



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.11.2017
PRONOUNCED ON : 20.11.2017

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THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP(PD) (MD) No.2025 of 2017
and CMP(MD) No.10132 of 2017

S.Subramania Othuvar ... Petitioner/Petitioner/Plaintiff

Vs.

1.S.Vasanthi
2.A.Sornavel
3.S.Sivakumar

... Respondents/Respondents/Defendants

PRAYER: Petition filed under Article 227 of the Constitution of India, against the fair order and decreetal order dated 15.07.2017 in I.A.No.280 of 2017 in O.S.No.125 of 2015 on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri.

For Petitioner : Mr.F.X.Eugine
For Respondents : No appearance

O R D E R

This Civil Revision Petition has been filed against the order dated 15.07.2017 passed in I.A.No.280 of 2017 in O.S.No.125 of 2015 on the file of the District Munsif cum Judicial Magistrate Court, Sivagiri.

2. The learned counsel for the petitioner would submit that an application was filed by the plaintiff/petitioner herein seeking permission to transpose the third defendant as the second plaintiff in the suit. The learned District Munsif Cum Judicial Magistrate, Sivagiri, has observed in the order that when the third defendant is set *ex-parte*, the application filed to transpose the third defendant could not be allowed and on that ground, the learned Munsif has negative the petition filed by this petitioner.

3. According to the learned counsel for the petitioner, the plaintiff has every right to transpose the third defendant as the second plaintiff since the plaintiff is the "*Dominus Litis*". In support of his contention, the learned counsel for the petitioner would rely on the judgment of this Court reported in **AIR 1978 Madras 384**. **M/s.Aruppukottai Sri Jaya Vilas (P) Ltd Vs. K.N.Karupiah and others.**



4. Heard the learned counsel for the petitioner and perused the materials available on record. There is no representation for the respondents.

5. The only question to be decided in this civil revision petition is that whether the petition for transposition of the third defendant as second plaintiff can be filed by the plaintiff when the third defendant has been set ex-parte in the suit.

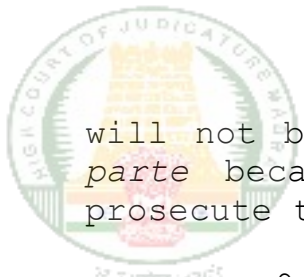
6. Before advertng into the judgment, let us examine the judgment quoted by the learned counsel for the petitioner. In the case of **Aruppukottai Sri Jaya Vilas's** cited supra, though notice was served on the defendant thrice followed by paper publication, however, he did not receive the same and make his appearance before the Court below leading to the dismissal of the suit. In the said case, exercising the power conferred under the provisions of C.P.C, Order 1 Rule 10(2), the High Court allowed the civil revision petition filed by the defendant.

7. Further, according to the Order XXIII Rule 1A read with O.I.R.10 of the Code of Civil Procedure, a defendant or a respondent as the case may be, is entitled to file an application for transposition for transposing himself as the plaintiff or the appellant, as the case may be, even after the dismissal of the proceedings - whether it be an appeal or suit. Order XXIII Rule 1A is usefully extracted hereunder:

"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"

Further, if the Court is satisfied that the defendant can be allowed to be transposed himself as a plaintiff, the application is to be allowed necessarily. The court has got the power to restore the suit itself to file to protect the interests of justice. If the petitioner succeeds and if he is permitted to transpose himself as an appellant, then as held by this Court in *Madhavan Pillai vs. Vasu Pillai* (1989 (1) KLT 168) even a party who is declared ex parte is entitled to invoke such a right under Order XXIII Rule 1A. In the said case, the suit was set ex parte against the defendant and he filed an application for restoration of the suit and the same was disallowed by the Court below. Aggrieved over the same, he filed an application to transpose him as plaintiff and the same was allowed by the High Court. The Court went on to state that even ex parte at the trial stage, the Court can be transposed as plaintiff under Order 1 Rule X CPC.

8. Therefore, this Court is of the considered view that whatever it be once an application for transposition is allowed, it



will not be necessary to set aside the order declaring him *ex parte* because his right thereafter is that of an appellant to prosecute the matter.

9. Back to the case, admittedly, at the time of instituting the suit, the third defendant had gone to abroad and he became *ex parte*. In fact, the said suit was filed by the plaintiff for the welfare of the third defendant too, being the son of the plaintiff. Now, he came back from abroad to India and wants to proceed along with his father for having proper and effective adjudication and in such circumstances, the Court below cannot debar for transposing the third defendant therein as plaintiff in the suit. It is apt to mention that even in cases where the suit has been dismissed as against the defendant or defendants concerned under Order 9 Rule 5 C.P.C. yet the Court has the power to implead the very same defendant or defendants concerned by exercise of power under Order 1 Rule 10(2) C.P.C in order to give a complete and comprehensive adjudication of the questions that would arise for consideration in the suit. To sum up, the petitioner has *prima facie* raised reasonable ground to sustain his case.

10. In the light of the foregoing reasons coupled with the supreme Court judgment cited *supra*, this Civil Revision Petition stands allowed and the order passed dated 15.07.2017 made in I.A.No.280 of 2017 in O.S.No.125 of 2015 is set aside. No costs. Consequently, connected C.M.P.(MD) No.10132 of 2017 is closed.

Sd/-

Assistant Registrar (Records)

/True Copy/

Sub Assistant Registrar

To

The District Munsif cum
Judicial Magistrate Court,
Sivagiri,
Tirunelveli District.

+ 1 CC TO Mr.F.X.EUGENE, ADVOCATE IN SR No. 88153

SSM

TE/KP/SAR-1 : 12/12/2017 : 3P/3C

order made in
CRP(PD) (MD) No.2025 of 2017
and CMP (MD) No.10132 of 2017
20.11.2017