

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

WRIT PETITION NO. 10012 OF 2019

Sou. Nalini @ Madhavi Madhukar Murkute
Age 55 years, Occu : Service,
Residing at 7 `A', Ganesh Datt Society,
Jayantrao Tilak Nagar, Sahkar Nagar No.1,
PUNE # 411 009

..Petitioner
(Orig. Plaintiff)

Versus

- (1) Shri Deepak Manohar Gaikwad
Age 62 years, Occu : Agriculture,
- (2) Mrs. Rohini Deepak Gaikwad,
Age 61 years, Occu : Household,
- (3) Smt. Sunita Dilip Gaikwad
Age 57 years, Occu : Household,
- (4) Shri Shrikant Dilip Gaikwad,
Age 33 years, Occu : Service,
- (5) Shri Shubham Dilip Gaikwad
Age 27 years, Occu : Service
- (6) Miss Supriya Dilip Gaikwad
Age 25 years, Occu: Service
- (7) Smt. Shakuntala Manohar Gaikwad
Age 82 years, Occu : Well to do
Respondent Nos.(1) to (7) are
all residing at "Matoshree" Bungalow,
Kondhava Budruk,
Taluka Haveli, District Pune.
- (8) Sau. Rohini Shankar Jadhav,
Age 60 years, Occu : Service,
Residing at 4-B, `Shanti Heights',
1st Floor, Survey No.54,
Near Khadi Machine, Katraj Kondhava Road,
Pune 411 046
- (9) M/s Bora Properties,
Registered Partnership Firm,

having its office at 1276/Accused,
Deccan Gymkhana,
Pune 411 004 Through its Partners

- (A) Shri Gautamchand Bhikchand Bora,
Age Adult, Occu : Business,
Residing at 1, `Bora Paradise`,
Mrutyunjay Society, Kothrud,
Pune 411 038
- (B) Shri Santosh Bhikchand Bora,
Age Adult, Occu: Business,
Residing at 7, `Bora Pride`,
Bibwewadi, Pune 411 037
- (10) Shri Rajan Harakchand Khivsara,
Age Adult, Occu: Developer,
Residing at Mary Flex Parking Plaza,
Mary God, Kalyani Nagar,
Pune 411 014
- (11) Shri Ashok M. Chhabria
Age Adult, Occu : Developer,
- (12) Smt. Sunita Ramesh Chhabria,
Age Adult, Occu : Household
- (13) Shri Jethanand S. Bhatija
Age Adult, Occu : Developer,
Respondent Nos.(11) to (13) all
residing at 461, Budhwar Peth,
Pune 411 002
- (14) Shri Mahadev Sopan Ghate
Age Adult, Occu : Developer,
Residing at Patharwadi, Post Bhivri,
Taluka Purandar, District Pune
- [(15) Shri Devkinandan Gitaram Gupta,
Age 50 years, Occ: Business,
Residing at D-3, Lal Deul Housing Society,
Pune 411 001] (Deleted)
- (16) Shri Dattatray Sadu Shinde,
Age 50 years, Occu : Business,
- (17) Shri Anna Sadu Shinde,
Age 47 years, Occu : Business,

