

**In the Court of II Additional District and Sessions Judge,
Thiruvallur @ Poonamallee.**

**Present: Thiru. C.Vijayakumar, B.A., B.L.,
II Additional District and Sessions Judge, Poonamallee.**

On this Wednesday, the 18th day of September 2024

I.A. No.1/2022 in O.S. No.37/2013

K. Rukmani, W/o.Nainangu,
Residing at 190/A, Pallavan Street,
Min Nagar,
Kancheepuram.

... 2nd Defendant/Petitioner

-Vs-

1. K. Padmanaban (died)
2. Rajalakshmi, W/o. Late Padmanabhan
3. Gayathri, D/o. Late Padmanabhan
4. Giridharan, S/o. Late Padmanabhan
5. Saranyan, S/o. Late Padmanabhan,
All are residing at, O.No.52, New No.131, Redhills Road,
S.V. Nagar, Ambattur, Chennai - 600 053.
6. Vijayakumar, S/o. Kannaian,
Residing at O.No.52, N.No.131,
Redhills Road, S.V.Nagar, Chennai-600053.
7. Nalini @ Kala, W/o. Subramani,
Residing at No.2/202, Perumal Koil street,

Manapondi Post, Thirukovilur Taluk,
Thiruvannamalai District.

8. Sasidharan, S/o Vijay Kumar,
Residing at O.No. 52, N.No.131,
Redhills Road, S.V.Nagar,
Chennai-600053.

9. Sudhaman, S/o. Vijay kumar,
Residing at O.No. 52, N.No.131,
Redhills Road, S.V.Nagar,
Chennai-600053.

10. Umachandran, Proprietor,
Chandraeshwarar Granite & Ceramic Tiles
Shop No. 1&2, No.131, Redhills Road, S.V.Nagar,
Chennai-600053.

11. Sudarsankumar, Proprietor,
Durga Industries, Shop No.3, No.131,
Redhills Road, S.V.Nagar, Chennai-600053.

12. Ohm Pachaiaammal dealers by its
Partner: N. Baskaran
Shop No.4, No.131, Redhills Road, S.V.Nagar,
Chennai-600053.

... Plaintiffs/Defendants/Respondents

This petition was coming up before me for final hearing on 19.08.2024
in the presence of M/s. K. Panneer Selvam, learned counsel for the Petitioner/ 2nd
Defendant and M/s. M.K. Murali and M.V. Seshachari, learned counsel for the
Respondents 6, 8 & 9, Respondents 2, 3, 4, 5, 7, 10 to 12 called absent and set

exparte, while 1st Respondent was died, on perusal of entire material records, upon hearing the arguments on both sides and having stood over for consideration till this date this Court pass the following :

ORDER

The petition is filed by the Petitioner, under Order 9 Rule 9 and Section 151 of CPC prays to restore the suit dismissed as withdrawn on 17.02.2020 and posted for cross examination of PW.1 and other witnesses.

2) The brief facts of the petition accompanying affidavit are as follows:

The Petitioner is the 2nd Defendant in the suit, submits that the original Plaintiff filed the suit for partition but passed away, and the suit was dismissed due to a lack of action, later restored. The Petitioner, suffering from papillary thyroid carcinoma, claims the other Defendants and legal heirs of the Plaintiff colluded to settle the matter without her involvement. She filed an application to set aside an ex-parte order, which was allowed. The Petitioner also submitted a counterclaim seeking her share of the suit property and agreed to pay the necessary Court fee. However, the 1st Defendant and others collusively filed and had an additional written statement allowed without giving her a chance to respond. The Plaintiffs then withdrew the suit fraudulently without her knowledge on 17.02.2020. The Petitioner submits that in a partition suit, all shareholders are

entitled to their share, and the withdrawal of the suit without deciding her share is illegal and fraudulent. She seeks to restore the suit to have her share determined, stating no harm would come to the Plaintiffs, but she would suffer great hardship if the application is not allowed. Therefore, the Petitioner prays to restore the suit dismissed as withdrawn on 17.02.2020 posted for cross examination of PW.1 and other witnesses.

