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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 26TH DAY OF MARCH 2021

THE HON'BLE MR. JUSTICE P.RAJAMANICKAM

A.No.5051 of 2019

in

C.S.No. 600 of 2010

Mrs.Azeezeh Khaleeli,
W/o Mohammed Khaleel Khaleeli.
Permanent address at
"Greams Court",
No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.
now residing at 64, Poulet Gardens,
Twickenham, Middlesex,
TW14QR, United Kingdom.

: Plaintiff

Vs

1.Gulam Hussain Khaleeli
S/o Late M.Kazim Khaleeli,
Permanent address at
"Greams Court",
No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.
now residing at 1577,
Adamson Street,
Mississauga, Ontario,L5C 188,
Canada.

2. Fahimeh Shirazi Khaleeli
W/o Mohammed Ali Shirazi,
residing at Ground Floor,
"Greams Court", No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.



3. Razieh Khaleeli

W/o Mr. Fairborz Roustayan,
permanent address at
"Greems Court", No:162, Greems Lane,
Nungambakkam, Chennai – 600 006.
now residing at 3561, Sanderling Crescent,
Mississauga L5L 3P4,
Ontario, Canada.

4. Reza Khaleeli,

S/o Late Kazim Khaleeli,
residing at Flat No:3-E,
Third Floor, "Greems Court",
No:162, Greems Lane,
Nungambakkam, Chennai – 600 006.

5. Mohammed Taher Khaleeli (Deceased)

S/o Late M. Kazim Khaleeli,
residing at Ground Floor,
"Greems Court",
No:162, Greems Lane, Nungambakkam,
Chennai – 600 006.

6. The Manager,

The Standard Chartered Bank.
Haddows Road, Chennai – 600 001.

7. The Reserve Bank of India,
The Public Department Legal,
Chennai.

8. The Apollo Hospital,
Greems Road, Chennai – 6.

9. Bank of America,
Anna Salai, Chennai.

*10. M. Kazim Khaleeli,
Son of Late Md. Taher Khaleeli,
D4, Diamond Castle, Royal Castle,
Hobard Road, Lovedale Junction,
Ootacamund, Nilgiris – 643 001.



* (10th defendant implead as the legal heir of the deceased 5th defendant as per order dt 30.07.2018 made in Appl.No.4949/18).

..Defendants

A.No.5051 of 2019:

Kazim Khaleeli,
Son of Late Md.Taher Khaleeli,
D4, Diamond Castle, Royal Castle,
Hobard Road, Lovedale Junction,
Ootacamund, Nilgiris – 643 001.

..Applicant/10th Defendant

Vs.

1.Mrs.Azeezeh Khaleeli,
D/o. Mohammed Khaleel Khaleeli.
W/o.Mr.M.K.Khaleeli,
Having her permanent residence at Greams Court,
No.162, Greams Lane,
Nungambakkam, Chennai – 600 006.
and now residing at 64, Poulet Gardens,
Twickenham, Middlesex,
TW-1,4, QR England.

2.Gulam Hussain Khaleeli
S/o Late M.Kazim Khaleeli,
Having his permanent residence at
"Greams Court",
No:162, Greams Lane,
Nungambakkam, Chennai – 600 006
and now residing at 1577,
Adamson Street,
Mississauga, Ontario,L5C 188,
Canada.

3.Mrs. Fahimeh Shirazi Khaleeli
W/o Mohammed Ali Shirazi,
Ground Floor,
"Greams Court", No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.



4. Razieh Khaleeli
W/o.Late Fairborz Roustayan,
Having her permanent residence at Greams Court,
No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.
and now residing at 3561, Sanderling Crescent,
Mississauga
Ontario, Canada.

5.Reza Khaleeli,
S/o Late Mohammed Kazim Khaleeli,
Flat No:3E,
Third Floor, "Greams Court",
No:162, Greams Lane,
Nungambakkam, Chennai – 600 006.