- (18) Shri Shankar Sadu Shinde
Age 42 years, Occu : Business,
- (19) Shri Tukaram Aakanna @ Aabhanna Shinde,
Age 40 years, Occu:Business,
- (20) Shri Dnyaneshvar, Aakanna @ Aabhanna Shinde,
Age 38 years, Occu : Service,
Respondent Nos.(16) to (20) are all
residing at Vaiduwadi, Hadapsar,
Pune 411 013
- (21) Mrs. Sangeeta Balasaheb Kamthe,
Age 39 years, Occu : Agriculture/Household,
- (22) Ms. Rupali Vikas Dnyandev Kamthe,
Age Adult, Occu: Household,
Respondent Nos.(21) and (22) are
residing at Khalad, Taluka Purandar,
Dist. Pune.
- (23) Mrs. Chhaya Ankush Kamthe,
Age 44 years, Occu : Agriculture/Household,
Residing at Khalad, Taluka Purandar,
District Pune
- (24) Mrs. Rekha Arjun Jagtap,
Age 62 years, Occu: Agriculture,
- (25) Mrs. Suvarna Kumar Jagtap,
Age 52 years, Occu: Agriculture,
Respondent Nos.(24 and (25) are
residing at Saswad, Taluka Purandar,
District Pune
- [(26) Ms. Meenakshi Chanmdrakant Bhoir
Age 50 years, Occu : Agriculture/Household,
Residing at `Clover Highland', N.I.B.M. Road,
Kindhwa Khurd, Pune 411 048] (Deleted)
- [(27) Shri Ganesh Murlidhar Sonavane,
Age 51 years, Occu : Agriculture/Household,
Residing at 1, Tadiwala Road,
Pune 411 001] (Deleted)
- [(28) Shri Sunil Ramdhari Mittal,
Age 48 years, Occu : Agriculture/Household,
Residing at Khadki [E],
Sangamwadi, Pune 411 003] (Deleted)

- (29) Shri Balasaheb Jaywant Zende
Age 58 yrs, Occu : Agriculture
- (30) Shri Manoj Balasaheb Zende
Age 31 years, Occu : Agriculture
- (31) Shri Tushar Balasaheb Zende
Age 30 years Occu : Agriculture
Respondent Nos.(29) to (31) are
all are residing at & Post Fursungi,
Taluka Haveli, District Pune
- [(32) Shri Gulab Javanmal Bhandari,
Age Adult, Occu : Business
Residing at Bhavani Peth,
Pune 411 042] (Deleted)
- [(33) Shri Narendra Hukumchand Jain
Age Adult, Occu : Business,
Residing at 857 Bhavani Peth,
Pune 411 042] (Deleted)
- [(34) Sau. Anita Ramanlal Porwal
Age 48 years, Occu : Business,
Residing at Hude ark Flat No.C-103,
Bhavani Peth, Pune 411 042] (Deleted)

...Respondents
(Orig. Defendants)

Mr.S.C. Wakankar a/w. Ms. Aishwarya Bapat, for petitioner.
Mr. V.R. Kasle, for Respondent Nos.1, 3 to 7.
Mr. P.B. Bhargude a/w Mr.Sumit Sonare for Respondent No.8.
Mr. R.D. Soni and Mr. Tushar Momaiyah i/b. Ram and Co. for
Respondent Nos.9, 9-A to 9-B.

CORAM : M.M. SATHAYE, J.

RESERVED ON : 3rd March, 2023
PRONOUNCED ON : 20th March, 2023

:: JUDGMENT ::

1. Notice of final disposal was issued in this matter on
27th January, 2020. Accordingly contesting Respondents have

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appeared. Learned counsel for the Petitioner has already deleted the unserved respondents as noted in order dated 3rd March, 2023, when arguments were finally heard and concluded.

2. Rule. Rule made returnable forthwith. Mr.Kasle, learned counsel waives service for respondent nos.1, 3 to 7. Mr.Bhargude, learned counsel waives service for respondent no.8. Mr.Soni, learned counsel waives service for respondent nos.9, 9-A and 9-B. Taken up for final disposal with consent of parties.

3. By this petition filed under Article 226 and 227 of the Constitution of India, the original Plaintiff in Special Civil Suit no.2375 of 2011 (“the said suit” for short) is challenging an Order dt. 6th June, 2019 passed by the Joint Civil Judge, Senior Division, Pune below Exh. 185. By this order, the application of Defendant No.6 (present Respondent no.8) for transposing her as Plaintiff, under Order 23 Rule 1A of the Civil Procedure Code, 1908 (“CPC” for short) is allowed and Defendant no.6 is transposed as Plaintiff in the said suit.

4. Though the Petitioner is sole Plaintiff and Respondents are Defendants in the said Suit, it appears that numbering in the array of parties have been changed for reasons best known to Petitioner. However, for better understanding, parties are referred hereinafter in their original capacity.

