

**(2002) 07 KAR CK 0041**

**In the Karnataka High Court**

**Case No : Civil Revision Petition No. 2322 of 2001**

Smt. Kashibai Ambekar and Others

APPELLANT

Vs

Vasanthrao Hanumanthrao Ambekar

RESPONDENT

**Date of Decision : 16-07-2002**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10 (2), Order 23 Rule 1A

**Citation :** (2002) ILR (Kar) 4442 : (2002) 6 KarLJ 470 : (2002) 4 KCCR 2209

**Hon'ble Judges :** Chandrashekaraiah, J

**Bench :** Single Bench

**Advocate :** J.S. Shetty, for the Appellant; Pramod N. Kathavi, for the Respondent

**Final Decision :** Allowed

## **Judgement**

Chandrashekaraiah, J.—This revision petition is by the plaintiffs challenging the order dated 2-2-2001 passed by the II Additional Civil Judge (Junior Division), Dharwad, in O.S. No. 427 of 1997 on the application (I.A. No. 5) filed under Order 1, Rule 10(2) of the Code of Civil Procedure.

2. The facts of the case in brief are.--That the plaintiffs filed a suit for partition and separate possession of their half share. It appears that in the said suit the defendant admitted the share of the plaintiffs and on that admission, the plaintiffs got withdrawn the suit. Thereafter, the defendant has filed the application (I.A. No. 5) under Order 1, Rule 10(2) of the CPC to transpose himself as plaintiff in the suit. Since the said application has been allowed, the petitioners are now before this Court.

3. The only question that arises for my consideration is whether the defendant can maintain the application filed under Order 1, Rule 10(2) of the Code of Civil Procedure, to transpose himself as one of the plaintiffs in the suit which has already been disposed of?

4. Order 1, Rule 10(2) of the CPC provides for striking out or add parties. Order 1, Rule 10(6) of the CPC as amended by the State of Karnataka reads as under:

"The Court may on the application of any party and after notice to the other parties affected by the application and on such terms and conditions as it may impose, transpose a plaintiff to the position of a defendant or subject to the provision of Sub-rule (3), a defendant to the position of a plaintiff".

5. In order to consider the scope of the above rule, it is also necessary to refer to Order 23, Rule 1-A of the Code of Civil Procedure, which reads as follows:

"Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order 1, the Court shall in considering such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 defendant".

6. A reading of the above Rule 10(6) of Order 1, it is clear that an application could be filed to transpose any party either as plaintiff or as defendant if the suit is pending consideration before any Court. In the instant case, admittedly the suit has already been disposed of, consequent on the withdrawal of the suit by the plaintiffs. If that is so, Order 1, Rule 10(6) as amended by the State of Karnataka is not maintainable. If the suit is withdrawn by the plaintiff, under Order 23, Rule 1-A one of the defendants may apply to the Court to transpose himself as plaintiff provided if substantial question to be decided as against any other defendants. In the case on hand the respondent in this petition is the only defendant and there is no question to be decided as against any other defendant or defendants. Therefore, even under Order 23, Rule 1-A, the plaintiffs being not defendants cannot maintain the application in the absence of anything to be decided as against any other defendant or defendants.

7. The learned Counsel for the respondent relying upon a decision in the case of Smt. Gowramma v. Nanjappa and Ors., contended that in a suit for partition, the defendant is permitted to file an application claiming his share. In a suit for partition, all the parties who are entitled for shares are to be treated as plaintiffs. If any one of the defendants in such suit makes claim by paying necessary Court fee, even though the plaintiff withdraws the suit, the share of the defendant is required to be considered treating him as plaintiff in the suit. In the instant case, no such claim has been made by the defendant in the written statement by paying necessary Court fee during the pendency of the suit. Therefore, the defendant, who has now made the application to transpose himself as plaintiff cannot maintain the application to transpose himself as plaintiff where the proceedings in the suit were not pending before the Court. Therefore, the above decision relied upon by the learned Counsel for the respondent has no application to the facts of this case. However, the order passed in the suit filed by the plaintiffs on their application for withdrawal will not come in the way of the defendant to file a separate suit, if he wants a decree in respect of his share and for separate possession. Therefore, in my considered view, the Trial Court is not right in allowing the application (I.A. No. 5) of the defendant filed under Order 1, Rule 10(2) of the CPC. Hence, I pass the following:

## ORDER

The revision petition is allowed.

The impugned order dated 2-2-2001 passed by the II Additional Civil Judge (Junior Division), Dharwad, in O.S. No. 427 of 1997 is hereby set aside.