Mohammed Taher Khaleeli (Deceased)

6.The Manager,
Standard Chartered Bank.
Haddows Road, Chennai – 600 001.

7.Reserve Bank of India,
The Public Department Legal,
Chennai.

8.The Apollo Hospital,
Greams Road, Chennai – 600 006.

9.Bank of America,
Anna Salai, Chennai.

..Respondents/Defendants

Application praying that this Hon'ble Court be pleased to permit the
Applicant/10th Defendant (Khazim Khaleeli) to be transposed as the plaintiff
in C.S.No.600 of 2010, and consequently, the 1st Respondent/ plaintiff
(Azeezeh Khaleeli) be transposed as the 10th Defendant in C.S.No.600 of
2010.



This Application coming on this day before this Court for hearing, the Court made the following order:

This application has been filed by the 10th defendant under Order XIV Rule 8 of O.S Rules r/w Order XXIII Rule 1-A and Order I Rule 10 (1) of CPC to transpose him as plaintiff in the above suit and consequently, transpose the first respondent/plaintiff as 10th defendant.

2. The learned counsel for the applicant has submitted that as per Order 23 Rule 1- A of CPC, where a suit is withdrawn or abandoned by a plaintiff, the defendant can file an application to transpose him as a plaintiff. He further submitted that the first respondent herein has filed the above suit for partition impleading the applicant's father as 5th defendant. He further submitted that during pendency of the suit, the applicant's father (5th defendant) passed away but the 1st respondent did not take steps to implead the LRs of the 5th defendant and hence, the applicant herein himself has filed an application in A.No.4949 of 2018 to implead him as 10th defendant. He further submitted that in the said application, the 1st respondent/plaintiff did not raise any objection and hence, the said application was allowed and consequently the applicant herein was impleaded as 10th defendant. He further submitted that after impleading the applicant herein as 10th defendant, he filed a written statement with counter claim. He further



submitted that in the counter claim, the applicant herein has clearly averred that the first respondent/plaintiff has purposely omitted to include some of the properties belonging to the family and hence the said properties also should be subjected to partition. He further submitted that after filing of the counter claim by the applicant herein, the 1st respondent/plaintiff has filed an application stating that he is withdrawing the suit.

3. The learned counsel for the applicant has further submitted that since this is a suit for partition, the principle that the plaintiff is a *dominus litus*, he is entitled to withdraw the suit will not apply. He further submitted that if the 1st respondent/plaintiff is permitted to withdraw the suit, that would cause prejudice to the applicant and hence, the applicant has decided to transpose him as plaintiff and to transpose the 1st respondent/plaintiff as 10th defendant and accordingly, he filed the present application and therefore, he prayed to allow this application.

4. In support of the aforesaid contentions, he relied upon the following decisions:-

**1. *Edulji Muncherji Wacha Vs. Vullebhoy Khanbhoy And Others*,
(1883) ILR 7 Bom 167;**

2. *Devsey Khetsey Vs. Hirji Khairaj* (1941) 43 BOM LR 993;

3. *R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao*: 1973 SCR (1) 904



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4. *Bhagwan Swaroop and Others Vs. Mool Chand and Others, AIR*

1983 SC 355 and

5. *R.Dhanasundari @ R. Rajeswari Vs. A.N.Umakanth and Others*

(Civil Appeal No.7292 of 2009 on the file of the Hon'ble Supreme Court dated 06.03.2019.)

5. Per contra, the learned counsel for the 1st respondent/plaintiff has submitted that since the plaintiff is a *dominus litus*, he is entitled to withdraw the suit at any stage and he cannot be compelled to conduct the case.

