

IN THE COURT OF SENIOR CIVIL JUDGE & JMFC, BANAHATTI

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

Sr.Civil Judge & JMFC, Banahatti

Original Suit No.270/2024

Dated this 19th day of January 2026

Plaintiffs:

Siddram S/o: Ghulappa Bhilawadi
and Others.

(By Sri. B.V.K. Adv)

// Vs //

Defendants:

Prabhu S/o: Doddayamanappa Naik
and Others.

**(By Sri. H.R.P. Adv for D.1 to
D.4 & D.7 and Sri. A.V.B. Adv
for D.5 & D.6)**

I.A.No.III

Applicants/Plaintiffs :

Siddram S/o: Ghulappa Bhilawadi
and Others.

//Vs//

Opponents/Defendants :

Prabhu S/o: Doddayamanappa Naik
and Others.

ORDER

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

2. The IA supported with the affidavit of plaintiffs, wherein it is stated that, they have filed suit for declaration and injunction against the defendants on 30.10.2024. Later they have changed counsel and engaged Sri B.V. Kerur Advocate on 27.02.2025. It is stated that, the case is posted for hearing on IA No.II filed under order 7 rule 11 of CPC.

3. It is further stated that, the land Sy.No.65/1+2/5 measuring 12 acres 09 guntas situated at Rabkavi town was owned by plaintiff No.5 and it was purchased from Naik family. The Naik family owned the land Sy.No.63 measuring 131 acres 10 guntas, land Sy.No.64 measuring 254 acres 17 guntas and entire land Sy.No.65 of Rabkavi.

4. It is further stated that, the plaintiff No.5 got converted land Sy.No.65/1+2/5 into non-agricultural purpose in two phases i.e., 08 acres 08 guntas on 11.05.1984 and remaining 04 acres 11 guntas on 06.10.1988. The NA land measuring 04 acres 11 guntas, carved in all 65 open sites and in 08 acres 08 guntas NA land carved in all 125 open sites. The PT sheet of said NA lands had been prepared by the ADLR Jamkhandi in

consultation with Town Planning authorities. The said PT sheet shows actual situation of plots and 80 meters road i.e., 40 meters from center on each side of Kudachi-Jamkhandi State Highway SH-53. Out of 65 plots, more than 30 plot owners had already constructed their residential houses time to time and living their till these days and all are using southern Jamkhandi-Kudachi highway/road for reaching to their respective houses site for more than 25 years.

5. It is further stated that, the predecessors in title of plaintiff No.3 purchased plot No.43 & 51, plaintiff No.1 purchased plot No.55 (part), 56 (part), 62 (part) and 63 (part), plaintiff No.2 had purchased plot No.56 (part) and 63 (part), plaintiff No.4 purchased plot No.58, 59 & 65 in the year 1999 and defendant No.5 is the vendor of said suit plots. In the sale deeds of said plots, it has been clearly mentioned that towards the southern side of said plots, there is a road. The said open sites and other sites had been carved in the year 1988 itself. As such there exists a road towards the southern side of all the plots bearing plot No.47 to 52 and 62 to 65 as could be seen from the said registered sale deeds, PT sheet No.LNA.JKD.SR.No.12/1991-92 and a map issued by ADLR Jamkhandi in the year 1991-92 produced in the list of documents annexed with the plaint. In the year 1991-92, the ADLR Jamkhandi had fixed the boundaries of said open sites and clearly shown that towards southern side of said plots,

there is road/Kudachi-Rabkavi-Jamkhandi State highway SH-53 i.e., Kudachi highway.

6. It is further stated that, towards western side and towards northern side of entire NA land Sy.No.65/1+2/5, land Sy.No.64 (part) of Rabkavi is situated and towards the southern side of said highway/road, land Sy.No.63 belonging to Naik family is situated. The said Kudachi highway passes through some part of land Sy.No.64 and also passes through some part of land Sy.No.63 and both lands belongs to Naik family. As such, some part of land Sy.No.64 situated towards southern side of NA land Sy.No.65/1+2/5 and some part of land Sy.No.63 situated towards southern side of said state highway had been merged in the development of said Kudachi-Jamkhandi state highway since long back. The said state highway is exclusively owned and possessed by PWD department.

7. It is further stated that, towards northern side of said NA land Sy.No.65/1+2/5, there is a portion of land Sy.No.64 measuring 06 acres 39 guntas owned by Santaram S/o: Bhimappa Naik and others and developed by one Suresh Shankareppa Pattanashetti i.e., defendant No.9, a Civil Engineer and Real Eastatetor got converted said part of land Sy.No.64 measuring 06 acres 39 guntas into non-agricultural tenure in the year 2016-17 on the basis of PT sheet of said NA land Sy.No.65/1+2/5 and carved in all 125 open sites in said NA

land Sy.No.64 (part) measuring 06 acres 39 guntas i.e., NA land Sy.No.64/23 of Rabkavi as could be seen from the annexed layout and NA order dated 19.09.2016 issued by Deputy Commissioner Bagalkot wherein the said competent authority at para No.6 of said NA order had clearly stated that there is 80 meters road/Kudachi State Highway to approach the intended residential houses to be constructed in said NA land Sy.No.64/23.

8. It is further stated that, taking into consideration recently NA order dated 19.09.2016 is traced out and as per annexed layout made in NA land Sy.No.64/23 in respect of NA land Sy.No.64/23 measuring 06 acres 19 guntas of Rabkavi belonging to Naik family, there is defect in the instant suit/cured by way of amendment and as such they may be permitted to withdraw the instant suit with a liberty to institute a fresh suit on the said sufficient grounds to prevent the multiplicity of the proceedings.

