

**IN THE COURT OF THE PRINCIPAL DISTRICT JUDGE, KRISHNAGIRI**

**Present Thiru R.Sakthivel, B.A., B.L.,  
Principal District Judge.**

Friday the 09th day of September 2022.

I.A.No.01/2021 in O.S.No.18/2012

[TNKI01-000025-2012]

1] Dr.R.Girija (Died)

...[Plaintiff]

2] R.C.Shekar

...Petitioner /4<sup>th</sup> defendant

..Versus..

1] Parvathi Rajasekar

2] R.Prema (Died)

3] R.Vanaja (Died)

4] R.C.Sekar ( Filed the present petition for transposing him as plaintiff)

5] R.Sivasankar

6] S.Visalakshi (Died)

7] S.Leelavathi

8] S.Vahini (Died)

9] D.Sampathkumar

10] S.Uma

11] S.Sunilkumar

12] M.Venkatesh

13] G.Nazaar

14] Viswanatha Guptha

15] M.Krishnan

... Respondents / Defendants.

This petition is coming on 14.07.2022 before this Court, for final hearing in the presence of the petitioner as party in person. [Petitioner is a practicing Advocate],

and Advocate Thiru S.Liyakath Ali Khan for the 1<sup>st</sup> respondent, Advocate Thiru N.R.Ranganathan for the 7, 9 to 11<sup>th</sup> respondents. Respondents No. 2, 3, 6, 8 reported dead, Respondents No.5, 12 to 15 were called absent set exparte in the main suit itself, after hearing both the side arguments, upon perusal of records, having stood over for consideration till this day [09.09.2022] this Court passes the following:

### ORDER

This petition is filed by the petitioner / 4<sup>th</sup> defendant, under Order 23 Rule 1(A) r/w. Order (1) Rule (10) of the code of civil procedure, 1908 praying to transpose the petitioner as plaintiff in the main suit.

#### The averments made in the petition in brief :-

2] Petitioner herein is the 4<sup>th</sup> defendant in the suit. The plaintiff by name Dr.R.Girija has filed a suit for partition praying to pass a preliminary decree to divide the 54% share of the Gowrammal, who is the mother of the plaintiff, in to 7 equal shares and to allot one such share to the plaintiff and other reliefs.

3] The said Girija was living at United Kingdom and used to visit native place Krishnagiri frequently. When she was here, she filed the above suit. While the suit was in progress, she died in United Kingdom and her body was brought to India and the funerals took place at Hosur, Krishnagiri District. She died leaving behind her husband T.V.Rajashekar and one son by name Pravin. They are living in United Kingdom. They did not take any steps to come on record in the suit. It is settled position of law that in a suit for partition, every defendant is a plaintiff. The other

defendants are also interested in the subject matter of the suit. So it has become necessary for transpose the petitioner / 4<sup>th</sup> defendant as plaintiff to carry on and conduct the above the said suit. Hence, this petition praying to transpose the petitioner / 4<sup>th</sup> defendant as plaintiff in the main suit.

Averments made in the counter filed by 7<sup>th</sup> respondent / 7<sup>th</sup> defendant, adopted by 9 to 11 respondents in brief : -

4] Petition is not maintainable. The petitioner / 4<sup>th</sup> defendant's sister by name Dr.Girija was a permanent resident of United Kingdom. The said Girija's husband by name Dr.Rajasekar and their only son by name Dr.Pravin also settled in the United Kingdom. This 7<sup>th</sup> respondent is the daughter of petitioner's own brother late Srikanandan. 7<sup>th</sup> respondent learns that Dr.Girija's only son Dr.Pravin has married a foreign national and he has converted himself into Christian. The above suit was originally instituted by the said Dr.Girija as sole plaintiff for partition in respect of her alleged share in the partnership concern under the name and style of 'Anand Theatre' located in Cooperative colony road, Krishnagiri. The petitioner herein with some mental reservation and with the object of suppressing the factum about the date of death of sole plaintiff Dr.Girija. The said Dr.Girija died on 19.03.2018. The legal heirs of sole plaintiff by name Dr.Rajasekar and Dr.Pravin did not take any steps to implead themselves on or before 17.08.2018 [ i.e., 150 days] from the date of death. In the above circumstances, the above suit automatically gets abated on 18.08.2018 by operation of law. While so, the petitioner herein cannot try to transpose himself as a plaintiff in the above suit which is already abated.

