

**Reserved on : 10.07.2025**  
**Pronounced on :30.07.2025**



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30<sup>TH</sup> DAY OF JULY, 2025

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CIVIL REVISION PETITION No.144 OF 2025

**BETWEEN:**

- 1 . SMT.SHESHAMMA  
W/O LATE K.NAGARAJA RAO,  
SINCE DECEASED BY HER LR.s.
- a. SMT.N.PRATHIBA RAJA KUMARI  
D/O LATE K.NAGARAJA RAO  
AGED ABOUT 63 YEARS  
RESIDING AT NO.1038, 27<sup>TH</sup> MAIN  
9<sup>TH</sup> BLOCK, JAYANAGAR  
BENGALURU – 560 069.
- b. SRI N.KEERTHIRAJ  
S/O LATE K.NAGARAJ RAO  
AGED ABOUT 61 YEARS  
RESIDING AT NO.1038, 27<sup>TH</sup> MAIN  
9<sup>TH</sup> BLOCK, JAYANAGAR  
BENGALURU – 560 069.
- c. SRI RAJESH KUMAR N.,  
S/O LATE K.NAGARAJ RAO  
AGED ABOUT 58 YEARS  
RESIDING AT NO.1038, 27<sup>TH</sup> MAIN  
9<sup>TH</sup> BLOCK, JAYANAGAR

BENGALURU – 560 069.

... PETITIONERS

(BY SRI SAINATH, ADVOCATE FOR LR's OF THE  
PETITIONER)

**AND:**

- 1 . SRI RAMESH KUMAR  
S/O LATE P.RAMACHANDRA RAO,  
AGED ABOUT 60 YEARS,  
PRESENTLY R/AT BRAHMIN'S STREET, PARAPANNAHALLI  
VILLAGE,  
JIGANI HOBLI, ANEKAL TALUK,  
BENGALURU DISTRICT – 560 105.
- 2 . JAYANTHIMALA  
D/O LATE P.RAMACHANDRA RAO,  
AGED ABOUT 57 YEARS,  
PRESENTLY R/AT BRAHMIN'S STREET, PARAPANNAHALLI  
VILLAGE,  
JIGANI HOBLI, ANEKAL TALUK,  
BENGALURU DISTRICT – 560 105.

... RESPONDENTS

(BY SRI RAMACHANDRA G.BHAT, ADVOCATE)

THIS CIVIL REVISION PETITION IS FILED UNDER SECTION 115 OF CIVIL PROCEDURE CODE 1908, a) CALL FOR THE RECORDS OF O.S.NO.8121/2012 WHICH IS PENDING FOR HEARING ON IA's ON THE COURT OF LXXV ADDL.CITY CIVIL AND SESSION JUDGE BENGALURU CITY; SET ASIDE THE ORDER DATED 21.03.2024 (ANNEXURE –A) AND CONSEQUENTLY ALLOW THE MEMO FILED BY THE PETITIONER TO DISMISS THE SUIT.

THIS CIVIL REVISION PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 10.07.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

CORAM: **THE HON'BLE MR JUSTICE M.NAGAPRASANNA**

**CAV ORDER**

The plaintiff, since deceased represented by her legal representatives/petitioners 1(a) to 1(c) are before this Court calling in question an order dated 21.03.2024, passed by the LXXV Additional City Civil and Sessions Judge, Bengaluru City in O.S.No.8121 of 2012, rejecting the memo filed by the plaintiff seeking dismissal the suit as not pressed.

2. Facts, in brief, germane are as follows: -

Before embarking upon consideration of the issue on merits, I deem it appropriate to notice the protagonists to the *lis*. The plaintiff, original petitioner one Smt.Sheshamma dies during the proceedings. Therefore, petitioners 1(a) to (c), the legal heirs of Sheshamma are brought on record as petitioners. The defendants are also represented by their legal heirs as defendants 1(b) and

1(c) and they are respondents 1 and 2 in this revision petition. All are members of the same family.

3. One Keshavaiah, owner of the suit schedule properties had three children. The other member of the family K. Ramachandraiah had several children. All the parties enter into a family arrangement on 30-12-1998 by drawing up a family settlement deed. A suit is then instituted on some dispute between the members of the family in O.S.No.2086 of 2006, seeking partition of the suit schedule properties. The said suit ends up in a compromise not between all the parties to the suit but between few of them on 18-11-2006. The parties to the compromise were the families of Keshavamurthy, defendants 2 to 5, Defendants 11, 12, 13 and 14 excluding the plaintiff. In accordance with the compromise, several properties were distributed which led the other persons who are not parties to the compromise to file a suit in O.S.No.8121 of 2012 again seeking partition of the suit schedule properties, which were according to the plaintiff, joint family properties. The original plaintiff Sheshamma contended that she owns 1/6<sup>th</sup> share in the suit schedule properties as a coparcener and so had filed the suit for

partition. The plaint later comes to be amended to declare the compromise decree dated 18-11-2006 as not binding on Sheshamma, the plaintiff. Sheshamma dies during the proceedings. On 08.08.2019, the legal representatives of Sheshamma were brought on record. When both the defendants died during the pendency of the proceedings, their legal representatives have come on record. The proceedings go on. Written statement was filed by the defendants. Long thereafter, on 18-01-2023, the petitioners file a memo seeking dismissal of the suit as not pressed. Respondents 1 and 2 objected to the filing of the memo on the score that it was filed 11 years after institution of the suit and it was a collusion between the plaintiff and defendants 2 to 18 leaving out respondents 1 and 2, who are the legal representatives of the original defendants. On 30.01.2023, several of the defendants filed their memo of 'no objection' for withdrawal or dismissal of the suit and to receive compensation. Respondents 1 and 2 filed a memo enclosing plethora of judgments objecting to the withdrawal of the suit. It is their claim in the objections that their legitimate share, which they have inherited through their late mother should be determined. The concerned Court in terms of the

