

IN THE COURT OF SENIOR CIVIL JUDGE & JMFC, BANAHAATTI

**Present: Sri. ASHAPPA,
B.Com., LL.M.**

Senior Civil Judge & JMFC, Banahatti.

Original Suit No.95/2018

Dated this 20th day of March -2025

Plaintiffs:

Sunil S/o: Kallappa Alagond
and Others.

(By **Sri. S.A.S. Adv**)

// Versus //

Defendants:

Smt. Sundrawwa W/o: Annappa Kagi
(Since died defendant No.2 to 7 being LR's
already on record)

(By **Sri. S.R.K. Adv** for D.2, D.3
& D.7, D.4 to D.6 placed ex-parte
and D.1 dead)

IA.No.III

Applicants/plaintiffs:

Sunil S/o: Kallappa Alagond
and Others.

-Versus-

Opponents/ Defendants:

Smt. Sundrawwa W/o: Annappa Kagi
(Since died defendant No.2 to 7 being LR's
already on record)

: ORDER ON IA No.III :

Plaintiffs filed the present application under Section 23 Rule 1(3) (b) R/w section 151 of C.P.C. seeking permission of the court to withdraw the present suit with liberty to file the fresh suit on the same cause of action.

2. The supported with the affidavit of plaintiff No.1. It is stated that, the suit filed seeking relief of Declaration and Injunction in respect of suit properties. It is stated the plaintiffs are absolute owners and possessors of suit properties. During pendency of the suit, the defendants made encroachment of suit properties of the plaintiffs illegally and high highhandedly and on the strength they are claiming exclusive ownership of encroached portion. In that regard there is no any pleadings and relief in this suit. If this suit continued in the present form and and there is chance to failure. Therefore, it is just and necessary to with draw the suit and to file fresh suit on same cause of action.

3. The defendant No. 3 filed objection inter alia it is denied the averments of petition. It is stated that, the present IA filed by the plaintiffs without any reasonable grounds.

4. It is stated the provisions of order 23 rule 1 (3) of C.P.C can be invoked only when the suit is likely to fail due to formal defects or there are no sufficient grounds for allowing the plaintiff to withdraw the suit.

5. It is stated the plaintiff filed this suit stating that, the defendants are trying to encroach suit property of plaintiff. Now he is contending that, the defendants encroached suit land during pendency of the suit. But he has not all mentioned that, when the defendants encroached his land. Already the cross of Pw.1 completed. In the cross examination the Pw.1 given some admissions in favour of defence. When the plaintiff came to know that, he will not succeed his suit and then filed present suit. The plaintiff filed present petition without any real facts. Hence sought to reject.

6. Heard arguments both side and perused the material.

7. The following points arises for my consideration.

POINTS

1. Whether plaintiffs have made out sufficient grounds to allow the application?

2. What Order?

8. My answer to the above points as under :

Point No.1 :: **In the Negative.**

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

REASONS

9. **Point No.1:** It is an admitted fact that, the instant suit is for the relief of declaration and injunction. As stated above the plaintiff filed the present IA under order 23 rule 1 of CPC. Order 23 Rule 1 of C.P.C. no doubt empowers the plaintiff in any suit to abandon in any suit to abandon the suit or abandon a part of claim at any time. As per sub-Rule 4 of Rule 1 of order 23, where the plaintiff abandons his suit or abandons his part of claim, he would be precluded from instituting any fresh suit in respect of such subject matter or such portion of claim. The same principle is also embedded in order 2 Rule 2 of C.P.C.

However, sub Rule (3) of order 23 vests discretion in the court to grant permission to the plaintiff to withdraw such suit or such part of claim with liberty to institute fresh suit in respect of subject matter of such suit or such portion of claim, if the court is satisfied that, the suit much fail by reason of formal defect or there are sufficient grounds for allowing the plaintiff to institute fresh suit with respect to subject matter of this suit or part of the claim. But party seeking liberty to institute fresh suit, has to satisfy 2 conditions set down in clause 'a' and 'b' of sub Rule (3) of Rule 1 of Order 23 of C.P.C. From the affidavit filed by the plaintiff it nowhere transpires or reveals that, the suit of the plaintiff will fail by reason of formal defect. Therefore, clause (a) of sub-Rule (3) is not attracted. Clause (b) of order 23 Rule 1 of C.P.C. contemplates that, the discretion can be exercised by the court if sufficient grounds are urged by the plaintiff for allowing him/her to file fresh suit. The intended fresh suit to be filed by the plaintiff is for the relief of possession. It is stated that, during pendency of the suit the defendants encroached the suit property. It is not stated when

the defendants encroached the suit property. There is no bar to the plaintiff to seek the possession of encroached area by way amendment of plaint and inspite of it the plaintiff filed present suit with a liberty to file fresh suit. Already the cross examination of Pw.1 completed and case posted for further evidence of plaintiff side. Under such circumstances, no sufficient grounds as contemplated in sub-cause (b) of Rule 1 or order 23 of C.P.C. are also not made out by the plaintiff for considering I.A.III.