5] Further, even as per the averment in the affidavit, the legal heirs of sole plaintiff namely, Dr.Rajasekar and Dr.Pravin did not take any steps to implead themselves though nearly 3-1/2 years elapsed. Apart from that the petitioner herein is not having any share in the partnership firm namely 'Anand' Theatre.

6] Apart from that, the 3<sup>rd</sup> defendant Vanaja also died on 4.11.2015 and her legal heirs have not been brought on record. Similarly, the 8<sup>th</sup> defendant Vahini died on 9.8.2013 and the 6<sup>th</sup> defendant Visalakshi died on 13.02.2020. The 2<sup>nd</sup> defendant Prema also died during the pendency of the suit. The said Prema's legal heirs have not been impleaded. While the facts are as stated above, the petitioner /4<sup>th</sup> defendant has filed the above petition with incomplete particulars, without adding the legal heirs of deceased Girija, Prema and Vanaja.

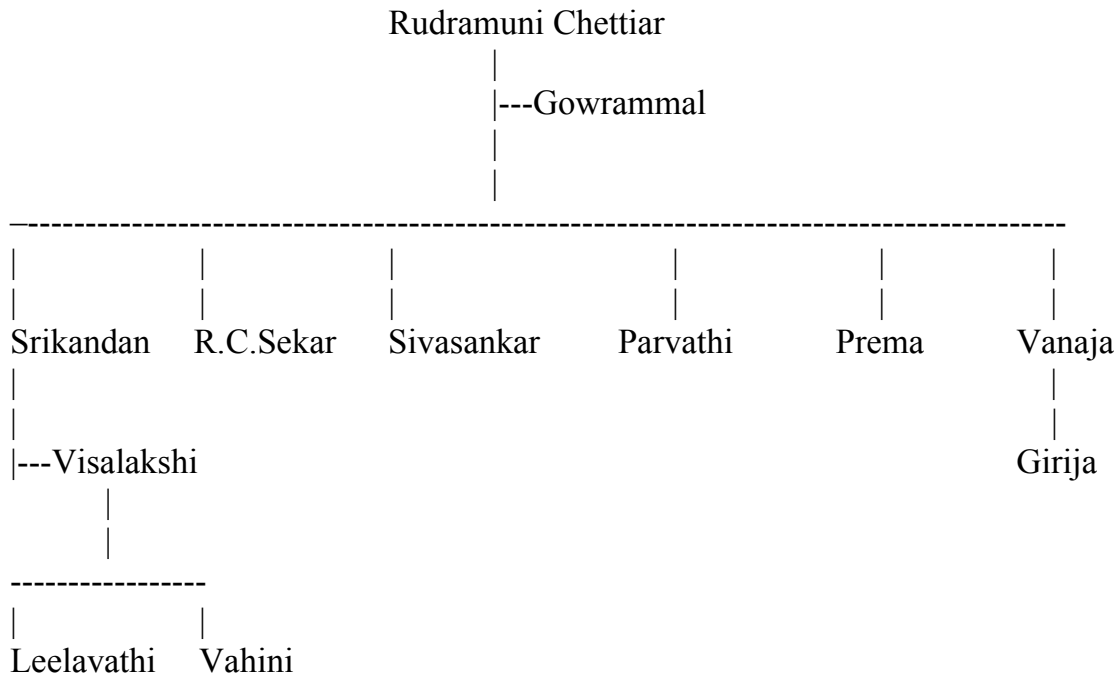
7] Since the main suit is deemed to be abated and not pending, the question of transposing the petitioner as plaintiff does not arise and the allegations in that regard are false and concocted. Hence, petition is to be dismissed.

8] The point that arises for the consideration are :

- 1) Whether the main suit has abated as alleged by the petitioner ?
- 2) Whether the petition is maintainable or not ?
- 3) Whether the petition is allowable or not ?