9. It is further stated that, the documents relied by the defendants i.e., alleged sale deeds, record of rights of land Sy.No.64/29 to 64/35 and revenue records are the false and fabricated documents created illegally recently in the year 2022 by suppressing the earlier revenue records and existence of southern road/Kudachi-Rabkavi-Jamkhandi State Highway SH-53 as stated above and hence, there is an apprehension

that suit will fail by reason of formal defect or proper grounds and hence filed this IA.

10. It is further stated that, if the IA is not allowed they will faced heavy loss and hardship and on the other hand, no loss or harm will be caused to the other side. Hence, prayed to allow the IA.

11. The defendant No.5 filed objection wherein the averements of affidavit filed along with IA is categorically denied. It is stated that, the plaintiffs are playing with the court and wasting the precious time of the court for their own pleasure regarding the Easementary Right which is not available for the open space.

12. It is further stated that, the IA for withdrawal of said suit and permission to file fresh suit is act of clever art of Advocate for plaintiffs to fill up the lacunas of the present suit through the observation made in OS.No.329/2025 pending before this court. The said IA deserves to be dismissed with cost of Rs.5,000/- as these defendants as they are made scape goat without any reason to be added as a party to the present suit.

13. It is further stated that, the plaintiffs have filed another suit in OS.No.329/2025 which is pending before this court through another owner with same remedy, the plaintiffs have liberty to get impeded in that suit. On these and other grounds, sought to dismiss the IA.No.III.

- 14.** Heard both side and perused the material on record.
- 15.** On the basis of the above pleadings, the following points arises for my consideration, which are as under.

//POINTS//

1. Whether the plaintiffs have made sufficient grounds to allow the petition filed U/O 23 rule 1(3) of C.P.C ?
 2. What order?
- 16.** My answer to the above points are as under:

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

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

REASONS

- 17. Point No. 1:** It is an admitted fact that, the instant suit is for the relief of declaration that, the plaintiffs have got their easement rights for use of passage in land Sy.No.64 for reaching Kudachi-Rabkavi main road and for injunction against the defendants from interfering in the easement right of plaintiffs in using the said passage as shown ABEF letters in the hand sketch map. The present application filed by the plaintiff U/o. 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 plaintiffs 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 plaintiffs 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 plaintiffs, it nowhere transpires or reveals that, the suit of the plaintiff will fail by reason of formal defect. Formal defect is must be given a liberal meaning which cannot various kinds of defects not affecting the merits of the plea raised by either of the parties, is not able to get the decree executed successfully and thus, the said defect will constitute to be a "formal defect" within the meaning of Order 23, Rule 1(3) (a). In the present IA, the affidavit filed along with IA by the plaintiffs is discloses that, the plaintiffs wanted to change their entire pleadings of the plaint by withdrawing the earlier admissions given in the

plaint. So, it is not an formal defect as contemplated in order 23 of CPC. 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 plaintiffs for allowing them to file fresh suit. The intended fresh suit to be filed by the plaintiffs is for the same relief but the entire nature of suit property will be changed, which is not permissible under law. It is stated that, earlier counsel not properly pleaded the plaint and recently on gone through the NA order and Layout in respect of land Sy.No.64/23 it is found there is defect in the instant suit. As per plaint hand sketch map, the plaintiffs stated that, towards southern side of suit plots, the land Sy.No.65 is situated, thereafter Kudachi main road is existence. The plaintiff stated that, they are ingress and egress to their plots through passages existence in land Sy.No. 65 as shown in the hand sketch map. But in the present IA, the plaintiffs stated that, the main road is existence towards southern side of their plots, which was not stated in earlier pleadings and therefore it is formal defect. So, it changes entire nature of the case and therefore it is not an formal defect. Already this court rejected the IA No.I filed by the plaintiffs U/o. 39 rule 1 and 2 of CPC. Being aggrieved by the order passed by this court, no appeal filed by the plaintiffs. So, the order passed by this court on IA No.I is attained finality.

18. It is pertinent to note here that, One Sanket S/o Veerupakshappa Hagargi has filed suit in OS.No.329/2025 seeking declaration and injunction. The subject suit property of the said suit and suit property of present suit is one and same. As per plaint averments of suit in OS.No.329/2025, there is main road is existence towards southern side of plot No.55 and 62. After filing the said suit, the present application is filed seeking to withdraw the same with a liberty to file fresh suit. Therefore, the plaintiffs failed to establish what is formal defect in the plaint. Only to fill up the lacuna, the plaintiffs wanted to withdraw the suit and sought permission to file fresh suit on same cause of action which is against the pleadings of the plaint. Under such circumstances, the court can not use his discretion to allow the application. No sufficient grounds made out by the plaintiffs as contemplated in sub-cause (b) of Rule 1 or order 23 of C.P.C to withdraw the suit and therefore I hold that there is no merits on the application filed by the plaintiffs.

19. 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.

20. The afore referred decision has laid down the principles governing order 23 Rule 1 of C.P.C. in detail and it is applicable

to the facts of the case in hand. Therefore, I am of the firm opinion that, no merits on the application filed by the plaintiffs.

Accordingly, the point No.1 answered in the Negative.

21. Point No. 2: In view of discussion made above, the IA is liable to be rejected and hence I proceed to pass the following:

ORDER :

I.A.No.III filed by the plaintiffs U/O-23 Rule-1
(3) (a) and (b) R/w. Section- 151 of C.P.C. is hereby
rejected.

No order as to costs.

(Typed to my dictation directly on computer to the stenographer, corrected, signed by me, and then pronounced in the open Court on this the 19th day of January 2026)

(ASHAPPA)
Senior Civil Judge & JMFC,
Banahatti.