10. The decision relied upon by the learned counsel for the plaintiff in the case of **D.P Sharma V/s Bangalore Mahanagar Palike and others reported AIR Karnataka 2001 page No. 40**, wherein it is held that,

12. We respectfully agree to what was held by this court as well as the High court of Himachal Pradesh in the above two decisions. We also accept the above arguments advanced by Sri Datar. That we do, firstly for rule 1 of order 23 makes it abundantly clear that if the court is satisfied that the suit must fail by reason of

some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or a part thereof, it may grant permission to the plaintiff to withdraw the suit with liberty to institute a fresh suit on such terms as it thinks fit and secondly that for the writ proceedings the provisions in CPC are made applicable under the writ rules.

11. Admittedly, it is well settled law that, the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit such application may be allowed. Herein the plaintiff fails to state what is the formal defect is in the plaint. Only stated that during pendency of the suit the defendants encroached the sit property. Encroachment of suit property by the defendants is not a formal defect. Therefore, the plaintiff not made sufficient grounds to withdraw the suit with liberty to file fresh suit. Hence with due respect of the judgment cited by the plaintiff is not applicable to the present facts of the case.

In the case of **Smt. Jayalakshmamma V/s. Mohan patel and Others reported in 2013 (3) KCCR 2211**, wherein it is held that,

CIVIL PROCEDURE CODE, 1908- Order 23, Rule 1(3) – Withdrawal of suit-Court must be satisfied that, a suit must fail by reason of some formal defect or there are sufficient grounds for allowing plaintiff to institute a fresh suit for subject – matter of a suit or part of a claim, on such terms as it thinks fit-Plaintiff filing suit for partition and separate possession of his share- Leading evidence- Case set down for defendant's evidence- Making application stating that, he wanted to give up plaint in respect of certain property-Trial Court allowing application – Improper- Hence, impugned order quashed.

In another case of **Maliyappa Since deceased by his L.Rs. and others V/s. Muniyappa and others reported in HCR 2013 Kant. 622**, wherein it is held that,

A. Civil Procedure Code, 1908- Order 2, Rule 2 read with Order 23, Rule 1 and

Section 151- Withdrawal of suit- Where plaintiff abandons his suit or abandons his part of a claim, he would be precluded from instituting any fresh suit in respect of such subject matter or such portion of claim-In order to seek liberty to institute fresh suit, plaintiff will have to satisfy two conditions set down in Clauses (a) (b) of sub-Rule (3) of Rule 1- Such permission can be granted provided there are sufficient grounds for allowing plaintiff to file fresh suit-Subsequent events said to have occurred subsequent to filing of suit, cannot constitute as sufficient ground for granting permission as sought in application.

Hon'ble Supreme Court of India in the case of (2000) 5 Supreme Court Cases 458, wherein it is held that,

A. Civil Procedure Code, 1908- Or. 23 R.1(3)- Permission to withdraw suit with leave to file a fresh suit- Before granting permission for withdrawal of suit, held, the court is duty bound to satisfy itself that, proper grounds exist for granting such permission-Merely

stating that, defendant will not be prejudiced by the granting of permission to withdraw is not sufficient compliance with the statutory mandate- Further held, when such permission is granted at the first or second appellate stage, prejudice to the defendant is writ large, because he loses the benefit of the decision in his favour by the lower court- Plaintiff-respondent filing suit seeking inter alia, injunction preventing defendant-appellants from establishing a flour mill on their adjoining property and also from disturbing the plaintiffs' exclusive user of the pathway between the two properties-Trial court decreeing suit- First appellate court modifying decree and holding that, the pathway was common and exclusive rights could not be claimed over it-After filing second appeal, the respondent- plaintiff filing application under Or.23 R.1(3) seeking to insert a prayer for declaration of title over the pathway in a fresh suit-Held, High Court order, allowing the application under Or.23 R.1(3) and holding that, appellant – defendants would not suffer prejudice, was vitiated on account of non-

application of mind to the relevant aspects of the matter.

C. Civil procedure Code, 1908- Or. 23 Rr.1(3) and 1(1) – Withdrawal and adjustment of suits- Application at appellate stage- Held, the provision in Or. 23 R.1 is an exception to the common law principle of non- suit – Sub-Rule (1) grants an absolute liberty to the plaintiff, whereas under sub-Rule (3) the court has the discretion to grant leave or not- Further held, discretion of the court is to be exercised with caution and circumspection- All aspects of the matter are to be examined, including the desirability or otherwise of permitting a fresh round of litigation on a cause of action which has already been agitated- Such examination is all the more important where the application under Or.23 R.1(3) is filed at the appeal stage- Court's time already utilized should not be wasted.

12. The afore referred decisions have laid down the principles governing order 23 Rule 1 of C.P.C. in detail and they are applicable to the facts of the case in hand.

Therefore, I am of the firm opinion that, the application at IA.No.III filed by the plaintiffs is devoid of merits.

Hence, the following,

ORDER

IA.No.III filed by the plaintiffs is hereby
rejected.

(Dictated to the Stenographer directly on computer, typed by her, revised and corrected by me and then pronounced in the open court on this the 20th day of March -2025)

(Sri. Ashappa)
Senior Civil Judge & JMFC,
Banahatti.