3)The averments of the Counter filed by the 6th Respondent as adopted by the 8th and 9th Respondents are in brief as follows :

The Respondent submits that the petition filed by the 2nd Defendant to restore the suit is legally and factually unsustainable and should be dismissed outright. The Respondent denies all allegations except those specifically admitted and points out that the Petitioner never sought to be transposed as a Plaintiff. The suit, initially filed by the 1st Respondent, was withdrawn by the legal heirs after the 1st Respondent's death. The Respondent rejects the Petitioner's claim of filing a Counterclaim, stating no such claim was recorded, and denies any collusion or fraud in withdrawing the suit. The Petitioner's assertion of a share in the property is labeled false, and the Respondent contends that any grievances should have been raised during the suit's withdrawal. As the Petitioner remained silent then, she cannot now seek restoration. Therefore, the Respondent prays to dismiss the petition with costs.

4) The point for consideration is whether this petition is allowed or not ?

5) **Point:**

Heard both sides. Perused the documents.

6) The Petitioner filed this petition under Order 9 Rule 9 and section 151 CPC to restore the suit dismissed on 17.02.2020 and requested to post the suit for cross examination of PW.1 and other witnesses. The Petitioner herein is the 2nd Defendant in the main suit. Originally the main suit was filed by one K. Padmanabhan against the Defendants 1 to 8 for the prayer of Partition, Declaration of two Settlement Deeds as null and void and for the prayer of permanent injunction against the Defendants. The Defendants 6 to 8 in respect of respective portions of the suit property are tenants.

7) The case of the Plaintiff in the main suit is that the entirety of the suit property had originally belong to Mrs. Umapathy wife of Iyyakannu who is the grandmother of the Plaintiff as well as Defendants 1 to 3. The said Umapathy died on 08.02.1990 and that the grandfather Iyyakannu who is the husband of the said Mrs. Umapathy had predeceased her. That the entirety of the suit property had devolved by succession on the only daughter of the said Mrs. Umapathy and Iyyakannu being Mrs. Lakshmi Ammal wife of Kannaian. That the patta in respect of the suit property still stands in the name of the said Mrs. Umapathy.

The Lakshmi Ammal is the mother of the Plaintiff and the other Defendants 1 to 3. That the said Lakshmi Ammal was enjoying the suit property during her lifetime without any let or hindrance from any person whomsoever. That the said Lakshmi Ammal's husband Kannaiah who is also the father of the Plaintiff as well as the other Defendants 1 to 3 had died on 30.10.1976. The said Lakshmi Ammal had died on 03.11.2008 intestate leaving behind the following persons as her legal heirs.

1. Mrs. Rukmani, wife of Nainangu Pillai (daughter) (2nd Defendant)
2. K. Padmanabhan, son of Kannaian (son) (Plaintiff)
3. K. Vijay Kumar, son of Kannaian (son) (1st Defendant)
4. Mrs. K. Nalini alias KI. Kala (daughter) (3rd Defendant).

8) When the suit is posed for further Plaintiff side witnesses on 17.02.2020, the legal heirs of the Plaintiff filed a memo to withdraw the suit and the same was allowed by this Court without a leave to file a fresh suit on the same cause of action. In this circumstances the Petitioner filed this petition and before the filing stage this petition was returned without numbering hence the 2nd Defendant prepared a Civil Revision Petition No.1267/2022 before the Hon'ble High Court, Madras to assign a number for the petition filed by the 2nd Defendant before this Court under Order 9 Rule 9 CPC. The Hon'ble High Court passed a Final Order

in this petition and directed this Court to assign a number of the petition filed under Order 9 Rule 9 CPC.

9) The first point for consideration is whether the Petition filed under order 9 rule 9 CPC by the Defendant of the suit is maintainable or not the Order 9 Rule 9 CPC reads as follows :

Order 9 Rule 9, if the first suit has been dismissed either wholly or partly under Rule 8, the Plaintiff would not be permitted for bringing a fresh suit on the same cause of action. He is however entitled to make an application for an order to set aside the dismissal in default of the first suit.”

The Order 9 Rule 8 CPC as reads as follows :

Order 9 Rule 8 CPC Procedure where Defendant only appears.—Where the Defendant appears and the Plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the Defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the Defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

10) On a conjoint reading of the two provisions mentioned above, the petition under Order 9, Rule 9 of the CPC is maintainable only when the Defendant appears on the date of hearing and the Plaintiff does not. In such a case, the Court may order that the suit be dismissed, and an application for restoration can then be

filed. In the present case on 17.02.2020 this Court passed an order on the basis of the memo filed by the Plaintiffs 2 to 5 that

“Memo filed by the counsel for the Plaintiffs 2-5 that Plaintiff is willing to withdraw the case without any further leave to file fresh suit on the same cause of action. Counsel for the Defendant filed No objection. In view of the memo, suit is dismissed without leave to file a fresh suit on the same cause of action and settled out of Court No cost.”