FACTS :

5. Some facts emerging from record, necessary for disposal of this petition are as below. It is alleged that on 10.08.2006, Defendant no.6 (transposed Sister) executed a release deed and power of attorney in favour of Defendant nos.1 and 3, who are real brothers of Defendant no.6 and Plaintiff. Based on this, Defendant nos.1 and 3 have allegedly executed certain documents in favour of Defendant No. 7 Developer subsequently. In 2011, present suit is filed seeking partition and separate possession by Plaintiff (other sister - Petitioner) in respect of many suit properties including a portion described in plaint para 1.1(1) and 1.1(2) (“the said portion of suit property” for short)

6. On 01.03.2012, Defendant no.6 filed written statement claiming equal right and share in the suit properties along with Plaintiff and supported the Plaintiff to that extent. However, it is her case that her signatures were taken on certain blank papers, and she was taken to a Government office under undue influence and with a misrepresentation that certain documents are required to be executed for entering names of all heirs to the ancestral property. It is her case that it has transpired that her said signatures were misused to create false and fabricated documents.

7. On 05.08.2013 the Trial Court granted interim injunction in respect of few of the suit properties against Defendant Nos. 1 to 7. The Defendant No. 7 developer, Plaintiff & Defendant nos.1 to 5 filed various Appeals From Order in this Court (AO Nos. 1207/13, 725/13 & AO Stamp No. 35843/13) and in those matters, a compromise was entered on 07.10.2014 between Plaintiff and Defendant nos.1 to 5 & Defendant No. 7 (Developer). It is the case of the Plaintiff that during that compromise, Defendant Nos. 1 & 3 have acted as power of attorney holder of Defendant no.6. The said compromise recorded that interim injunction granted by Trial Court will not apply to said portion of suit property and Plaintiff undertook to withdraw the said suit in respect of the said portion of suit property and to hand over vacant and peaceful possession thereof to Defendant No. 7 Developer for joint development. Defendant No. 7 Developer was permitted to delete Defendant No. 6 at his own risk from his appeal from order.

8. It appears that Defendant No. 6 filed Review Petition Stamp No. 31561/15 and challenged the said compromise, which according to her is executed behind her back. On 09.06.2016, this Court disposed off the said Review with clarification that the said order dt. 07.10.2014 (recording compromise) will not be binding on Defendant no.6 and will not come in her way of agitating her rights in the suit properties.

9. On 4th March, 2016, Defendant no.6 filed application Exh.185 in the said suit, seeking her transposition as Plaintiff. The Plaintiff replied to the said application by filing Reply Exh. 189 contending *inter alia* that Defendant no.6 is trying to get a declaration about registered Release Deed dated 10th August, 2006, which is apparently time barred and it cannot be permitted under law. It is contended that in a suit for partition all parties are plaintiff and defendants and as such, whatever share Defendant No. 6 is entitled to, the Court will pass appropriate Orders and there is no need for her transposition. On 06.06.2019, learned Trial Judge has allowed the said application Exh.185, which is impugned in this petition.

SUBMISSIONS :

10. Mr.Wakankar, learned counsel for the Petitioner - original Plaintiff submitted that by the impugned order, Defendant No. 6 is allowed to be transposed in his suit, when there is conflict of interest so far as prosecution of suit for some of the suit properties is concerned. So also, the interest of the parties viz. Plaintiff & Defendant no.6 are not identical and therefore transposition should not be permitted. In fact interest of Plaintiff and Defendant No. 6 is separate because of the intervening events and as such, in the peculiar facts of this case, transposition should not have been allowed. He further submitted that the provisions of Order 23 Rule 1A of CPC are not applied in proper perspective to

the facts of the present case, especially about the said portion of suit property. He contended that so far as the said portion is concerned, during the pendency of aforesaid Appeals From Order, the Plaintiff, Defendant Nos. 1 to 5 and Defendant no.7, who is developer, have entered into a compromise before this Court and now there is no dispute between Plaintiff and Defendant no.7 about the said portion of the suit property. He submitted that in this peculiar situation, since the Plaintiff is not interested in prosecuting the said suit for said portion of the suit property and since Defendant no.6 is specifically interested in continuing her dispute in respect of said portion with rest of the Defendants including developer, there is clear mis-joinder of cause of action, mis-joinder of parties, all in one place, as a result of impugned order. He further submitted that Defendant No. 6 is free to file her own suit and claim whatever reliefs against whoever she wants, and the same will be decided on its own merits including issue of limitation that Defendant No. 6 is bound to face. He therefore urged that the impugned Order be set aside.

