title Partition Suit No. 37 of 1994 and Title Partition Suit No. 63 of 2013 are different though some of the properties are common. The fact could be thrashed out before the learned trial court after full hearing and the same cannot be decided without proper evidence and hearing of the matter. Therefore, rejecting the prayer of the petitioner for the transposition on the ground that a compromise has taken place in Title Partition Suit No. 277 of 1976 is not correct. Learned senior counsel further submitted that Title Partition Suit No. 63 of 2013 has been filed for the properties not mentioned in Title Suit No. 37 of 1994 and on this ground, the petitioner could not be denied the right to be transposed as plaintiff in Title Suit No. 37 of 1994.

6. I have given my thoughtful consideration to the rival submission by the parties and also perused the record.

7. The issue before this Court is whether in the given facts and circumstances, it is just and proper to allow the petitioner to be transposed as defendant in Title Suit No. 37 of 1994. Provision of law is very clear.

8. Rule 1 of Order 23 of the Code reads as under:

“1. Withdrawal of suit or abandonment of part of claim.

(1)At any time after the institution of a suit, the plaintiff may as against all or any of the



defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in [rules 1 to 14 of Order XXXII](#) extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.

*(3) Where the Court is satisfied,-
(a) that a suit must fail by reason of some formal defect, or
(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.*

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule(1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

The withdrawal has been sought in the light of aforesaid provision by the respondent of his title partition suit.



The provision for transposition of defendant has plaintiff has been prescribed in Rule 1A of Order 23 which reads as under:

“1A. When transposition of defendants as plaintiffs may be permitted.

Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order 1 the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.”

9. In the instant case, perusal of the impugned order does not reflect the reasons on which the prayer of the petitioner for being transposed as defendant has been rejected except for the fact that the learned trial court recorded the finding that the suit property has already been partitioned in Title Suit No. 277 of 1976 and there is no ground to further proceed in the case. When there has been claim and counter claim about some of the properties not being part of the suit property of Title Suit No. 277 of 1976 and already a title partition suit has been filed by the petitioner vide Title Partition Suit No. 63 of 2013, apparently there are certain triable issues and the learned trial court ought to have taken these facts into consideration as Rule 1A of Order 23 of the Code provides that while considering the application for transposition as plaintiff by the defendant the Court shall have due regard to the question whether the



application has a substantial question to be decided as against any of the other defendants. Once the petitioner has brought before the Court such issue which needs consideration, the learned trial court ought to have considered this fact and would not merely have gone to deny the prayer of the petitioner to be transposed as defendant on the ground of compromise in earlier title partition suit between the parties.

10. So far as opposition to transposition of the petitioner as plaintiff by the respondent is concerned, the same is on the grounds that there has already been a partition and the petitioner has himself filed another partition suit and could always raise the issues before the said Court. Since there has been specific averment that different properties are involved starting from Title Suit No. 277 of 1976, it is more necessary that the learned trial court should take up all the matter and dispose of the same having regard to each of the contentions of the parties instead of outrightly denying the claim of the petitioner to be transposed as plaintiff when the prayer of the respondent for withdrawal of the partition suit was being allowed. Then the fact is also to be borne in mind that the suit which is being withdrawn is a partition suit and in a partition suit every plaintiff is considered as defendant and every



defendant is a plaintiff and considering the status of the parties, any of the defendants on his prayer should be given an opportunity to proceed with the matter.

11. In the light of the discussion made hereinbefore, I am of the opinion that the learned trial court committed an error of jurisdiction while passing the impugned order and hence, the order dated 18.07.2017 is set aside.

12. Accordingly, the present petition stands allowed.

13. However, considering the antiquity of the title partition suit and also taking into consideration the multifarious suits whether title suit arising out of probate and other partition suit, the learned trial court would take up the matter in all earnest and try to dispose of the suits at the earliest without granting unnecessary adjournment to any of the parties and adjournments sought on frivolous grounds will be sternly dealt with by the learned trial court.

(Arun Kumar Jha, J)

Anuradha/-

AFR/NAFR	NAFR
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