Discussion and decision to the Points No.1 to 3 :

9] For easy understanding, of the relationship between the parties, this court has drawn the following genealogical tree.



10] An extent of 0.41 cents in S.No.791/A, in Krishnagiri Town and the building thereon is the suit property. The suit property is a cinema theatre including the land machine etc., it is named as 'Anand' Theatre. The suit property is situated in the prime locality of Krishnagiri Town. As per the partnership deed dated 25.03.1982 it begun functioning with the partners (1) Ponnusamy (2) Rajan (3) Sampathkumar (4) Gowramma. Thereafter, it appears that reconstitution had taken place in the partnership. According to the plaintiff, plaintiff's mother Gowramma is entitled 54% of the share in the suit property.

11] The case of the plaintiff is that, plaintiff is the daughter of Rudra Munichettiar and Gowrammal. Plaintiff's father died 11.11.1995. Mother Gowrammal died 18.11.2010. Rudra Munichettiar and Gowrammal had three sons and 5 daughters. The eldest son Srikandan died leaving behind the respondents 6 to 8 as his legal heirs. The defendants 4 and 5 are son of Rudramuni chettiyar and Gowrammal. The plaintiff and defendants 1 to 3 are daughters. Hence, the plaintiff, defendant 1 to 5 are entitled 1/7th share each in the 54% of the suit properties. Accordingly, the plaintiff filed the suit for partition to divide the 54% share of the plaintiff's mother Gowramma in the suit Theatre and shops into 7 equal shares and to allot one such share to the plaintiff and for other reliefs.

12] The defendants 1,2 and 4 filed their separate written statement. They are admitting averments made in the plaint and seek division of 1/7 share out of 54% share of Gowrammal.

Para 4 of the written statement of the petitioner /4th defendant reads as follows.

*It is true to state that Gowrammal was entitled to 54% in the suit property out of which the plaintiff is entitled to 1/7th share this defendant admits that he is also entitled to 1/7th share in the suit property and prays that the Hon'ble court may be pleased to pass a decree and judgment declaring his 1/7th share in the suit property . For which this defendant is willing and prepared to pay the court fee.*

13] The defendants no.6 and 7 filed written statement. The sum and substance of the written statement is that the 6th defendant is the wife of Srikandan who is the brother of the petitioner. 7<sup>th</sup> defendant is the daughter of Srikandan. As per the partnership deed dated 25.03.1982 the suit Cinema Theatre was functioning with the partners (1) Ponnusami (2)Rajan (3) Sampathkumar and Gowramma who had the share in the ratio of 28%, 24%, 24% and 24% respectively. The husband of 6<sup>th</sup> defendant Srikandan who had contributed money to acquire 24% share of Gowrammal in the suit property. Subsequently, among the said partners, there was transfers of shares and ultimately Gowrammal had given up her 24% share in favour of R.Srikandan and R.Srikandan and his wife / 6<sup>th</sup> defendant had acquired some share from D.Ponnusamy and Rajan and as per the partnership deed dated 07.04.1997 the partnership was re-constituted and as per the said partners are (1) 19<sup>th</sup> defendant D.Sampathkumar (2) R.Srikandan (3) S.Visalakshi /6<sup>th</sup> defendant (4) R.Parvathi Rajasekar (1<sup>st</sup> defendant) (5) S.Uma (10<sup>th</sup> defendant) and (6) Babu sahib. The said partners held the share in the ration of 24%, 26%, 26%, 6%, 12% and 6%. Accordingly, Srikandan and his wife /6<sup>th</sup> defendant having 52% of share in the suit property. On 15.07.2007 the 6th defendant has purchased 2% share from one partner by name M.Babu sahib for valuable consideration. Hence, the R.Srikandan and 6th defendant are having 54% in the suit property. R.Srikandan has acquired his shares as own funds and entire 54% is belongs to Srikandan and 6th defendant. R.Srikandan while he was in proper disposing mind bequeathed his 27% share in the suit property to his elder daughter namely Leelavathi 7th defendant herein.

