

ORDER ON I.A. No.I

1. The instant application has been filed by the plaintiff under Order XXIII Rule 1 (3) of the Code of Civil Procedure seeking to withdraw the present suit with liberty to sue afresh on the same cause of action.
2. The learned Counsel for the defendant no.1 has filed his statement of objections to the said application.
3. Heard both Counsel.
4. After perusal of the records of the case, the following point would emerge for my consideration:
 - 1) Whether the plaintiff proves that there exist sufficient grounds for allowing her to institute a fresh suit on the same cause of action in the suit?
 - 2) To what order?
5. My findings to the above points are as under:

Point No.1: In the Negative.

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

REASONS

6. **Point No.1:** In an affidavit appended to the application, it is stated by the plaintiff that she has not made some persons as parties to the suit and she has not inserted some properties in the suit and the suit must fail by reason of some formal defects and the said defect can be cured by filing a fresh suit and due to over sight by mistake there are immovable properties available for suit not included in the suit and she has further stated that if this application is not allowed hardship will be caused to her and accordingly, among other grounds prays to allow the application.

7. In the statement of objections, the learned Counsel for the defendant no.1 has denied the application averments in material aspects and contended that, the reasons mentioned in the application are not proper reasons and at this stage the plaintiff cannot ask the prayer to withdraw the suit and further he has contended that only on the basis of necessary parties and necessary properties are not included in the suit, she cannot ask the relief of withdrawing the suit accordingly, among other grounds prays to dismiss the application with costs.

8. In view of the rival contentions put forth by both the parties, now, let me see as to whether the permission needs to be granted to the plaintiff to file a fresh suit in respect of the same cause of action. Order XXIII Rule 1 (3) of CPC contemplates that “ Where the Court is satisfied, (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such

terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.” The grounds on which the plaintiff sought permission to withdraw the suit with a liberty to file a fresh suit on the same cause of action comes within the Sub-Rule (3), Sub-Rule (A) of Order XXIII Rule 1 of CPC.

9. I have perused the plaint averments in detail. The plaintiff had filed the suit for partition and separate possession and in particular she has stated that she is entitled 1/3rd share in the suit properties. Now, the plaintiff is asking the relief of withdrawing the suit and permission to file the fresh suit on the same cause of action. It is pertinent to note that the plaintiff wants to file the fresh suit by adding the necessary parties and necessary properties. It is pertinent to note that the plaintiff has stated that she will implead the necessary parties and she will insert necessary properties and she can do so in the very suit itself and she cannot file the separate suit and if permission is not granted to the plaintiff for withdrawal of the suit, the suit will not be failed. Under Order 23 Rule 1 of CPC, a formal defect refers to procedural error or technical imperfection in a law suit that does not affect the merits of the case, such as, incorrect party identification, improper court fee payment, misjoinder of parties, or a lack of necessary legal documentation etc., But, in the case on hand, the court does not find any formal defect in a suit. Further, it is pertinent to note that the defendant no.1 has got some right in favour of him and if the defendant

acquires any right, the court will consider all the circumstances before accepting the prayer of the plaintiff for withdrawal of the suit. But, in the case on hand, there is no formal defect and the prayer for withdrawal of the suit and permission to file the fresh suit on the same cause of action does not arise at all. Further, when the case is posted for cross of P.W.1, the plaintiff has filed this application to withdraw the suit. Of course, the plaintiff can file this application at any stage but, in the case on hand if the application is allowed, it will prejudice the defendants. Accordingly, I answer this point in the Negative.

10. **Point No.2:** In view of my discussion made supra, I proceed to pass the following:

O R D E R

I.A. No.I filed by the plaintiff under Order XXIII
Rule 1 (3) R/w. Section 151 of the Code of Civil
Procedure is hereby rejected.

There is no order as to costs.

(Hanamantarao R.Kulkarni)
Senior Civil Judge & JMFC,
Hunagund.