order impugned, relying on the judgment of the division bench of this Court in the case of **SMT.GOWRAMMA v. NANJAPPA**<sup>1</sup>, rejected withdrawal memo on the score that in a suit for partition; plaintiff and the defendants are on equal footing and if anyone objects to withdrawal of the suit, the suit may be continued by the defendants, transposing themselves as plaintiffs in the suit. By a subsequent order dated 01-02-2025, the concerned Court allows respondents 1 and 2 to transpose themselves as plaintiffs 2 and 3 and prosecute the suit seeking their share. It is aggrieved by the aforesaid action, the petitioners are before this Court.

4. Heard Sri Sainath, learned counsel appearing for the petitioners and Sri Ramachandra G. Bhat, learned counsel appearing for the respondents.

5. The learned counsel appearing for the petitioners would vehemently contend that institution of the suit and its withdrawal is the prerogative of the plaintiff. She is the master of the suit. The learned counsel would submit that the Court was not justified in relying on the judgment of the division bench in the case of

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<sup>1</sup> **2001 SCC OnLine Kar. 501**

**SMT.GOWRAMMA** (*supra*) as the ratio laid down therein is entirely different. The application under Order XXIII Rule 1 CPC filed by the plaintiff generates an unqualified right to withdraw the suit and if no permission to file a fresh suit is sought, the plaintiff becomes liable for costs as the Court may reward. There is no provision under the CPC, which requires the Court to refuse permission to withdraw the suit and compel the plaintiff to proceed with it. He would place reliance upon the judgment of the Apex Court in the case of **R.RAMAMURTHI AIYAR (DEAD) v. RAJA V.RAJESWARARAO**, reported in **AIR 1973 SC 643** to buttress his submission that under Order XXIII Rule 1 CPC the Court can reject the petition for withdrawal of a suit filed by the plaintiff on a very limited circumstance only when a preliminary decree has already been passed and not otherwise. He would submit that the case in **SMT.GOWRAMMA** (*supra*) is *per incurium* as it does not consider the issue appropriately. No preliminary decree is drawn in the case at hand and there is no determination of rights of parties. Therefore, the suit must be permitted to be withdrawn.

6. On the converse, the learned counsel appearing for the respondents submits that the family settlement deed or a compromise decree earlier arrived at is not binding on the respondents. The daughters of Keshavamurthy were married to the sons of the original plaintiff and they very well knew about the family settlement deed of the year 1998, since they have received money on the said settlement. Defendant No.1, mother of respondents 1 and 2 was seriously ill and passed away before she could file the written statement. The memo for withdrawal has within it a hidden agenda to help defendants 6 to 18 and defendants 3 and 5 who are daughters-in-law of the plaintiff. Solely because some of the legal representatives of the 1<sup>st</sup> defendant have no objection to the memo, it cannot be said that all other respondents also should agree for withdrawal giving up their share or right in the property. He would seek dismissal of the petition.

7. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

**8. The gravamen of the matter is, whether in a suit for partition, quintessentially *inter se* amongst the members of the family with regard to undivided property, a plaintiff enjoys an unfettered liberty to withdraw from the fray, leaving others similarly placed in the lurch. The said issue though ostensibly simple, calls for nuanced engagement and consideration.**

9. Before embarking upon consideration of the subject issue on its merit, I deem it appropriate to notice the judgment of the division bench judgment in the case of **SMT.GOWRAMMA** (*supra*) upon which the concerned Court has placed its reliance to reject the memo. The division bench has held as follows:

".... ....

**7.** On the other hand, learned Counsel appearing for the respondent No. 1 (plaintiff) submitted that the plaintiff in a suit is the dominus litis and he has the right and freedom to withdraw the suit filed by him or seek dismissal at any point of time and a defendant has no right to oppose such withdrawal or dismissal. It is also contended that dismissal of the suit would in no way prejudice a defendant in a partition suit as the defendant who wants a partition can always file a fresh suit for partition, and the dismissal of the plaintiff's suit would not in any way affect a defendant's right to file such suit.

8. Therefore the question that arises for consideration is, whether in a partition suit, the plaintiff can be permitted to withdraw the suit, or whether a suit can be dismissed as settled out of Court between plaintiff and some of the defendants, when other defendants have also sought partition and separate possession.

9. At the outset it should be noticed that the reason given by the trial Court for rejecting the objection of first and fifth defendant to the memo of the plaintiff for dismissing the suit, is wholly erroneous. The Trial Court has held that defendant's prayer for partition is a counter claim; and that a counter claim is permissible only in a money suit and not in a partition suit; and therefore the counter claim was not tenable. Firstly, when a defendant in a suit for partition seeks his or her share in property by paying court-fee, such a defendant is not making a 'counter claim' against a plaintiff alone. He is virtually joining the plaintiff in seeking the relief. He is seeking relief for himself not only against the plaintiff, but also the other defendants. The Court below, therefore, fell into an error by treating the written statement in a suit for partition seeking separate possession of the defendants' share as a counter-claim against the plaintiff. Secondly, the Court also fell into an error in assuming that a counter claim is permissible only in a money suit and not in any other suit.