6. The learned counsel for the 3rd respondent/2nd defendant has submitted that since the applicant herein has filed a counter claim, he can work out his remedy in the said counter claim. He further submitted that as per Order 8 Rule 6-A (2) of CPC, such counter claim shall have the effect as a cross suit. As per Sub Rule - 4 of the said Rule, the said counter claim shall be treated as a plaint and the rules which are applicable for plaint will also apply to the said counter claim. He further submitted that as per Order 8 Rule 6-C of CPC, the Court can order that the counter claim can be treated as an independent suit. He further submitted that as per Order 8 Rule 6-D of CPC, even if the suit is dismissed, the court has to proceed with the counter



applicant as a separate suit and dismiss the present suit as per the request made by the 1st respondent/plaintiff. He further submitted that in the decisions relied upon by the learned counsel for the applicant, the question as to where a defendant filed a counter claim, whether he can be permitted to transpose as plaintiff not at all arose for consideration and hence, the aforesaid decisions have no application in the present suit.

7. The learned counsel for the 3rd respondent/2nd defendant relying upon the decision of this court in ***M.S.Miganed Jaffar Vs. M.S.Mohamed Yahya & Another, 1988-2- LW 36*** has submitted that the plaintiff is entitled to withdraw the suit by making an endorsement and the defendant can proceed with his counter claim.

8. In this case, the applicant has set up a counter claim also. As per Order 8 Rule 6-A (2) of CPC, such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim. Further, as per the Sub Rule 4 of the Order 8 Rule 6-A, the counter claim shall be treated as a plaint and governed by the rules applicable to plaints.

9. Further, as per Order 8 Rule 6-D of CPC, if in any case in which

the defendants set up a counter claim, the suit filed by the plaintiff is stayed,



discontinued or dismissed, the counter claim has to be proceeded with and disposed of irrespective of the fact that the suit filed by the plaintiff is dismissed or discontinued or stayed. Therefore, this court is of the view that the applicant can work out his remedy through the counter claim which was filed by him.

10. The learned counsel for the applicant has submitted that in the counter claim, he has not described the properties which were mentioned in the plaint. He further submitted that the properties which were left out by the plaintiff alone described in the counter claim and if the suit is allowed to dismiss, the applicant cannot seek relief against the suit properties.

11. As already pointed out that the Sub-Rule 4 of Rule 6 – A of Order 8 of CPC has clearly stated that the counter claim shall be treated as a plaint and governed by the rules applicable to the plaints. Therefore, when an applicant decided to file a counter claim, he should have described all the properties in the schedule. Even if he failed to describe the said properties in the counter claim, since he averred in the counter claim that apart from the suit properties, the other properties also shall be subjected to partition, there will not be any difficulty for him to seek amendment of the counter claim to include the suit properties in the counter claim.



12. In ***M.S.Miganed Jaffar Vs. M.S.Mohamed Yahya & Another***,

(cited supra), the same issue arose for consideration before this court wherein this court in paragraph Nos.4 and 5 has observed as follows:

“4. In a suit in which counter claim had been filed, by virtue of the amendment now enacted by Amendment Act, 1976, under O. 8 R. 6-D, C.P.C., even if the suit is dismissed, the defendant can pursue the counter-claim put forth by him. By seeking the withdrawal of the suit, it results in the suit being dismissed; and inspite of it, on the counter claim already filed by the second defendant the court will nevertheless, proceed with that claim in view of O. 8 R. 6-D, C.P.C. Hence the second defendant would not in any manner be prejudiced by the suit being allowed to be withdrawn, because the resultant effect will be, the counter-claim made by the second defendant will be numbered as a suit and proceeded with further.

5. Second defendant appearing in person would state that there would be difficulty in the numbering of the counter claim by the court. There could be no difficulty because, on what is provided under O. 8 R. 6-D C.P.C, what would happen is that the trial court will have to give a fresh number to the counter claim put forth by the second defendant and treat it as a suit. He also refers to the decision in Basudeb Narain v. Seshnarayan 1, which takes the view that the plaintiff has a right under O. 23 R. 1 (i), C.P.C., to withdraw a suit at any stage, but such a right of the plaintiff is limited to the extent that it does not result in defeating a right which has already vested in the defendant.