Srikandan died 2.2.2009. Thereafter, the Will came into effect and as per the Will, 7th defendant is entitled 27% share of the suit Theatre. The plaintiff and the defendants 1 to 5 are not entitled to claim any share in the said 54% share in the suit properties. In short, the case of the defendants 6 and 7 is that the plaintiff and defendants 1 to 5 are not entitled any share in the 54 share of Gowrammal.

14] The defendants no.9 to 11 are not connected with the family of Rudra Munichettiya and his legal heirs. They are not concerning with the 54% share of the Gowrammal's family.

15] The learned counsel for the petitioner has admitted that the plaintiff and the defendants 1 to 6 are entitled 1/7 share in 54% share left by Gowrammal. The plaintiff filed a suit for partition claiming 1/7 share in 54% in the suit property, the defendants 1 to 5 also claiming the same ratio of share. The 6th defendant also admitted that the 54% share stands in the name of Gowrammal. He sets up a case that of the defendant, contributed money to acquire 54% share in the suit property in the name of Gowrammal. In short, the case of the 6th defendant is that the 6th defendant had contributed money to acquire 54% share in the suit property to his mother Gowrammal. Accordingly, he has defended the suit by way of filing his written statement.

16] The suit has been filed in the year 2012. The relief sought for in the plaint is as follows:

- (a) by passing a preliminary decree of partition directing the 1 to 12 defendants to divide the 54% share of the plaintiff's mother Gowamma in the suit Theatre and shops, into 7 equal shares and to allot one such share to the plaintiff and put her in separate possession of the same;
- (b) failing which, by permitting the plaintiff to get her legal 1/7th share through court of process in final decree proceedings ;
- (c) by granting mandatory injunction against the 6 to 12 defendants, directing them to deposit 54% of collection amount from the suit Theatre into the court ;
- (d) by granting mandatory injunction against the 13 to 15 defendants, directing them to deposit 54% of rent of shop situated in the suit Anand Theatre into court;
- (e) by granting permanent injunction against 6 to 8 defendants, restraining them from in any way selling the 54% of the suit properties to anybody else to creating any documents in respect of 54% of suit property;

Pending suit, the plaintiff died on 19.03.2018 leaving behind her husband Dr.Rajasekar and their son Dr.Pravin. Admittedly, husband and son of the plaintiff have settled at United Kingdom. They have not brought on record as plaintiffs. In the circumstances the petitioner wants to transpose him as the plaintiff.

17] It is settled position of law that in a suit for partition the parties are interchangeable. This court has perused written statement filed by the defendants including this petitioner. Except the 6th defendant, other legal heirs support the case of the plaintiff. 6th defendant also claiming right through Gowammal. The other defendants are not concerning 54% share of Gowammal. The suit is pending since 2012. The plaintiff and the defendants were eagerly waiting for the result of

the suit. In the circumstances, the plaintiff died at United Kingdom. Their legal representatives did not come on record. Since because the legal representative did not come on record, the right if any accrued to the petitioner / defendant during the pendency of the suit cannot be denied.

18] The learned counsel for the petitioner has submitted that after 150 days from the date of death of Dr.Girija the suit gets abated automatically. This court has to simply record the factum of death and record the factum abatement. This court has no power beyond that. He has relied on the Hon'ble Supreme Court Judgment, Perumon Bhagavathi Devaswom .. vs. Bhargavi Amma (died) By Legal representatives and others.

*5. Having regard to the wording of Rule 4, it is clear that when a respondent dies and an application to bring his legal representative on record is not made, abatement takes place on the expiry of the prescribed period of 90 days, by operation of law. Abatement is not dependant upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheles 'abatement' requires judicial cognizance to put an end to a case as having abated. To borrow a phrase from Administrative Law (used with reference to void orders), an appeal bears no brand on its forehead that it has 'abated' , nor does it close itself automatically on abatement. At some stage, the court has to take note of the abatement and record the closure of the case as having abated ( where deceased was a sole respondent ) or record that the appeal had abated as against a particular respondent (if there are more than one and the cause of action survives against the others )*

Per contra the petitioner has relied on the judgment S.Anjaneyalu ..Vs..