11. *Per contra*, Mr.Bhargude, learned counsel for Respondent no.8 (Defendant no.6) submitted that his client was left with no option but to file such application below Exh.185 seeking transposition in the existing suit because behind her back, the Plaintiff and Defendant nos. 1 to 5 & 7 in the aforesaid Appeals from order, entered into compromise in the High Court. He invited

this Court's attention to the Order passed by this Court dated 07.10.2014 wherein certain terms of compromise have been entered between Plaintiff and Defendant nos. 1 to 5 & 7. He further invited this Court's attention to subsequent order dated 09.06.2016 passed by this Court in his client's Review Petition. He submitted that by specific Order passed in his review, this Court has clarified that the order of compromise passed in said Appeals from order are not binding on his client since his client was not present before the Court and was deleted. He urged that this Court has clarified that the said Order (recording compromise as aforesaid) will not come in the way of his client in agitating her rights in the suit properties, including the said portion thereof. He further submitted that all the ingredients of Order 23 Rule 1A of CPC are satisfied and in order to protect the interest of his client, in a suit for partition, there is no option but to transpose Defendant no.6, which has been rightly ordered by the Trial Court. It is his specific submission that since Order 23 Rule 1A makes a reference to 'withdrawal or abandonment of suit by Plaintiff under Rule 1', even in case of partial withdrawal of suit or part-abandonment of suit, Rule 1A will apply and transposition can be ordered. He further submitted that if Defendant no.6 is not permitted to prosecute the suit (as transposed Plaintiff), his client would face irreparable loss as her valuable rights therein would be compromised forever. He contended that in the peculiar facts of the case, no interference is called for in the impugned order.

12. Mr. Soni, learned counsel for Defendant No. 7 Developer, submitted that he is only concerned with the said portion of the suit property which his client has taken for development from Defendant brothers, acting for themselves and on behalf of Defendant No. 6 sister also. He submitted that the Plaintiff has given up her dispute in respect of the said portion of suit property. He submitted that in these set of facts, Defendant No. 6 having conflicting interest, should not be permitted to thrust herself as plaintiff and keep the said portion of suit property under litigation. He submitted that the intention of Defendant No. 6 is not bona fide. He submitted that obviously by present application Exh. 185, Defendant No.6 is trying to sneak a back-door entry for disputing registered documents executed by her in favour of her brothers, which claim is otherwise *ex-facie* time barred. He submitted just as Mr. Wakankar, that Defendant No. 6 is free to file her own suit and the same will be decided on its own merits.

13. Mr. Wakankar, learned counsel for the petitioner relied upon the Judgment of this Court in the matter of ***Kashibai Waman Patil (D) Thr. L.Rs. Vs. Shri Taukir Ahmed Mohammed Hanif Khan and Ors*** reported in **2015(6) All MR 340**, in support of his case. On the other hand, Mr. Bhargude, learned counsel appearing for Defendant no.6 relied upon the Judgment of Apex Court in the case of ***R. Dhanasundari alias R.***

Rajeswari Vs. A.N. Umakanth and others reported in (2020)

14 SCC 1 in support of his submissions.

14. Therefore, the **question that falls for consideration** is “whether a defendant whose interest is not identical with the plaintiff, can be permitted to be transposed as plaintiff in case of part abandonment of suit claim by the Plaintiff ?” The answer is No.