10. in *Jagmohan v. Dera Radha Swami Satsang* [AIR 1996 SC 2222.] the Supreme Court has held that a counter claim is no longer confined to money claims or to a cause of action of the same nature as original action of the plaintiff. This Court, while considering the nature and scope of a counter claim, as contrasted from a set off, in *State Trading Corporation of India Limited v. Vanivilas Co-Operative Society Limited* [R.F.A. No. 551/1994 dd 29.3.2001.] has held that counter-claim need not be restricted to money suits only. Hence, the ground on which the fifth defendant's objection (to plaintiff's request for dismissal) has been rejected is untenable. Be that as it may. Whether a claim for share by a defendant in a partition suit is a counter-claim is not the issue. The question is whether a defendant seeking a share is also in the position of a plaintiff and whether the original plaintiff cannot therefore withdraw the

suit without the consent of the defendant, who is in the position of a plaintiff.

**11. In *Tukaram MahaduTandel v. Ramchandra MahaduTandel* [ AIR 1925 Bombay 425.] the Bombay High Court held as follows:—**

**“But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another.” The Court further emphasised that though as a general proposition, a plaintiff may at any time withdraw a suit, a plaintiff cannot always in all circumstances withdraw a suit. This was approved and followed by the Supreme Court in *R. Ramamurthi v. Rajeshwara Rao* [AIR 1973 SC 643.] .**

**12. In *Ajita Debi v. Hossenara Begum* [AIR 1977 Cal 59.] the Calcutta High Court reiterated the following principle:**

**“In our view, where an application has been made under Order XXIII, Rule 1 the plaintiff is entitled to withdraw his suit and the defendants cannot be heard to oppose such prayer. But the said legal right of the plaintiffs to withdraw the suit is not unconditional or absolute. The Court can only exercise its jurisdiction in favour of the plaintiffs where the interests of the defendants are not adversely affected in any way it the plaintiff are allowed to withdraw the suit. To Illustrate, in a partition suit by a sole plaintiff against defendants, the former cannot be allowed to withdraw the suit inasmuch as a defendant having a cause of action against such plaintiff, may be allowed to be transposed as plaintiff in the suit....”**

**“Where an application simpliciter has been made under Order 23 Rule 1, the Court cannot compel the plaintiff to proceed with the suit and the defendants cannot be allowed to complain against**

such order. But where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, the plaintiffs cannot be allowed to withdraw or to compromise the suit with one of the defendants if an application on behalf of other defendants having an interest in the suit is made for their transposition to the category of plaintiffs and for transposition of the plaintiffs to the category of the defendants under Order 1, Rule 10."

13. The above principle was followed and reiterated *B. Pattabhiramayya v. B. Gopalakrishnayya* [AIR 1986 AP 270.] . It was held that if a Court grants permission to the plaintiff to withdraw a partition suit without giving notice to all the contesting defendants, it acts without jurisdiction, as the Court had denied the defendants their lawful right to prosecute the suit by getting transposed as plaintiff. The contention based on the decision of the Supreme Court in *Hulas Rai v. K.B. Bass and Company* [AIR 1968 SC 111.] that there was an unqualified right in a plaintiff to withdraw the suit as dominus litis was rejected by pointing out the exceptions to such right is pointed out by the Supreme Court itself in the said decision.

14. In *Manohar Singh v. Sardar Bal* [ AIR 1987 Rajasthan 177.] a Learned Single Judge of the Rajasthan High court held that in a suit for partition, even the defendants have the same right as plaintiff to claim partition and the manner in which the parties are arrayed as plaintiffs or defendants in the suit is not material; and the defendants can always be transposed as plaintiffs and can continue the suit if they feel that the plaintiff is not continuing the suit in their interest and therefore, in a suit for partition, the plaintiff has no absolute right to withdraw a suit under Order 23 Rule 1 of the Code of Civil Procedure.

15. When a suit for partition is filed, by a member of a joint family, he expresses his unequivocal intention to separate himself from the joint family and consequently there is a severance of joint family status from the date of suit. A suit for partition is invariably

brought in respect of all the joint family properties. Every person (including female members) who is entitled to a share on partition is impleaded as plaintiff or defendant, having regard to the fact that any decree which gives a property or a portion of a property to a plaintiff, takes away the right of the other members in that property or portion of the property, and non-impleading of the necessary parties will lead to its dismissal. (Where however partition is claimed branch-wise by any particular branch, it may be sufficient if the heads of all the branches are made parties). In a suit for partition, each defendant is entitled to seek partition and separate possession of his share by paying the specifically prescribed Court Fee for such purpose. When a plaintiff seek partition, he is seeking partition not only against the defendants but also against his co-plaintiff, if any. Similarly when a defendant seeks partition, the relief is sought not only against the plaintiffs, but against the co-defendants also. In other words, each party to a suit for partition, whether a plaintiff or defendant, who seeks the relief of partition and separate possession by paying separate Court Fee, is in the position of plaintiff with reference to all other parties to the suit. When a defendant seeks partition and separate possession of his share, in a suit for partition filed by a plaintiff, the defendant's claim is neither a set off, nor a 'counter-claim' against the plaintiff in the traditional sense, but is one of a wider scope. The Karnataka Court Fees and Suits Valuation Act, 1958 treats a counter-claim and a defendants' claim for partition differently by providing for them under Section 8 and 35(3) respectively and prescribes different types of Court Fee. Therefore, when the defendants in a suit have paid separate Court Fee and sought partition and separate possession of their shares also, the suit cannot be dismissed as withdrawn or settled out of Court by plaintiff with other defendants.

