



**Orders on I.A. No. 15 filed under
Section 151 of CPC**

Counsel for defendant No.2 has filed an application under Section 151 of CPC to recall the order dated 29/07/2019 i.e., disposing the suit as not pressed.

2. In the affidavit annexed to the application it is stated that the plaintiff had filed this suit for the relief of partition and separate possession in the suit properties and he had filed his written statement and in paragraph No. 11 of his written statement he had contended that “till today there is no partition by metes and bounds in respect of suit properties which are ancestral and joint family properties and he is ready to pay the necessary court fee in respect of his share and his share be carved out”. Further the plaintiff, defendant Nos. 1 and 3 by colluding with each other have hatched a plan to deprive his share in the suit properties. He had filed memo on 17/1/2019 seeking permission of the court to deposit the court fee to carve out his

share which is on record but the plaintiff has fraudulently presented the memo not pressing the suit which is not tenable in the eyes of law.

3. It is further stated that the defendant Nos. 1 and 3 induced the plaintiff to withdraw the suit high handedly and without serving notice about not pressing the suit, behind his back with an intention to deprive his share has filed the memo. The plaintiff and defendants are equal in partition suit and the plaintiff has no absolute right to get dispose of the suit unilaterally. The plaintiff's counsel had argued the matter and he also submitted his written arguments and adopted the arguments of plaintiff's counsel. When the matter was posted for arguments of defendant No. 3 on 29/07/2019, the plaintiff without giving any notice to defendant No. 2 has filed memo to not press the suit. As such it is just and necessary to recall the order dated 29/07/2019 and the suit be heard and shares be determined to meet the ends of justice. If the order is not recalled, he will be put to greater hardship and loss which cannot be compensated in terms of money. Hence, prayed to allow the application.

4. Counsel of plaintiff filed his objections and denied the contents of affidavit annexed to the application. He contended that once the suit is withdrawn or dismissed by this Court then there is no provision to recall the said order under CPC. This court has no jurisdiction to entertain this application and there are other remedies available to the parties. Plaintiff has filed memo for dismissal of suit as he does not want to proceed with the suit as he is satisfied and partition is effected. Further defendant No.1 and 3 who are contesting parties and also brother of present plaintiff have given their no objections to dismiss the suit as they are also satisfied with the partition, the question of reopening the suit does not arise. Further it is not the contention of the plaintiff that there is any coercion or undue influence or any fraud has been played by the defendants on him. The plaintiff on his own filed memo to dismiss the suit and defendants have also given no objection to the same. If the defendant No.2 is aggrieved by the order of dismissal he has got remedy to file fresh suit for partition of the suit property. When there is partition effected between the parties the plaintiff is not interested to

contest the suit. The defendant No.2 has filed false application only to drag the matter and if at all if he is aggrieved he can approach the plaintiff and settle the dispute when the plaintiff is ready to do so. If it is not satisfied then he can approach the court by filing fresh suit seeking his share in the suit property on fresh cause of action. Hence, prayed to dismiss the application with cost.

5. Heard the counsel for defendant No. 2. Even after providing sufficient opportunities, Counsel for plaintiff failed to address his arguments. Hence, arguments of plaintiff on the said application is taken as nil. Counsel for defendant No.2 has relied upon **2015(1) Civ. C.R. 661 (Bom.) I, Gurudayalsing S/o Mehersing Bindra and others V/s Basant Singh S/o Mehersing Bindra since deceased through his Lrs and another**, the Hon'ble Bombay High Court held that "For withdrawal of suit, ordinary no permission of Court is necessary if plaintiff has no desire to have liberty to file fresh suit. That permission is given on grounds mentioned in Order 23, Rule 1 of CPC which are to be used before decision of suit. Though there

is such provision when suit is filed for relief of partition, things are different. In such a suit plaintiff and defendant are party of equal status. Plaintiff from partition suit has no absolute right to withdraw suit even though suit has not reached stage of decision. Appeal is continuation of suit and withdrawal of appeal in such a case is also not an absolute right of plaintiff. When withdrawal would deprive a defendant to get fruits of decree given by trial court, appellate court is not expected to permit suit to be withdrawn at appellate stage”.