REASONS AND CONCLUSION :

15. I have heard both sides at length and carefully considered the rival submissions. Perused the record.

16. This is a suit filed by one sister against two brothers, their wives, mother and remaining sister, along with third persons, purchasers etc. who have been granted rights by some of the defendants before filing of the suit. This suit is for partition and separate possession of shares of two brothers, two sisters and a mother. In such a fact situation, what unequivocally emerges is that for said portion of the suit property (described in plaint para 1.1(1) and 1.1(2) only), plaintiff-sister and defendants-brothers along with mother and a developer to whom the said portion of suit property has been transferred, have chosen to compromise the dispute and the plaintiff-sister and two brothers and mother have chosen to let go their dispute about said portion. This fact is

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clear from the undertaking given to this Court by Plaintiff-sister that she will withdraw the suit so far as the said portion of suit property is concerned. It is also clear from the fact that these parties have agreed before this Court that the interim injunction, which is granted by the Trial Court, will not operate vis-a-vis the said portion of the suit properties. In respect of the same portion of the suit property however, Defendant no.6 is raising serious dispute contending that her signatures taken on blank papers on misrepresentation and undue influence have been misused to create documents and she does not consent to transfer in favour of the developer and that she has right in the said portion of the suit property also. Defendant No. 6 has alleged collusion amongst Plaintiff and Defendant Nos. 1, 3 and 7 in filing compromise terms. These are separate and distinct causes of action to Defendant No. 6. With such diametrically opposite interests claimed by Defendant no.6 on one hand, and Plaintiff and Defendant nos.1, 3 & 7 on the other, it is impossible to accept that the interest of Defendant no.6 is identical with the interest of the Plaintiff.

17. Relevant provision of law i.e. Order 23 Rule 1A is quoted below for ready reference :

“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 I 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.”

Interestingly within its fold, the above provision encloses provisions of Order I, Rule 10 of CPC also.

18. Careful reading of the Judgment of the Apex Court relied upon by the Defendant No. 6, in the matter of **R. Dhanasundari** (supra) shows that the law laid down in the said judgment is in fact supporting the Plaintiff rather than Defendant no.6. Useful reference can be made to the paragraph nos.12 and 13 of said Judgment, which are reproduced below :

“12. The present one is clearly a case answering to all the basics for applicability of Rule 1-A of Order 23 read with Order 1 Rule 10 CPC. As noticed, the principal cause in the suit is challenge to the sale deed executed by Defendant 1 in favour of Defendant 2, with the original plaintiff asserting his ownership over the property in question. After the demise of original plaintiff, his sons and daughters came to be joined as Plaintiffs 2 to 8 with Plaintiff 5 being the power-of-attorney holder of all the plaintiffs. After the suit was decreed ex parte, Plaintiff 5 transferred the property in question to the aforesaid three purchasers, who were joined as Plaintiffs 9 to 11 when the ex parte decree was set aside and suit was restored for bi parte hearing. In the given status of parties, even if Plaintiffs 5 and 9 to 11 were later on transposed as Defendants 3 to 6, the suit remained essentially against

Defendants 1 and 2, that is, in challenge to the sale deed dated 23-3-1985, as executed by Defendant 1 in favour of Defendant 2. In regard to this cause, even if Plaintiffs 5 and 9 to 11 came to be transposed as Defendants 3 to 6, their claim against Defendants 1 and 2 did not come to an end; rather, the interest of the existing plaintiffs as also Defendants 3 to 6 had been one and the same as against Defendants 1 and 2.

13. In the given status of parties and the subject-matter of the suit, when the plaintiffs entered into an arrangement with Defendants 1 and 2 and sought permission to withdraw under Order 23 Rule 1 CPC, the right of Defendants 3 to 6 to continue with the litigation on their claim against Defendants 1 and 2 immediately sprang up and they were, obviously, entitled to seek transposition as plaintiffs under Order 23 Rule 1-A CPC.”

19. The aforesaid narration by the Apex Court would show the gist of facts and application of law that because the interest of the existing plaintiff as also defendant nos.3 to 6 in that matter has been found as “one and the same” against contesting Defendant nos.1 and 2 therein, the transposition order under Order 23 Rule 1-A of the Civil Procedure Code was sustained. Therefore the touch-stone is “one-ness of interest”. I respectfully agree with the said proposition.

