

**IN THE COURT OF THE II ADDITIONAL DISTRICT & SESSIONS JUDGE,
THANJAVUR.**

**Present : Tmt. A. Malarvizhi, M.L.,
II Additional District & Sessions Judge,
Thanjavur.**

Friday the 23rd day of July 2021
(Thiruvalluvar Aandu 2052- Aadi 11th day)

I.A No.91/2019 in OS.103/2015

K. Ashok kumar

...Petitioner/ 5th Plaintiff

/vs/

1.Kalyanasundaram

2. Meena

3. Shanthy

4. Savithiri

..... Respondents/ Plaintiffs 1 to 4

5. Saraswathi

6. Manimozhi

7. Nithiya

...Respondents/ Defendants

This petition having come up for final hearing before me on 21.4.2021 in the presence of **Thiru.N. Ranjith**, Advocate for the Petitioner/5th plaintiff and of Tmt. **S. Poongothai**, Advocate for the Respondents 1 to 4 and of **Thiru. R.Uthayakumar**, Advocate for the respondents 5 and 7 and of Thiru. **R. Ilayaraja**, Advocate for the 6th respondent and upon hearing the arguments of both sides, upon perusal of the entire material records pertaining to the case and the matter having stood over for consideration till this date, this court delivered the following

ORDER

(1) This petition has been filed by the Petitioner u/s. 151 of C.P.C. to pass an order to transpose the petitioner as 4th defendant.

(2)The Gist of the affidavit filed by the petitioner along with the petition can be stated as follows:

This petitioner is the 5th plaintiff in the original suit. The petitioner/5th plaintiff signed in the plaint filed by the 1st plaintiff who is the father of this petitioner on the basis of assurance given by his father that he had agreed to give share in all the ancestral properties to this petitioner and would execute settlement deed in respect of certain plots mentioned in the suit property. But, now only, the petitioner came to know that his father not filed the suit for all the ancestral properties and he has executed settlement deed in favour of second plaintiff in respect of some properties. On 14.1.2015, the second defendant and his men did not assault the first plaintiff and this petitioner and his mother. But, it was falsely stated in plaint that the second defendant assaulted father, mother and this petitioner. So, the petitioner is not willing to conduct the case along with the other plaintiffs. If the petitioner is the defendant, then only he can include the omitted ancestral properties in this suit. So, he may be transposed as 4th Defendant.

(3)The Gist of the counter filed by the 1st respondent and adopted by the respondents 2 to 4 can be stated as follows:

This petition is not maintainable either in law or on facts. It is false to state the 1st respondent/1st plaintiff had obtained the signature of the petitioner on the assurance given by him that he had agreed to give share in all the ancestral properties. In that ancestral property, the second defendant

and the 5th defendant are enjoying the properties which were allotted to them orally. Then when he attempted to divide some ancestral properties as plot, dispute was arisen. Then only this suit was filed. The 1st respondent/1st plaintiff has no objection to include if there is any ancestral property omitted to include in the suit. The first plaintiff has executed settlement deed in favour of the second plaintiff for the purpose of mobilizing amount in order to execute settlement deed in favour of remaining sharers. All other averments in the plaint is false. The respondent had no objection to include the ancestral property which were allotted orally to the petitioner and the first defendant. If the court ordered for transposing the petitioner as the 4th defendant, it may order the petitioner to pay the court fee which were already paid by the first plaintiff for this petitioner.

(4)The Gist of the counter filed by the 6th respondent can be stated as follows:

This petition is not maintainable either in law or on facts. This petition was filed on the instigation of the 1st respondent to drag on the suit. The 6th respondent had mentioned clearly in the written statement filed by him that the ancestral properties were not included in the suit. It is false to state that the activities of the respondents 1 to 4 is against the petitioner. Hence, this petition has to be dismissed.

(5)The Gist of the counter filed by the 7th respondent and adopted by the 5th respondent can be stated as follows:

This petition is not maintainable either in law or on facts and it is liable to be dismissed in limine. All the averments in the affidavit are false and this petition is unsustainable in law as per Order 23 Rule 1(A) of C.P.C. The defendant can only apply for transposition as plaintiff. The plaintiff cannot be allowed to transpose as defendant. The petitioner is not an illiterate

man. He has signed in the plaint to file a suit for partition along with father and others. No other properties are included for partition in the suit. The petitioner has not any details of the properties excluded by his father as contended by him. The second defendant who is having money by selling the suit property during the pendency of the suit on the basis of settlement deed executed by his father has winover the 5th plaintiff who now wants to take the sides of elder brother the second defendant. Therefore, this petition is absolutely not maintainable. The petitioner cannot be allowed to resile from his earlier stand. So, this petition may be dismissed.

(6) The Point for consideration here is

Whether this petition has to be allowed ?