16. The procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus:

- (i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties.**
- (ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.**
- (iii) If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not.**
- (iv) Even if no defendant has sought the relief of partition and separate possession, till then, the Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court."**

(Emphasis supplied)

**The division bench holds that the plaintiff in a partition suit is not a solitary suitor but a representative of a class of potential claimants. In such context, the unilateral withdrawal of a suit if permitted, would work injustice upon those defendants who have espoused, or may yet espouse,**

**similar claims. The division bench lays down in crystalline clarity that in suits for partition, the dichotomy between the plaintiffs and the defendants is illusory; all parties asserting their rights in a suit for partition stand on equal footing.**

The division bench considers the judgments rendered by the Apex Court and that of the High Court of Bombay and holds that the Court can exercise its jurisdiction in favour of the plaintiff to withdraw the suit only if the interest of the defendant is not adversely affected in any way. If one or more defendants object to the withdrawal of the suit for partition, the plaintiff cannot be allowed to withdraw the suit, if one defendant's interest in the suit is put to jeopardy. In those circumstances, those categories of defendants can always transpose themselves as plaintiffs and in that light holds that a suit for partition, if there is objection, cannot be withdrawn in its entirety. The defendants are entitled to transpose themselves as plaintiffs. The concerned Court has passed the impugned order in strict consonance with what the division bench has held.

10. Following the aforesaid judgment, another division bench in the case of **SMT.MAHADEVI v. MALLIKARJUN**<sup>2</sup>, has held as follows:

" .... .... "

5. However, the judgment referred to hereinabove lays down the procedure to be followed in cases such as this. The facts of that case were almost similar to the present case on hand and the Division Bench while referring to the decision in the case of *Jagmohan v. Dera Radha Swami Satsang* [(1996) 4 SCC 699 : AIR 1996 SC 2222] , has noticed that the Supreme Court has laid down that a counter claim is no longer confined to money claims or to a cause of action of the same nature as an original action of the plaintiff and that this Court in *State Trading Corporation of India Ltd. v. Vanivilas Co-Operative Society Ltd.* [2001 (5) Kant. LJ 570] , has held that a counter claim need not be restricted to money suits only. Therefore, it was held that whether a claim for a share by a defendant in a partition suit, is a counter claim was not the issue. **The question was, whether the defendant seeking a share is also in the position of a plaintiff and whether the original plaintiff cannot therefore withdraw the suit without the consent of the defendant who is in the position of the plaintiff. After noticing the judgment of other High Courts namely, *Tukaram MahaduTandel v. Ramchandra MahaduTandel* [AIR 1925 Bom. 425], *R. Ramamurthi v. Rajeshwara Rao* [(1972) 2 SCC 721: AIR 1973 SC 643], *Ajita Debi v. Hosseena Begum* [AIR 1977 Calcutta 59], wherein it was held that where an application has been made under Order XXIII Rule 1 C.RC, the plaintiff is entitled to withdraw the suit and defendants cannot be heard to oppose such a prayer but the said legal right of the plaintiff, to withdraw the suit, is not unconditional. The Court can only exercise its power in favour of the plaintiff where the defendant's right is not adversely affected if the plaintiff is allowed to withdraw the suit. The sole plaintiff normally cannot be**

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<sup>2</sup> 2016 SCC OnLine Kar 6400

allowed to withdraw the suit. The defendant may be allowed to be transposed as plaintiff in the suit. And that the above principle was followed and reiterated in the case of *PattabHiramayya v. B. Gopalakrishnayya* [AIR 1986 Andhra Pradesh 270] , while placing reliance on the decision of the Supreme Court in the case of *Hulas Rai v. K.B. Bass and Co.* [AIR 1968 SC 111] . It was laid down that the procedure to be followed by Courts in a partition suit when the plaintiffs want to withdraw the suit or when the plaintiff wants the suit to be dismissed as settled out of Court with some defendants as compromised, as follows:

“8. The procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus:

- (i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties.
- (ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.
- (iii) If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not.
- (iv) Even if no defendant has sought the relief of partition and separate possession, till then, the Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court Fee

and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court.”

6. In the above view of the matter, though the Trial Court has reserved liberty to the appellant to file a fresh suit, the procedure as laid down by this Court is the appropriate procedure, to be followed and hence the matter is remanded to enable the appellant to be transposed as plaintiff, and to adjudicate the suit in accordance with law. Hence the Trial Court shall take appropriate steps to issue notice to the other parties after the appellant is permitted to transpose himself as plaintiff and the proceeding shall go on in accordance with law. The impugned judgment is set-aside.”

(Emphasis supplied)

The division bench reiterates the view taken in the case of **SMT.GOWRAMMA** (*supra*) and holds that when a plaintiff files an application for withdrawal of a partition suit, then the defendants need not be directed to file a fresh suit with regard to his claim and instead the appropriate procedure is to transpose the defendants as plaintiffs and allow them to continue with the suit in accordance with law.