Soorampally Venkata Rama Gupta [1993 3 ALT 607]

*“...An administration / partition suit does not abate as a whole due to not bringing on record the legal representative of a deceased party (co-sharer/co-owner) as such party is in the position of the plaintiff and the heirs of the deceased co-sharer – co-owner is a necessary party to the suit, he can come on record on his application under Order 1, Rule 10 CPC..” The same principle has to be applied also in the case of transposition of a party under Order 1 Rule 10(2).*

*...Now it is clear that partnership suit, as was pointed out by West J, in 7 Bombay 167 is a suit of a peculiar character and the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally and that each of the parties to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant and in both capacities comes before, the Court for the adjudication of his rights relatively to the other partners, which the Court endeavours to determine by its decree. In that case the facts were somewhat similar to the facts in this case. There the plaintiff who had filed a partnership suit had settled with most of the defendants and wanted leave to withdraw the suit or, in the alternative, to have the suit dismissed. Ten of the defendants supported the plaintiff's application. Two of the defendants objected and applied, under Section 32, Civil P.C.(Act 10 of 1877), that they might be made plaintiffs and that the plaintiff might be made defendant. Elaborate arguments were addressed to West J., and although West J., felt some difficulty as no case on the point appeared to be forthcoming either in India or from English Courts, he ultimately made the order stating that he clearly had jurisdiction to do so. Now, there is no doubt that under Order 1, Rule 10, the Court has the jurisdiction in proper cases to transpose defendants as plaintiffs and I think that in this case weree partnership accounts have to be taken it would work great hardship if the death of the original plaintiff, who filed a pertnership suit for partnership accounts, should put an end to the suit, therefore I am inclined to grant the application made to me by Mr.Taraporevala.*

*..The order that I will make will be that the defendant in the suit should be transposed as the plaintiff and he as the new plaintiff should amend the plaint and proceeding in this suit. The written statement that he has filed as the original defendant he will be allowed to treat as the plaint in the proceedings, which, will be amended according to my order. The defendant will bring the heirs of the original plaintiff. Bai Moorbai, Daniji Deysey and Dhanpati Deysey, on record as defendants to the suit. I will also give liberty to the defendant to amend his written statement in order that any reliefs which he might have asked, if he had been the plaintiff in the suit, might be incorporated in his written statement ...”*

19] Hence in view of the above decision, this court is of the view that since the plaintiff Dr.Girija died, the suit will not abate automatically. Since this is a partition suit, the parties are interchangeable, the petitioner is claiming share in the suit property as that of the plaintiff . In fact, he claims 1/7th share out of 54% of the suit property and he undertakes the pay court fee. The defendant No.2 and 4 claims share like the plaintiff. The petitioner and 2<sup>nd</sup> defendant have taken a similar stand with that of plaintiff. Some rights and interest have been accrued in the suit property during the pendency of suit i.e., during pendency of 10 years. The sole plaintiff died and her legal representative did not wish to come on record as plaintiffs. Because of the reason only the petitioner the defendants 1 to 5 might give up their valuable rights and interest which are accrued to them during the pendency of the suit. In view of the written statement filed by the petitioner /4th defendant , and

other defendants the petition is maintainable and is to be allowed. Needless to mention that of the transposing the petitioner / 4<sup>th</sup> defendant , the legal heirs of the original plaintiff namely Dr.Girija have to be added as defendants in the suit, after filing necessary petition to set aside abatement as per the law. No prejudice would be caused to the petitioner if the petition is allowed. On the other hand, if the petition is not allowed, valuable rights accrued to the petitioner and defendants no.1 to 3 and 5 will be prejudiced . Hence, this court does incline to allow the petition. The points no.1 to 3 are answered accordingly in favour of the petitioner and against the 6th and 7th defendants.

Finally, this petition is allowed. The petitioner / 4th defendant shall be transposed as 2<sup>nd</sup> plaintiff in the main suit.

Dictated to the Stenographer, transcribed by him, corrected and pronounced by me in the Open Court, this the 09th day of September 2022.