In the present case, interest of the Defendant No. 6 is not identical with the Plaintiff. Also, in that case the Plaintiff was withdrawing the suit fully and it was not a case of part-

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abandonment. In the present case, the Petitioner has not fully abandoned her claim. In that view of the matter, the said Judgment will not advance the case of the Defendant No. 6.

20. Perusal of the judgment in the matter of **Kashibai Waman Patil** (supra), relied upon by the Petitioner, would show that so far as Order 23 Rule 1-A is concerned, this Court, after considering the judgment of **Jethiben Vs. Maniben** reported in **AIR 1983 Guj 194** has held in para no.10 as below :

10. "..... This provision is added, as stated earlier, in order to facilitate a pro forma defendant who has identical interest from being denied his right if he rested on the success of the plaintiff's suit and the plaintiff wanted to withdraw the suit....."

Useful reference can also be made to certain observations in para no. 8 of **Jethiben's case** (supra), which are as below :

"8. But one thing cannot be ignored that to be transposed as a plaintiff, the defendant who claims to be transposed must have interest identical with the interest of the plaintiff

.

.

Courts would not permit such transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by the original plaintiff..."

Since, in the present case, interest of the Defendant No. 6 is not identical with the Plaintiff, as discussed earlier, both these Judgments support the case of Petitioner.

21. In view of the aforesaid discussion, this Court has no hesitation in holding that transposition of a defendant can be permitted in case of part abandonment of the claim by the plaintiff, provided the defendant seeking transposition has identical interest with the plaintiff *vis-a-vis* both, contesting defendants and subject matter property. If there is a conflict of interest between plaintiff and defendant seeking transposition, in respect of even one defendant or in respect of even one of the suit property, then transposition of such defendant can not be permitted. The obvious reason for such interpretation is that if such Defendant is permitted to be transposed in a suit, then it would virtually mean that there will be more than one set of causes being permitted amongst parties in one suit and that will be clearly a mis-joinder of cause of action or a mis-joinder of parties or both. It is unimaginable that such suit can be permitted to proceed where one plaintiff wants to let go its dispute against some of the defendants in respect of some of the suit property and at the same time, defendant seeking transposition wants to proceed in respect of same subject property against the same set of defendants.

22. Perusal of the impugned Order shows that the Trial Judge has not considered the key aspect of one-ness of interest amongst plaintiff and defendant no.6 and has proceeded on the footing that apprehension of defendant no.6 is not baseless about plaintiff possibly withdrawing the suit. In the present case, the Petitioner-plaintiff is not withdrawing the suit completely and is admittedly prosecuting the same against rest of the suit properties and against rest of the defendants. That apart, in the concluding paragraph of the impugned Order, the Trial Judge has apparently proceeded on the footing of inference that the conduct of the Plaintiff compromising part of the suit claim with defendant no.1 to 5 and 7 and filing of application for deletion of defendant no.7, means that plaintiff is going to withdraw full suit. This inference as well as finding is totally misconceived and unfounded and therefore cannot be sustained. Impugned Order has permitted two sets of parties having opposite interests and opposite causes vis-a-vis part of the suit property and some of the defendants, to prosecute the suit together, which cannot be permitted on the touch-stone of one-ness of interest. Therefore, the impugned order cannot be sustained and is liable to be set aside.

23. In the net result, the petition succeeds and the impugned Order dated 6th June, 2019 passed by the Joint Civil Judge, Senior Division, Pune below Exh. 185 in Special Civil Suit No.2375 of 2011 is quashed and set aside.

24. It is however clarified that Defendant no.6 will be at liberty to adopt appropriate legal proceedings including a substantive suit to agitate her grievances and claim in respect of the suit properties including the said portion thereof. If any such proceeding is filed by Defendant no.6, then all contentions of the both sides including that of limitation are expressly kept open to be decided on its own merits, in accordance with law, without being influenced by this Order.

25. Rule made absolute in the above terms. No order as to costs.

[M.M. SATHAYE, J]