11. A co-ordinate bench of this Court in the case of **SHRI.SANGAPPA v. SHRI.SADASHIV**<sup>3</sup>, holds as follows:

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<sup>3</sup> W.P.No.107673 of 2017 decided on 09-01-2023

" .... .... "

5. Per contra, learned counsel for respondents-defendants No.7 to 15 submits that having regard to the undisputed fact that the suit was one for partition and separation possession in which all parties occupy the status of plaintiff and defendant and in the light of the judgment of the Division Bench of this Court in the case of **Smt.Gouramma V/s Nanjappa and others**, ILR 2001 KAR 4853, when the plaintiffs sought to withdraw their claim as not pressed, it was the duty of the trial Court to call upon the defendants to state as to whether they have no objection for suit to be dismissed as not pressed or transpose them as the plaintiffs upon their request and consequently the trial Court was fully justified in passing the impugned order permitting defendants No.7 to 15 to be transposed as additional plaintiffs to the suit. It is therefore submits that there is no merit in the petition and same is liable to be dismissed.

6. The law relating to transposition of defendants as plaintiffs in a suit for partition when the plaintiffs intend to withdraw their claim by way of settlement or otherwise is no longer *res-integra* in the light of the judgment of the Division Bench of this Court in the case of **Smt.Gouramma** supra wherein it is held as under:

"8. Therefore, the question that arises for consideration is, whether in a partition suit, the plaintiff can be permitted to withdraw the suit, or whether a suit can be dismissed as settled out of Court between plaintiff and some of the defendants, when other defendants have also sought partition and separate possession.

9. At the outset it should be noticed that the reason given by the Trial Court for rejecting the objection of first and fifth defendants to the memo of the plaintiff for dismissing the suit, is wholly erroneous. The Trial Court has held that defendant's prayer for partition is a counterclaim; and that a counter-claim is permissible only in a money suit and not in a partition suit; and therefore the counter-claim was not tenable. Firstly, when a defendant in a suit for partition seeks his or her share in property by paying Court

fee, such a defendant is not making a 'counterclaim' against a plaintiff alone. He is virtually joining the plaintiff in seeking the relief. He is seeking relief for himself not only against the plaintiff, but also the other defendants. The Court below, therefore, fell into an error by treating the written statement in a suit for partition seeking separate possession of the defendants' share as a counter-claim against the plaintiff. Secondly, the Court also fell into an error in assuming that a counter-claim is permissible only in a money suit and not in any other suit.

10. In JAG MOHAN CHAWLA AND ANR. V. DERA RADHA SWAMI SAT-SANG AND ORS., the Supreme Court has held that a counter-claim is no longer confined to money claims or to a cause of action of the same nature as original action of the plaintiff. This Court, while considering the nature and scope of a counter-claim, as contrasted from a set off, in STATE TRADING CORPORATION OF INDIA LIMITED, BANGALORE V. VANIVILAS COOPERATIVE SUGAR FACTORY LIMITED, HIRIYUR, CHITRADURGA DISTRICT, 2001(5) Kar. L.J. 570 has held that counter-claim need not be restricted to money suits only. Hence, the ground on which the fifth defendant's objection (to plaintiff's request for dismissal) has been rejected is untenable. Be that as it may. Whether a claim for share by a defendant in a partition suit is a counterclaim is not the issue. The question is whether a defendant seeking a share is also in the position of a plaintiff and whether the original plaintiff cannot therefore withdraw the suit without the consent of the defendant, who is in the position of a plaintiff.

11. In TUKARAM MAHADU TANDEL V. RAMCHANDRA MAHADU TANDEL, AIR 1925 Bom. 425 the Bombay High Court held as follows:

"But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another".

The Court farther emphasised that though as a general proposition, a plaintiff may at any time withdraw a suit, a plaintiff cannot always in all circumstances withdraw a

suit. This was approved and followed by the Supreme Court in R. Ramamurthi Aiyar (dead) by L.Rs v. Raja V. Rajeswararao.,

12. In SMT. AJITA DEBI V MUSST. HOSSENARA BEGUM AND ORS., the Calcutta High Court reiterated the following principle:

"In our view, where an application has been made under Order 23, Rule 1 the plaintiff is entitled to withdraw his suit and the defendants cannot be heard to oppose such prayer. But the said legal right of the plaintiffs to withdraw the suit is not unconditional or absolute. The Court can only exercise its jurisdiction in favour of the plaintiffs where the interests of the defendants are not adversely affected in any way if the plaintiffs are allowed to withdraw the suit. To illustrate, in a partition suit by a sole plaintiff against defendants, the former cannot be allowed to withdraw the suit inasmuch as a defendant having a cause of action against such plaintiff, may be allowed to be transposed as plaintiff in the suit....."

"Where an application simpliciter has been made under Order 23, Rule 1, the Court cannot compel the plaintiff to proceed with the suit and the defendants cannot be allowed to complain against such order. But where there is an affinity or identity of interests between the plaintiffs and one or more of the defendants, the plaintiffs cannot be allowed to withdraw or to compromise the suit with one of the defendants if an application on behalf of other defendants having an interest in the suit is made for their transposition to the category of plaintiffs and for transposition of the plaintiffs to the category of the defendants under Order 1, Rule 10."