(7) Points:

Both side arguments heard. The petitioner/5th plaintiff has filed this petition u/s.151 of Code of Civil Procedure to transpose as the 4th defendant. The petitioner has stated in his affidavit that his father /1st plaintiff agreed to give share in all the ancestral properties to this petitioner also. On that assurance only this petitioner has signed in the plaint as the 5th plaintiff. Now only, he came to know that his father failed to include some ancestral property and his father has executed settlement deed in favour of second plaintiff in respect of some properties. Further, he stated that on 14.1.2015 , the second defendant and his men did not assault the first plaintiff and this petitioner and his mother. But, it was falsely stated in plaint that the second defendant assaulted father, mother and this petitioner. So, the petitioner is not willing to conduct the case along with the other plaintiffs. If the petitioner is the defendant, then only he can include the omitted ancestral properties in this suit. So, he may be transposed as 4th Defendant.

(8) The counsel for the defendants 1 to 4 has argued that already ancestral property situated in Kothattai Village orally allotted to the second defendant and this petitioner. They enjoyed it as per the allotment. Then when he attempted to divide some ancestral properties as plot, dispute was arisen. Then only this suit was filed. The 1st respondent/1st plaintiff has no objection to include if there is any ancestral property omitted to include in the suit. The first plaintiff has executed settlement deed in favour of the second plaintiff for the purpose of mobilizing amount in order to execute settlement deed in favour of remaining sharers. All other averments in the plaint is false. If the court ordered for transposing the petitioner as the 4th defendant, it may order the petitioner to pay the court fee which were already paid by the first plaintiff for this petitioner.

(9) The counsel for the 6th respondent has argued that this petition was filed on the instigation of the 1st respondent to drag on the suit. This petition is not maintainable . So, it may be dismissed.

(10) The counsel for the respondents 5 and 7 has argued that all the averments in the affidavit are false and this petition is unsustainable in law as per Order 23 Rule 1(A) of C.P.C. The defendant can only apply for transposition as plaintiff. The plaintiff cannot be allowed to transpose as defendant. The petitioner is not an illiterate man. He has signed in the plaint to file a suit for partition along with father and others. No other properties are excluded for partition in the suit. The petitioner has not stated any details of the properties excluded by his father as contended by him. The second defendant who is having money by selling the suit property during the pendency of the suit on the basis of settlement deed executed by his father has winover the 5th plaintiff who now wants to take the sides of elder brother the second defendant. Therefore, this petition is absolutely not maintainable.

The petitioner cannot be allowed to resile from his earlier stand. So, this petition may be dismissed.

(11) Both side arguments considered. Record perused. Order 23 Rule 1 (A) of the Code of Civil Procedure deals with the transposition of defendant as plaintiff. It permits the defendant to comply Order 1 Rule 10 of the Code of Civil Procedure to transpose him as the plaintiff on certain conditions. In this case, none of the plaintiff withdrew for abandoned any of their claim. So, Order 23 Rule 10 is not applicable to this petition. In this point, the arguments of the respondents 5 to 7 is not acceptable. As per Order 1 Rule 10 (2)

“ The court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be to necessary in order to enable the court effectually and completely to adjudicate upon the settlr all the questions involved in the suit, be added. “

(13) Therefore, the court has power to strike off the name of the plaintiff or defendant and add the name of the plaintiff or defendant when if it is just and necessary to enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit. From the reading of the petition affidavit, it is clear that the petitioner/5th plaintiff has adversed view against his father/1st plaintiff and other plaintiffs. Whether the allegations stated in the petition are true or not is the question to be decided in the main suit. Therefore, this court viewed that this petitioner can apply for inclusion of omitted ancestral property even as the 5th plaintiff. If the petitioner is

contesting the case along with the other plaintiffs, it will be detrimental to the case of the plaintiff. Since it is a partition suit, this petitioner is one of the necessary party. So permitting him to contest the case as the defendant even though he filed this petition under wrong provision of Sec.151 instead of Or.1 Rule 10(2) of C.P.C will not prejudice the plaintiff and other defendants. So, in the interest of justice, this court is inclined to permit the petitioner to transpose him as the 4th defendant and contest the case as one of the defendant on condition that the petitioner has to pay the court fee paid by the 1st respondent/ plaintiff for this petitioner and to pay costs of Rs.500/- each to respondents 1 to 7 of this petition . The point is answered accordingly.

In the result, it is ordered that this petition is allowed on condition that the petitioner has to pay the court fee paid by the 1st respondent/ plaintiff for this petitioner and to pay costs of Rs.500/- each to respondents 1 to 7 of this petition (Total Rs.3500/-) on or before 2.8.2021. Call on 3.8.2021.

Dictated to the steno-typist, transcribed by her in computer, corrected and pronounced by me in open court, this the **23rd day of July 2021.**

(Sd) A. Malarvizhi

**II Additional District & Sessions Judge,
Thanjavur.**

Petitioner and respondents side

witnesses and Exhibits: Nil

(Sd) A. Malarvizhi

**II Additional District & Sessions Judge,
Thanjavur.**

Order
I.A No. 91/2019 in
O.S. NO.103/2015
Dated:23.7.2021