

ORDER ON I.A. No.3

Provision under which the applications are filed	Under Order 23 Rule 1(3) of C.P.C.
Relief sought for	Seeking permission to withdraw the suit with liberty to file fresh suit on same cause of action
The date on which the application is filed	I.A.No.3 filed on 28.09.2024 by the plaintiff.
Number of the applications	I.A.No.3.
The date on which the objection are filed by different opponents	Defendant No.1 and 2 have filed objection to I.A. No.3.
The date on which the orders were passed on the said application	03.12.2024.

The plaintiff has filed I.A.No.3 under Order 23 rule 1(3) of C.P.C., seeking permission to withdraw the suit, with a liberty to file fresh suit on same cause of action.

2. The plaintiff has sworn to an affidavit in support of I.A. He

submitted that, he has filed this suit for permanent injunction against the defendants seeking restraint order against them, from making any obstruction and construction of compound wall along with XY and also sought that XYMN public road. Further submitted that, he is owner of house property Plot No.192, 193 and 194, which are carved out in Sy.No. 310+311 of Mahalabhagayat Vijayapura, and he acquired the same under sale deed dated: 03-03-2010, executed by BDA Vijayapura. Further submitted that, towards Northern side his house property road is existing and it ends at Plot No.193, but Plot No.194 has not access to main road and it also not adjoins to road on any side. Further submitted that, the suit property road is shown with letters XYMN which is situated on the Eastern side of Plot No. 194, and he has got easementary right over the same. Further submitted that, the defendant No.1 and 2 started the work of construction of compound wall along with XY lane it resulted in preventing him from using the suit road, therefore he constrained to approach this Court. Further submitted that, accept suit road he has no other approach road to reach his property, and he is required to seek for relief of easement of necessity which he has not prayed for and he is also

required to plead in supported of the same. Further submitted that, if he proceed in this suit his suit will fail due to formal defects in the plaint.

3. Further submitted that, there are sufficient grounds to permit him to withdraw this suit and to permit to file fresh suit on same cause of action. Further submit that, if his I.A. is not allowed he will be put to heavy and irreparable loss and if allowed no loss or hardship will be caused to other side. Submitting thus, prayed to allow I.A.No.3.

4. Defendant No.1 and 2 have filed objections to I.A.No.3. They contended that, I.A.No.3 is not sustainable and deserves to be dismissed. The defendant No.1 and 2 have also submitted that, M.A.No.41/2023 filed by plaintiff is still pending for consideration.

5. Heard both side. Learned counsel for plaintiff also relied upon decision reported in 1) 2020(1) KCCR 858 between Satish Daniel Petitioner Vs Smt. Philomina and Another Respondents. 2) 2016(3) KCCR 2242 between Ishwar petitioner Vs Irappa Respondents. Perused the material available on record. Perused the decisions respectively.

6. The point that would arise for consideration is as under:

POINT: Whether I.A.No.3 filed by the applicant/plaintiff under Order 23 rule 1(3) of C.P.C. seeking permission to withdraw the suit, with liberty to file fresh suit on same cause of action, deserves to be allowed?

7. The answer to the above Point is in the Affirmative for the following :

REASONS

8. The plaintiffs have filed this suit for declaration and permanent injunction. It is the case of the plaintiff that, he has got right to use suit way demarcated with XYMN at hand sketch map annexed to plaint, but the defendants attempting to construct wall at XY, which will resulted in closure of suit way. The plaintiff also prayed for permanent injunction against the defendants restraining them from constructing compound wall to suit way at XY.

9. The defendant No.1 and 2 appeared and have filed written statement and denied the case of plaintiff.

10. At present plaintiff seeking permission to withdraw present suit and seeking liberty to file fresh suit. In the present case the plaintiff filed I.A. No.2 U/o.39 Rule 1 and 2 of CPC seeking restraint order against the defendant from constructing compound wall at XY. I.A.No.2 filed by the plaintiff came to be dismissed by considered order dated:04-02-2023 with cost of Rs.10,000/-. On going through the pleadings of both the parties it is come on record there is no approach road in the three sites purchased by the plaintiff from BDA. The plaintiff now contending that, there is approach road the plaintiff is having to seek for easementary right over the suit way. The contention of the plaintiff that, if he proceed in this case his suit will definitely fail due to technical reasons.

11. Other side only objected that M.A.No.4/2023 is pending, M.A.No.4/2023 also disposed off by the Hon'ble First Appellate Court, and this Court has received entire R and PS. The Learned counsel for plaintiff relied upon decision reported in 2020(1) KCCR 858 between Satish Daniel Petitioner Vs Smt.Philomina and Another Respondents. The Hon'ble High Court of Karnataka pleased to held that, which has to taken into

consideration, now the plaintiff proceed with the suit it would be futile, if he is not permitted to withdraw the suit, with liberty to file fresh suit. In the present case on hand as per the plaintiff cause of action arose to him in the month of December 2012, when defendants started work of construction of compound wall at XY road. The plaintiff who is purchaser of three sites from BDA contended that, there is no suit way for his sites and if the same is closed by the defendants he will be put to great hardship. If, the plaintiff continuation with this suit seeking declaration and permanent injunction temporary injunction will suffice the matter. The rights of the plaintiff is to be considered, whether he has got right of easement to use the alleged suit road. This Court by filing guiding principles laid down by the Hon'ble High Court of Karnataka case to conclusion that, if this plaintiff continuation with this suit it will be of no use for him and it will result in futile exercise to him.

12. Learned counsel for plaintiff also relied upon decision reported in 2016(3) KCCR 2242 between Ishwar petition Vs Irappa Respondents. Hon'ble High Court of Karnataka pleased to held that, the trial Court denying the permission on the ground

applicant has sought for amendment of plaint and dismissal of the I.A., pending for consideration before High Court is improper. In the present case also the defendants contending that, M.A.No.4/2023 is pending for consideration. M.A.No.4/2023 already disposed off. As contended by the plaintiff if he proceeds in this case his suit will fail due to technical defects in the plaint. The plaintiff intending to seek for easementary rights over the suit way. The reasons arising by the plaintiff are satisfactory. Hence, for all these reasons, this court has answered above Point in the Affirmative and proceeds to pass the following:

ORDER

I.A.No.3 filed by the applicant/plaintiff under Order 23 rule 1(3) of CPC, seeking permission to withdraw the suit with liberty to file fresh suit, on the same cause of action, is hereby allowed on cost of Rs.200/-.

The plaintiff is permitted to withdraw the suit with liberty to file fresh suit on same cause of action.

(Smt. Parimala Tubaki)
C/c Principal Civil Judge

O.S.No.1019/2022

Vijayapura.