6. Further the counsel for defendant No.2 relied upon **AIR 2018 JAMMU AND KASHMIR 65 in Guninder Pushp Jain V/s Arihant Jain and another** wherein it was held that “Order of dismissal of suit as withdrawn can be recalled not only in case of proved fraud but same can be recalled by court, ex-debit justicia, if it is satisfied that withdrawal of suit was engineered by defendants by deceit which would include constructive fraud, inducement and misrepresentation. For making false representation or inducing somebody to do particular thing in particular manner, one does not need written instrument. Such

representation or inducement can be oral or even inferable from conduct of person making it. In instant case, Trial Court had not passed compromise decree but had dismissed suit as not pressed. Respondents were persuaded to withdraw their suit on being induced by sheet misrepresentation which was not intended to be acted upon by petitioner. Withdrawal of suit was therefore on account of misrepresentation and constructive fraud played by petitioner on respondent. Order of court allowing recall of order of dismissal of suit as withdrawn thus was proper”.

7. The following points would arise for my consideration:

1. Whether the defendant No.2 has made out grounds to allow this application?
2. What order?

8. My answer to above points are as under:

Point No.1: In the Affirmative.

Point No.2: As per final order for the following;

REASONS

9. **Point No.1:** Counsel for defendant No.2 filed this application seeking to set aside

the order dated 29.07.2019 and to restore the suit and to dispose of the matter on merits. Counsel for plaintiff filed his objections.

10. Perused the entire materials available on record. This suit filed for the relief of partition and separate possession against the defendants. After entering his appearance, the defendant No.2 filed his written statement and admitted the case of the plaintiff. He further submitted that till today there is no partition by metes and bounds in respect suit properties which are ancestral and joint family properties and he is ready to pay necessary court fee and stamp duty in respect of his share which would be allotted to him in the suit properties. The Defendant Nos.1 and 3 filed their written statement and denied the case of the plaintiff and prayed to dismiss the suit. After framing of issues, plaintiff examined himself as PW.1 and he was duly cross examined by counsel for defendant Nos.1 and 3. Defendant Nos. 1 and 3 examined defendant No.3 as DW.1 and they have also examined one more witness as DW.2. Defendant No.2 did not choose to lead any evidence. Hence, matter is

posted for arguments. Counsel for plaintiff filed his written arguments on 02.07.2019. counsel for defendant No.2 filed memo adopting the arguments of plaintiff as arguments of defendant No.2. When the matter was set down for arguments of defendant No.1 and 3, plaintiff filed memo on 29.07.2019 stating that he is not interested to proceed with the suit as there is partition between plaintiff and defendants and prayed to withdraw the suit. The copy of the said memo was served on defendant No.1 and 3 as per endorsement made by counsel for defendant No.1 and 3. Copy of the said memo was not served upon defendant No.2 and he was neither present before the court on the said day. In view of the memo, the suit came to be dismissed as not pressed. On perusal of the memo and order sheet, it is clear that the defendant No.2 had no knowledge about the memo filed by plaintiff seeking for withdrawal of suit. Generally the plaintiff can withdraw his suit as he is the master of his suit and if he is not willing to continue with the same, he is at liberty to withdraw the suit. In a suit for partition, all plaintiffs are defendants and all defendants are plaintiffs. In order to provide an opportunity

to the defendant No.2 to put-forth his case, this court feels it proper to allow the prayer sought in the application. Hence, I answered point No.1 in the Affirmative.

11. Point No. 2: For the above discussed reasons, I proceed to pass the following:

ORDER

The application filed under Section 151 of CPC is hereby allowed.

Order dated 29.07.2019 is hereby recalled. The suit is restored to its original stage.

Office to put up this case on board on 27.05.2022.

Sd/-

**II Addl. Civil Judge & JMFC
Belagavi**