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C.P.C., by allowing

the counter claim to be numbered as a separate suit, with a fresh number, his right is not in any manner taken away, and in turn the counter claim is not affected by the suit being allowed to be withdrawn. Hence, the revision petition is allowed, and it results in the plaintiff being permitted to withdraw the suit by making an endorsement on the plaint that he is withdrawing the suit and then trial court will have to give a fresh number to the counter claim made by the second defendant and treat it as a suit filed by him. No costs."

13. From the aforesaid decision, it is clear that in a suit in which a counter claim had been filed, as per Order 8 Rule 6-D of CPC even if the suit is dismissed, the defendant can pursue the counter-claim put forth by him. By seeking the withdrawal of the suit, it results in the suit being dismissed; and in spite of it, on the counter claim already filed by the defendant the court will nevertheless, proceed with that claim. Hence, the defendant would not in any manner be prejudiced by the suit being allowed to be withdrawn, because the resultant effect will be, the counter claim made by the defendant will be numbered as a suit and proceeded with further. Further, it is also clear that at any stage of the suit, the plaintiff can withdraw a suit but such a right of the plaintiff is limited to the extent that it does not result in defeating a right which has already vested in the defendant.



14. In this case, since the applicant has opted to work out his remedy by filing a counter claim, by allowing the first respondent to withdraw his suit will not cause any prejudice to the applicant. Further, it is not the case of the applicant that by filing of this suit, any right has accrued in his favour and therefore, he cannot object the first respondent/plaintiff to withdraw his suit.

15. In *Edulji Muncherji Wacha Vs. Vullebhoy Khanbhoy And Others*, (cited supra); *Devsey Khetsey Vs. Hirji Khairaj* (cited supra); *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, (cited supra) and *R. Dhanasundari @ R. Rajeswari Vs. A.N. Umakanth and Others* (cited supra), the question as to whether the defendant who filed a counter claim can oppose for withdrawing of the suit by the plaintiff did not arise for consideration. Therefore, the aforesaid decisions will not help the applicant.

16. In *R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao*, (cited supra), a preliminary decree was passed for partition and thereafter, a final decree application was filed in which an Advocate Commissioner was also appointed. The Advocate Commissioner has filed a report stating that the properties are indivisible. At that stage, the defendant by filing an application under Section 3 of the Partition Act seeking permission of the



court to sell the property to him. At that stage, the plaintiff made a request to permit him to withdraw the suit. Considering the fact that already a preliminary decree was passed for partition and the defendant had filed an application under Section 3 of the Partition Act by exercising his right to purchase the property, the Hon'ble Supreme Court has held that since a right was accrued in favour of the defendant, the plaintiff cannot be permitted to withdraw the suit, but in this case, the said stage is not yet reached. Therefore, the aforesaid decision also will not apply to the facts of the case.

17. The purpose of allowing the defendant to file a counter claim itself is to give relief to him in the same suit instead of directing the defendants to go for a separate suit. That is why the Rules which are applicable to the plaint will also apply to the counter claim. The counter claim has to be disposed of irrespective of the fact that the suit filed by the plaintiff is dismissed, discontinued or stayed, etc., In this case, the plaintiff does not want to prosecute his case and he wants to withdraw the suit and if he is allowed to withdraw the suit that would not cause any prejudice to any of the defendants especially the applicant herein, because he himself opted to file a counter claim.



18. As already pointed out that the said counter claim can be treated as a separate suit in view of the decision in ***M.S.Miganed Jaffar Vs. M.S.Mohamed Yahya & Another*** (cited supra). Therefore, this court is of the view that this application is misconceived and the same is liable to be dismissed.

19. In the result, this application is dismissed. No Costs.

Sd./-P.R.M.J.
26.03.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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Jj 29/07/2021