
(2018) 06 JH CK 0022

In the Jharkhand High Court

Case No : Writ Petition (C) No. 1675 of 2009

Anand Kumar Arya

APPELLANT

Vs

Sri Bishwanath Poddar

RESPONDENT

Date of Decision : 18-06-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 23 Rule 1(A), Section 92, 151

Citation : (2018) 06 JH CK 0022

Hon'ble Judges : SHREE CHANDRASHEKHAR, J

Bench : Single Bench

Advocate : Anil Kumar Sinha, Prashant Pallav, Jyoti Nayan, Indrajit Sinha, Arpan Mishra

Final Decision : Allowed

Judgement

1. The petitioners, who are defendant nos.3 and 4 in Title (D) Suit No.98 of 2004, are aggrieved of order dated 24.11.2008 by which application filed

by the defendant nos.1,2,5,6 and 7 under Order XXIII Rule 1(A) CPC read with section 151 CPC has been allowed and they have been transposed

as plaintiffs in the suit and the original plaintiffs have been arrayed as defendants.

2. Title (D) Suit No.98 of 2004 was instituted by Sushant Kumar Jha and Chandan Nath Mishra for a decree for declaration that the suit property is a

public trust and the trustees have acquired no right, title and interest to alienate, convey, transfer and sell the suit property. In the pending suit an

application for temporary injunction was filed on 31.08.2004 and by an order dated 19.01.2005 parties were restrained from alienating the suit property

without permission of the Court. Thereafter, an application under Order XXIII Rule 1 CPC was filed by the plaintiffs on 10.08.2007 seeking leave

of the Court to withdraw the suit. An application for transposing themselves as plaintiffs in the suit was also filed by the defendant nos. 1,2,5,6 and 7

on 18.09.2007.Â Observing that certain issues against the defendant nos.3, 4 and 8 are required to be adjudicated in public interest, the trial Judge by

an order dated 24.11.2008 has allowed the application under Order XXIII Rule 1(A) CPC for transposition of defendant nos.1,2,5,6 and 7 as the

plaintiffs, and the original plaintiffs have been arrayed as defendants in the suit.Â

3. ContendingÂ thatÂ sectionÂ 92Â CPCÂ is mandatory, for non-compliance of which the suit would fail and therefore the application seeking

leave of the Court to withdraw the suit could not have been declined by the trial Judge, Mr. Anil Kumar Sinha, the learned Senior counsel for the

petitioners submits that the defendants who have been transposed as plaintiffs in the suit were also required to seek leave of the Court under section

92 CPC, a mandatory provision which stands waived of by virtue of the impugned order dated 24.11.2008.Â

4. Mr. Arpan Mishra, the learned counsel for the respondents, however, supporting the impugned order submits that certain issues such as validity of

the meeting held on 13.06.2007 and the resolution for sale of the trustâ??s property taken in the said meeting at the instance of defendant nos.3,4 and

8 are the issues on which stand of the defendant nos.1,2,5,6, and 7 are at variance with other parties and therefore once the plaintiffs sought leave to

withdraw the suit, these defendants have rightly been transposed as plaintiffs in the suit.Â

5. Section 92 CPC provides that in a case where breach of any express or constructive trust created for public purposes to a charitable or religious

nature is alleged or where direction of the Court is deemed necessary for the administration of any such trust, two or more persons having interest in

the trust and having obtained leave of the Court may institute the suit. The learned Senior counsel for the petitioners submits that there were certain

legal defects in the plaint and for that reason the plaintiffs sought leave of the Court to withdraw the suit. However, this stand of the plaintiffs has

been disputed by the defendants.Â

6. Provision for transposition of a defendantÂ as plaintiff has been incorporated in Order XXIII CPC by the Amendment Act of 1976. Rule 1-A to

Order XXIII CPC provides that 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 if considers that applicant has a substantial question to be decided as against any of the other defendants may permit transposition of a defendant as plaintiff for prosecuting the suit. Condition for transposition of a defendant as plaintiff in the suit has been spelt out in the later part of Rule 1-A itself. It provides that the court shall have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants. This rule contemplates a situation in which by withdrawing the suit the plaintiff may effect the interest of one or the other defendants adversely. Generally, in a partition suit where the plaintiff is not wholly dominus litis and if he applies for withdrawal of the suit to defeat the option of other defendants to seek partition, Rule 1-A provides remedy to the other defendants.Â

7. Broadly the tests which are applied to examine the application of a defendant for his transposition as plaintiff in the suit are; (i) whether there is a substantial question to be decided against any of the other defendants, (ii) whether there is identity of interest between the plaintiff and the defendant who seeks his transposition as plaintiff, (iii) whether judgment and decree in the suit would affect the defendant who seeks his transposition, as much as or the plaintiff, (iv) whether withdrawal of the suit would result in defeating a vested right of such defendant, and (v) whether at the point the withdrawal of the suit is sought by the plaintiff some right has devolved in favour of the defendant, in the meantime.Â Â Â Â

8. The defendants, infact, have not filed their written statement in the suit; they have filed the application for temporary injunction which has been treated as their written statement. No doubt, the defendant nos.1,2,5,6 and 7 have pleaded that there are certain issues which need to be decided by the court, but it is not shown that these defendants have an affinity or identity of interest alongwith the plaintiffs. It is not indicated in the impugned order whether withdrawal of the suit would take away some vested right of these defendants. The trial Judge has evidently committed serious errors in law.Â What was required from the trial Judge was to first decide the application under Order XXIII Rule 1 CPC and only if this application was allowed, the application filed on behalf of the defendant nos.1,2,5,6 and 7 for their transposition as plaintiffs in the suit could have been decided on

merits.Â Â Â Â

9.Â Â In the above facts, finding serious infirmity in order dated 24.11.2008 it is set-aside. The application dated 10.08.2007 filed by the original

plaintiffs and the application dated 18.09.2007 filed by the defendant nos.1,2,5,6 and 7 shall be heard afresh by the trial Judge.Â 10.Â Â The parties

shall appear before the trial court on 19.07.2018 when the trial Judge shall fix the date for hearing of these applications.

11. The writ petition stands allowed in the above terms.Â Â Â Â Â