11) The memo filed by the Plaintiff on 17.02.2020 requested the Court to permit the Plaintiffs to withdraw the suit. Therefore, on 17.02.2020, the main suit was not dismissed for the non-appearance of the Plaintiffs. Consequently, the petition filed under Order 9, Rule 9 of the CPC by one of the Defendants in the suit is not applicable. Despite being a well-settled principle of law that a petition quoting the wrong provision, the Court should consider the petition based on the relevant provisions.

12) In these circumstances, the claim of the Petitioner should be considered under Order 8, Rule 6D of the CPC. The claim of the Petitioner is that she filed her written statement along with the counterclaim. Although the main suit was dismissed as withdrawn, the counterclaim of the Petitioner should still proceed as a separate suit.

13) At this stage, to ascertain whether the Petitioner/2nd Defendant filed a counter claim, it is evident that she did not set out any counter claim against the plaint reliefs. She filed a statement by admitting the claim of the Plaintiff and seeks passing of Final Decree. The amended plaint filed on 27.02.2019 Page No. 13 para b) reads as follows :

“b) For grant a preliminary decree for partition by dividing the suit schedule property into 4 equal shares and thereon grant the Plaintiff $\frac{1}{4}$ share and $\frac{1}{4}$ share each in favour of the 1st Defendant, 2nd Defendant and 3rd Defendant in respect of the suit schedule property”.

though the amended plaint shows the above version before that the Defendant No.2 filed her written statement on 20.07.2018.

14) The Petitioner herein is the 2nd Defendant. In her written statement, she did not set out any counterclaim but admitted the Plaintiff's claim for partition. She did not pay any Court fee on the date of the written statement. The reply statements filed by D1, D4, and D5 against the written statement of D2/Petitioner do not qualify the written statement filed by D2/Petitioner as a counterclaim. The written statement does not comply with the requirements of Order 8 Rule 6A CPC. Hence, on the date of filing the written statement, there was no counterclaim sought by the 2nd Defendant. The Petitioner filed the Court fee in

2021. The written statement itself did not create any relief for a counterclaim against the Plaintiffs. Therefore, the restoration of the suit based on Order 8 Rule 6D CPC is not available to the Defendant/Petitioner.

15) It is a well-settled principle of law in a partition suit that all Plaintiffs and Defendants are deemed as Plaintiffs. In the present petition the Petitioner is entitled to file a petition to restore the suit, but not under Order 9 Rule 9 CPC and Order 8 Rule 6D CPC.

16) In these circumstances, the memo of the Plaintiff dated 17.02.2020 shows that they withdrew the suit. The withdrawal of the suit is covered under Order XXIII.

Order 23 Rule 5 of the CPC reads as follows :

Order 23 Rule 5 CPC Nothing in this rule shall be deemed to authorise the Court to permit one of several Plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other Plaintiff.

"As per the above provision and the settled principle of law, when the Petitioner is deemed to be a Plaintiff, the Plaintiffs who withdraw the suit must obtain the consent of the other Defendants. However, the Plaintiffs did not do so in this case.

17) In these circumstances, the Order 23 Rule 1A CPC read as follows :

ORDER XXIII Rule 1A. 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 I 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.

When considering the claim of the Petitioner under the provisions of Order 23 Rule 1A CPC, the Petitioner has the right to apply to be transposed as a Plaintiff under Order 1 Rule 10 of CPC. The main suit is for the relief of partition, which has not been affected to date. Although the Petitioner is the second Defendant, she seeks restoration of the suit under this provision and intends to conduct the suit as a Plaintiff, which is maintainable.

18) In view of the foregoing discussions, this Court has come to the conclusion that the Petitioner is entitled to sue as the Plaintiff in the suit. In the interest of justice, this petition is allowed, and the suit is ordered to be restored. The point is answered accordingly.

In the result, this petition is allowed. The suit is ordered to be restored, and the Petitioner is directed to take steps for the transposition of her status as 2nd Defendant to the position of Plaintiff. No costs.

Dictated to Steno-typist directly, typed by him in computer, corrected and pronounced by me in the Open Court on this the 18th day of September 2024.

**II Additional District and Sessions Judge,
Thiruvallur @ Poonamallee.**

Exhibits and Witnesses on both sides :- Nil.

**II Additional District and Sessions Judge,
Thiruvallur @ Poonamallee.**

DRAFT/FAIR ORDER
I.A. No.1/2022 in O.S. No.37/2013
Date : 18.9.2024
II A.D.C. Poonamallee.