13. The above principle was followed and reiterated in BANGARU PATTABHIRAMAYYA AND ORS. V. BANGARU GOPALAKRISHNAYYA AND ORS., It was held that if a Court grants permission to the plaintiff to withdraw a partition suit without giving notice to all the contesting defendants, it acts without jurisdiction, as the Court had denied the defendants their lawful right to prosecute the

suit by getting transposed as plaintiff. The contention based on the decision of the Supreme Court in HULAS RAI BAIJ NATH V. K.B. BASS AND COMPANY, that there was an unqualified right in a plaintiff to withdraw the suit as dominus litis was rejected by pointing out the exceptions to such right is pointed out by the Supreme Court itself in the said decision.

14. IN MANOHAR SINGH V. MST. SARDAR BAI AND ORS., a learned Single Judge of the Rajasthan High Court held that in a suit for partition, even the defendants have the same right as plaintiff to claim partition and the manner in which the parties are arrayed as plaintiffs or defendants in the suit is not material; and the defendants can always be transposed as plaintiffs and can continue the suit if they feel that the plaintiff is not continuing the suit in their interest and therefore, in a suit for partition, the plaintiff has no absolute right to withdraw a suit under Order 23, Rule 1 of the Code of Civil Procedure.

15. When a suit for partition is filed, by a member of a joint family, he expresses his unequivocal intention to separate himself from the joint family and consequently there is a severance of joint family status from the date of suit. A suit for partition is invariably brought in respect all the joint family properties. Every person (including female members) who is entitled to a share on partition is impleaded as plaintiff or defendant, having regard to the fact that any decree which gives a property or a portion of a property to a plaintiff, takes away the right of the other members in that property or portion of the property, and non-impleading of the necessary parties will lead to its dismissal. (Where however partition is claimed branch-wise by any particular branch, it may be sufficient if the heads of all the branches are made parties.) In a suit for partition, each defendant is entitled to seek partition and separate possession of his share by paying the specifically prescribed Court fee for such purpose. When a plaintiff seeks partition, he is seeking partition not only against the defendants but also against his co-plaintiff, if any. Similarly when a defendant seeks partition, the relief is sought not only against the plaintiffs, but against the co-

defendants also. In other words, each party to a suit for partition, whether a plaintiff or defendant, who seeks the relief of partition and separate possession by paying separate Court fee, is in the position of plaintiff with reference to all other parties to the suit. When a defendant seeks partition and separate possession of his share, in a suit for partition filed by a plaintiff, the defendant's claim is neither a set off nor a 'counter claim' against the plaintiff in the traditional sense, but is one of a wider scope. The Karnataka Court Fees and Suits Valuation Act, 1958 treats a counter-claim and a defendant's claim for partition differently by providing for them under Sections 8 and 35(3) respectively and prescribes different types of Court fee. Therefore, when the defendants in a suit have paid separate Court fee and sought partition and separate possession of their shares also, the suit cannot be dismissed as withdrawn or settled out of Court by plaintiff with other defendants.

16. The procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus:

- (i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co plaintiffs if any) and hear the parties.
- (ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.
- (iii) If any defendant has already sought partition and separate possession by paying Court fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not.

- (iv) Even if no defendant has sought the relief of partition and separate possession, still then, the Court may in appropriate cases permit any defendant who files an application in that behalf, to get himself transposed as plaintiff and claim partition and separate possession by paying necessary Court fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court.

17. In this case, the suit for partition was filed in the year 1990. The fifth defendant had filed her written statement seeking separation of her share in October 1993 and paid Court fee. Even the first defendant sought separate possession of her share in November 1997. The suit was sought to be withdrawn by the plaintiff after evidence, when the matter was listed for final arguments. While it is true that the withdrawal of the suit by the plaintiff would not bar the fifth defendant from filing a fresh suit for partition, there is no reason why fifth defendant should not be permitted to continue the suit by transposing herself as a plaintiff. But for the fact that the plaintiff had filed the present suit in the year 1990 and the fifth defendant was under the impression that she can get her share also in the said suit (having sought such share in 1993), she might have filed a separate suit long back. Therefore, the fifth defendant was justified in opposing the dismissal of the suit. In view of the objections of the fifth defendant to the memo for withdrawal on the specific ground that each defendant in a partition suit seeking his or her share is in the position of co-plaintiff, the Court ought to have permitted the fifth defendant to continue the suit by transposing her as the plaintiff. Even though the fifth defendant did not make any specific application for transposition, it was clear from her objections that she wanted the suit to be continued and specifically pleaded that she was in the position of the plaintiff. In the circumstances, the appropriate course was to direct her to be transposed as plaintiff and then proceed with the matter.

18. In view of the above, we allow the appeal as follows:

- (i) The order dated 3-2-1998 passed in O.S. No. 5 of 1991 on the file of the Civil Judge, Bangalore Rural District (dismissing the suit by accepting the memo of the plaintiff for dismissal) is set aside.
- (ii) The fifth defendant in the suit is permitted to get herself transposed as plaintiff 2 and the plaintiff is transposed as defendant 10.
- (iii) The suit by original plaintiff (who is renumbered as plaintiff 1 on transposition of 5th respondent) shall stand dismissed as settled out of Court.
- (iv) The suit with transposed 5th defendant as plaintiff 2 shall be continued from the stage at which was dismissed, if necessary by permitting parties to let in further evidence, having regard to the changed circumstances.
- (v) As the suit is of the year 1990, the Court shall endeavour to dispose off the matter expeditiously.
- (vi) Parties to bear their respective costs."

The coordinate bench also follows the law laid down by the division bench in **SMT.GOWRAMMA**'s case and holds that if the plaintiff applies for withdrawal of suit for partition, the defendants are entitled to be transposed as plaintiffs and continue with the suit.

12. Another coordinate Bench in the case of **SUDHA v. KAVERAMMA**<sup>4</sup> has held as follows:

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<sup>4</sup> 2018 SCC OnLine Kar 2089

"... .."

**10. Thus, in view of the law declared, in every suit for partition, if a memo is filed by the plaintiff to withdraw the suit, it is incumbent upon the trial court to verify and record notice of the Memo filed by the plaintiff for withdrawal of the suit and afford an opportunity to the defendant/s to either transpose themselves as plaintiff/s in the suit for adjudication of their claim for separate share/s, if any, or in the alternative, to accede to such request for dismissal of the suit, and in fact, it held by this court in *Gowramma v. Nanjappa* (supra) that such opportunity ought to be afforded to the defendant/s not only in cases where a claim is made for separate share/s and sufficient court fee is paid, but also in cases where the defendant is yet to file such claim and pay sufficient court fee.**

**11.** However, in the case on hand, though admittedly the appellants had filed a Memo, instead of a written statement asserting separate one-fifth shares, the trial court has not recorded that the defendants, including the appellants, were on notice of either the advance application or the Memo dated 11.9.2015 filed by the plaintiff or that the defendants had agreed to the terms of the Memo dated 11.9.2015 filed by the Plaintiff. Therefore, this court is of the opinion that, in view of the law laid down by this court in *Gowramma v. Nanjappa* (supra), the trial court could not have proceeded to pass the impugned order and decree without notice of the Memo by the plaintiff to the defendants and without ascertaining whether the defendants/appellants also agreed to the same or intended to transpose themselves as plaintiffs and continue the suit for adjudication for their respective claims for separate shares. As such, the impugned order and decree, at least insofar as the appellants (because the other defendants have not chosen to challenge the impugned order and decree) is liable to be set aside and the suit in O.S. No. 87/2014 on the file of the Senior Civil Judge and CJM at Madikeri be restored on the file of the trial court for adjudication of the appellants' claim with opportunity to the appellants in terms of the procedure provided for in paragraph-16 of the decision of this court in *Gowaramma v. Nanjappa* (supra).

**12.** Accordingly, the impugned order and decree are modified setting aside the impugned order and decree in O.S. No. 87/2014 on the file of the Senior Civil Judge and CJM at Madikeri insofar as the appellants and restoring the suit in O.S. No. 87/2014 on the file of the Senior Civil Judge and CJM at Madikeri for adjudication of the appellants' claim in accordance with the procedure provided for in paragraph-16 of the decision of this court. The appeal is disposed off in terms above. No costs."

(Emphasis supplied)

13. Earlier to the aforementioned judgments, the Apex Court in the case of **DWARIKA PRASAD v. NIRMALA**<sup>5</sup>, holds as follows:

".... ....

**24.** What is relevant to notice is that the late father of Respondent 1 did not claim any exclusive title to the properties in himself. He claimed partition of the properties as one of the joint owners. Initially, the suit was not only decreed in his favour but also in favour of the third brother. **It is well settled that in a suit for partition of the joint properties every defendant is also in the capacity of the plaintiff and would be entitled to decree in his favour, if it is established that he has a share in the properties. Therefore, the suit for partition of the joint properties, filed by the late father of Respondent 1, could not have been dismissed as withdrawn without notice to another brother, who was also entitled to a share in the properties."**

(Emphasis supplied)

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<sup>5</sup> (2010) 2 SCC 107

**The Apex Court holds that in a suit for partition of joint properties, every defendant is also in the capacity of the plaintiff and would become entitled to a decree in his favour, if it is established that he has a share in the property.**

14. The Apex Court in the case of **A.KRISHNA SHENOY v. GANGA DEVI G**<sup>6</sup> holds that in a suit for partition, every interested party is deemed to be a plaintiff. Law does not bar passing numerous preliminary decrees. The Apex Court holds as follows:

".... ....

6. Both the Courts have wrongly construed the wills relied upon by the petitioners, in disbelieving the evidence of the witnesses, who attested. In support of his contention, learned counsel has made reliance upon the decisions rendered by this Court in Malluru Mallappa (Dead) Through Legal Representatives v. Kuruvathappa and Others, (2020) 4 SCC 313 and Somakka (Dead) by Legal Representatives v. K.P. Basavaraj (Dead) by Legal Representatives, (2022) 8 SCC 261.

7. Upon perusal of the impugned order and the preliminary decree passed by the Trial Court, we find no error warranting interference. Order XLI, Rule 31 of the CPC has been complied with under the impugned order, inasmuch as adequate reasoning has been rendered. Suffice it is to state that the High Court has considered the contentions on merit and, therefore, dealt with the issues involved.

**8. Section 10 of the CPC has got no application in the case on hand. Admittedly, we are dealing with a suit**

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<sup>6</sup> S.L.P. (Civil) No.8080 of 2019 decided on 11-09-2023

**for partition, in which every interested party is deemed to be a plaintiff. Law does not bar passing of numerous preliminary decrees. The fact that the applicants are the sisters of the petitioner is not in dispute.**

9. In such view of the matter, they ought to have been arrayed as defendants in the main suit itself. The dismissal of the application during the final hearing proceeding has got no bearing on the application filed seeking yet another preliminary decree. Both the Courts had rightly disbelieved the unregistered wills executed in favour of the petitioner ignoring the two daughters.”

(Emphasis supplied)

15. It becomes apposite to refer to the judgment rendered by a division bench of this Court in the case of **SRI.SRINIVAS v. SRI.M.C. NARAYANASWAMY** in **RFA 946 OF 2018 decided on 26-07-2024**, which holds **that it is a settled principle of law that a suit for partition is a recurring and continuing cause of action and the right to seek partition is a substantive right.**

16. In the light of lucid elucidations of law by the Apex Court and the division benches of this Court and the single bench as well, the order of the concerned Court requires to be noticed. It reads as follows:

**"ORDER ON MEMO**

The plaintiff counsel filed the memo to dismiss the suit as not pressed and he submitted in the memo that, the plaintiff is aged about 87 years and unable to walk and her health issues also does not permit her to prosecute the case and as per her knowledge there was already a partition of the properties by virtue of partition deed dated 30-12-1998 and the plaintiffs children want to abide by the said partition and not interested plaintiff getting in any share in the property and plaintiff decide to withdraw all the averments allegations in the plaint, rejoinder, any other affidavit whatsoever and she is not claiming any share in the compensation amount deposited by defendant No.21 in the above suit as she admits the partition dated 30-12-1998 and prays to allow the defendant No.6 to 18 to receive the deposit amount as their lands were acquired by the defendant No.21 or as they agree upon and the plaintiff has no objection for this.

2. The defendant No.1(a), (d) to (g), defendant No.2 to 4, 6, 15(b, c) & defendant No.16 to 18 filed memo and submitted that, these defendants agree and admit the contents of the memo and they have also filed affidavit to give effect to the same and they have no objection to dismiss the same and memo filed by the plaintiff and no objection for defendant No.6, 11(a), 12, 13 and 15(a to c).

3. The defendant No.1(b) and (c) filed an application under Order 18 Rule 2 (3A) of C.P.C. prays to received on record, in the interest of justice and equity.

4. In the annexed affidavit, the legal heirs of 1<sup>st</sup> defendant has submitted that, the case is filed by Sheshamma who is none other than the sister of his deceased mother Sharadamma. The plaintiff has filed a memo for withdrawal of the suit and he is insisting that his counter claim has to be adjudicated since it is a suit for partition. The suit was posted for submitting their arguments on the memo filed by the plaintiff, On 04.09.2023. On that day to his ill health he could not appear before this Court. He had been informed that due to ill health his counsel also did not appear and therefore the suit stands posted for orders on the memo and the hearing is

scheduled on 30.09.2023. His failure to attend this Court on 04-09-2023 is not deliberate. He has filed necessary application in that regard. Hence, this application.

5. The defendant No.1(b & c) submitted on 15.09.2023 that, the memo filed by the plaintiff may be dismissed.

6. Heard the arguments.

7. It is pertinent to note that, D1(a), (d) to (g) and D.6-18 no objection on 30-01-2023. The defendant No.1(a), (d) to (g), defendant No.2 to 4, 6, 15(b, c) & defendant No.16 to 18 filed memo saying that, they have no objection.

**8. It is pertinent to note that the suit filed by the plaintiff is for partition and possession by meters and bounds and at present plaintiff and some defendants decided not to contest the matter. But, defendant No.1(b) and (c) not ready for the same and they want to contest the matter.**

**9. In a partition suit both plaintiff and defendant's are standing on the same foot as plaintiffs and if plaintiff does not want to contest the matter then defendant can come as plaintiff by transposing. Here in this case the ratio laid down in Gowramma v. Nanjappa is applicable even though the plaintiff is the master of his plaint and he can withdraw his suit or part of his claim in the suit, but in the partition suit plaintiffs and defendants stand in equal foot and if any one objects to the withdrawal of the suit then the suit may be continued as plaintiffs by transposing themselves in the suit.**

10. Here in this case, the defendant No.1(b , c) strongly opposing the withdrawal of the suit and this suit is filed for partition in which they also have the relief as the same relief sought by the plaintiff and proceed to pass the following:

**ORDER**

The memo filed by the plaintiff to withdraw the suit is hereby dismissed.”

(Emphasis added)

The concerned Court was answering a memo filed by the plaintiff seeking to withdraw the suit. The memo comes to be rejected following the judgment of the division bench in the case of **SMT.GOWRAMMA** (*supra*) holding that the plaintiff may be the master of her plaint, but in a suit for partition, the plaintiff and defendants are on equal footing and, therefore, the memo comes to be rejected.

**17. In the present suit, respondent Nos.1 and 2 - the objectors to the withdrawal of the suit, have clearly articulated their intent to pursue their lawful claim to the properties in question. The concerned Court in consonance with the well settled position of law, rightly permitted their transposition as plaintiffs. To permit withdrawal in the face of such objections, would amount to denial of justice to those who still seek adjudication in a suit for partition.**

Thus, the unmistakable inference is, sustainability of the order and unsustainability of the claim of the plaintiffs.

18. Finding no infirmity much less, perversity in the order, this Court declines to interfere in its revisional jurisdiction of this Court under Section 115 of the Code of Civil Procedure.

19. The Civil Revision Petition is thus, rejected.

I.A.Nos.1 and 2 of 2025, are disposed, as a consequence.

**Sd/-  
(M.NAGAPRASANNA)  
JUDGE**

NVJ  
CT:MJ